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IT-99-37-PT
D4672-D4600
19 OCTOBER 2001

4672

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case no. IT-99-37-PT

IN THE TRIAL CHAMBER

Before: Judge Richard May, *Presiding*
Judge Patrick Robinson
Judge Mohammed El Habib Fassi Fihri

Registrar: Mr. Hans Holthuis

Date filed: 19 October 2001

THE PROSECUTOR

v.

SLOBODAN MILOŠEVIC

AMICI CURIAE BRIEF ON JURISDICTION

Office of the Prosecutor:

Ms. Carla Del Ponte
Mr. Dirk Ryneveld QC
Ms. Cristina Romano
Mr. Milbert Shin
Mr. Daniel Saxon
Ms. Julia Baly
Mr. Daryl A. Mundis

The accused:

Mr. Slobodan Miloševic

Amici Curiae:

Mr. Steven Kay QC
Mr. Branislav Tapuškovic
Prof. Michaïl Wladimiroff

Introduction

1. *Challenge of jurisdiction*

The motion of the accused challenges the competence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) to prosecute him. The ICTY has dealt with a challenge to its jurisdiction previously in the Tadic case [Prosecutor v. Tadic, IT-94-1-T, Trial Chamber 10 August 1995; Prosecutor v. Tadic, IT-94-1-AR72, Appeals Chamber 2 October 1995]. Further, the International Criminal Tribunal for Rwanda (ICTR) has been subject to a challenge to the jurisdiction of the tribunal in the Kanyabashi case [Prosecutor v. Kanyabashi, ICTR-96-15-T, Trial Chamber 18 June 1997].

> *For an analysis of the Tadic jurisprudence see:* H. Fischer in Annotated Leading Cases on International Criminal Tribunal (Vol. 1) 1999, p. 140; G. Aldrich in 90 American Journal of International Law 1996, p. 64; L.E. Alvarez in 7 European Journal of International Law 1996, p. 245; C. Greenwood in 7 European Journal of International Law 1996, p. 265, C. Kress in Europäische Grundrechte Zeitschrift 1996, p. 638; T. Meron in 90 American Journal of International Law 1996, p. 238; G.P. Politatis in 52 Zeitschrift für Öffentliches Recht 1997, p. 283; P. Rowe, 45 International and Comparative Law Quarterly 1996, p. 691; M. Sassoli, 110 Revue Gnérale de Droit Interational Public 1996, p. 101; G.R. Watson, 36 Virginia Journal of International Law 1996, p. 687.

2. *Factual Challenges.*

It appears from the court documents disclosed to the *Amici Curiae* that the accused has expressed opinions and filed documents in which he asserts the illegal foundation of the ICTY, its lack of impartiality and independency, its lack of capacity to provide the accused with a fair trial or to guarantee his human rights, its lack of personal jurisdiction and its lack of territorial jurisdiction.

> *See:* The transcript of the Initial Appearance of 3 July 2001 and the handwritten Note signed by the accused dated 2 July 2001; the Preliminary Protective Motion of the accused, paragraph. 8; and The transcript of the Status Conference of 30 August 2001, and the Memorandum of the accused with Appendix.

Discussion

3. *Rule 72.*

Of all these issues, lack of personal and territorial jurisdiction are objections that unequivocally fall under the scope of Rule 72 of the Rules of Procedure and Evidence [as Amended 12 July 2001; hereinafter: "Rules"].

Rule 72 provides:

(A) Preliminary motions being motions which
  (i) challenge jurisdiction;
  (ii) allege defects in the form of the indictment;
  (iii) seek the severance of counts joined in one indictment under Rule 49 or seek separate trials under Rule 82(B); or
  (iv) raise objections based on the refusal of request for assignment of counsel made under Rule 45(C)

shall be in writing and brought not later than thirty days after disclosure by the prosecutor to the defence of all material and statements referred to in Rule 66(A)(i) and shall be disposed of not later than sixty days after they were filed and before the commencement of the opening statements provided for in Rule 84.

(B) [*et cetera*]

(C) [*et cetera*]

(D) For the purpose of paragraphs (A)(i) and (B)(i), a motion challenging jurisdiction refers exclusively to a motion which challenges an indictment on the ground that it does not relate to:
  (i) any of the persons indicated in Articles 1, 6, 7 and 9 of the Statute;
  (ii) the territories indicated in Articles 1, 8 and 9 of the Statute;
  (iii) the period indicated in Articles 1, 8 and 9 of the Statute;
  (iv) any of the violations indicated in Articles 2, 3, 4, 5 and 7 of the Statute.

4. *Illegal foundation.*

In the Tadic case the Appeals Chamber examined under the old Rule 72 [as amended up to 15 June 1995] the argument of the Prosecution that the validity of the creation of the tribunal should be distinguished from its jurisdiction. The learned judges considered such narrow interpretation of the concept of jurisdiction to fall foul of a modern vision of the administration of justice. It was held that an attack on the validity of the establishment of the ICTY was to be a plea against its jurisdiction that fell within the scope of the (former) Rule 72 [Tadic Interlocutory Appeal Decision, para. 10-12).

The restating of Rule 72 does not, in the opinion of the *Amici Curiae*, invalidate the finding that the issue is preliminary to and fundamental to all other aspects of jurisdiction. It is therefore submitted that the examination of a challenge to the jurisdiction of the Tribunal based on the invalidity of its establishment by the Security Council falls within the scope of Rule 72 [*Compare*: Tadic Interlocutory Appeal Decision, para. 22].

5. *Scope of argument.*

The *Amici Curiae* recall the arguments in the Tadic Interlocutory Appeal Decision that led to the finding that the judges were not barred from examination of a jurisdictional plea by the possible political or non-justiciable character of the issues it may raise [*Ibidem* para. 23-25]. The establishment unlawfully of the Tribunal may negatively effect the impartiality and independency of it and consequently cripple its capacity to provide the accused with a fair trial and/or to guarantee his human rights. This is in so far as it is submitted that such complaints are also a part of the issues within the scope of Rule 72.

6. *Fair treatment.*

A fair *treatment* of the accused, who is unfamiliar with the law and practices of the ICTY and who is not assisted by a defence counsel, reasonably necessitates the most extensive interpretation of the scope of his objections. Thereby, affording the accused the benefit of arguments that are not explicitly raised by him, but which are inherent to the point of his objections and argument. Accordingly, it is submitted that a fair interpretation of Rule 72 requires an inclusion of all arguments raised in his Motion and the Memorandum with the Appendix thereto. The Trial Chamber is reasonably bound to consider all arguments under Rule 72.

7. *Admissibility*

The Preliminary Protective Motion filed by the accused on 9 August 2001 was limited to paragraph 8 of that Motion by the notice of the accused to the Registrar on the same date. The Motion, as limited by the accused, deals with jurisdiction and contains issues and arguments that should be understood to fall under the scope of Rule 72. The Memorandum with appendix filed by the accused on 30 August 2001 is clearly not a new Motion replacing the initial Motion but is an explanation of the

motion filed on 9 august 2001. The filing of that motion complies with the final clause of Rule 72(A) since not *all* material and statements referred to in Rule 66(A)(i) had been disclosed to the accused *in a language which he understands* by 9 August 2001.

> *Rule 66(A)(i) provides*:
>
> (A) Subject to the provisions of Rules 53 and 69, the Prosecutor shall make available to the defence in a language which the accused understands
>
> (i) within thirty days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused;

The initial appearance of the accused was held on 3 July 2001 and documents were served on him on 10 July 2001, 17 July 2001, 27 July 2001 and 3 August 2001. On *10* August 2001 the Prosecutor filed a Notice of Compliance with Rule 66(A)(i). A number of the documents made available to the accused, though, were in English. That language is not a language the accused understands in the meaning of the Statute and the Rules [*see* The Decision on Prosecution Motion for Permission to Disclose Witness Statements in English of 19 September 2001]. It is therefore submitted that the motion on jurisdiction of the accused was filed in due time.

> *See* the Transcript of the Status Conference of 30 August, p. 15, lines 12-14: (prosecution:) *"My understanding is that the time for which he has to file any motion under Rule 72 is 30 days. From the 10th of August, time is running [et cetera]."*

Illegal foundation

8. *Introduction.*

At his initial appearance the accused rejected the legality of the ICTY [Transcript 3 July 2001, p. 2, lines 3-6. and the Note of 2 July 2001]. On 9 August 2001 the accused filed a Preliminary Protective Motion in which he (alternatively) denies the legality of the ICTY *inter alia* because of a lack of authority and power of the United Nations and the Security Counsel to establish an International Criminal Court [Preliminary Protective Motion, p. 3-5]. At the Status Conference of 30 August 2001 the accused produced written arguments on the illegality of the ICTY [Transcript 30 August 2001,

p. 17, lines 24 -p. 18, lines 1-12,] in the form of a Memorandum, [p. 1-7, Appendix, p. 5-10]. Further notable remarks on the establishment of the Tribunal are to be found in the Transcript of 30 August 2001, p 18, lines 21-25, p. 21, lines 23-25 and p.22, lines 1-2.

9. *Constitutionality*

The accused contends that the ICTY, to be duly established by law, should have been created either by treaty or by amendment of the Charter of the United Nations, but not by resolution of the Security Council. The accused has stated that "It is *(The Tribunal)* illegal being not appointed by the U.N. General Assembly [*et cetera*]" [see Transcript 3 July 2001, p. 2, lines 3-6]. The *Amici Curiae* submit that the arguments of the accused on the constitutionality should reasonably be extended to include the Defence arguments as summarised in paragraphs 27, 32, 41, 43, 44 and 55 of the Tadic Interlocutory Appeal Decision. The issues therein raised upon the constitutionality were set-out fully by the Appeals Chamber before addressing each argument. The *Amici curiae* request all these arguments be considered as inserted in the arguments of the accused.

See Annexe 1 hereof.

10. *Independence*

The accused further contends that by reason of its establishment by the Security Council, the political nature of the foundation of the ICTY bars its capability to function as an independent Tribunal. The ICTY must be considered on this matter in relation to all its organs, being the Judges, Prosecutor and Registrar. Pursuant to paragraph 25 of the Tadic Interlocutory Appeal Decision, the accused should be allowed to argue political and non-justiciable arguments to show the lack of independency of the Tribunal.

The issue he is raising here concerns the apparent lack of independence of the Prosecutor in the decision to issue an indictment against him in the first place. On 31 March 1998, The Security Council "urged" the Prosecutor to investigate "violence in Kosovo that may fall within the jurisdiction". [See U.N. Doc. S/RES/1160, 31 March 1998 para 17]. Acting upon that exhortation the investigation was commenced.

A fundamental principle for the validity of any judicial organ is its independence. The ICTY as a subsidiary organ of the Security Council must have such a characteristic. This was a declaration that was claimed would be a feature of the ICTY in the Report of the Secretary General which created it. See U.N. Doc S/25704, para 28: "This organ would, of course, have to perform its functions independently of political considerations; it would not be subject to the authority or control of the Security Council with regard to the performance of its judicial functions."

> Article 16(2) of the Statute cites:
>
> The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.

In the decision on the *Issuance of Subpoenae Duces Tecum, Prosecutor v Blaskic*, [IT-95-14-PT, 18 July 1997 para 23] the Trial Chamber held: "As a subsidiary organ of a judicial nature, it can not be overemphasised that a fundamental prerequisite for its fair and effective functioning is its capacity to act autonomously". The Appeals Chamber in Tadic Interlocutory Appeal Decision, para 45 affirmed: "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."

A breach of that independence which causes an investigation and leads to a subsequent indictment , could be criticised as being in mala fides. Accordingly, it is the duty of the Court to ensure once an issue is raised, that the prosecution of an accused has not been instigated as an abuse of power. A finding of lack of independence resulting in such abuse could lead to dismissal of charges.

11. *Fair Trial and protection of human rights*

The assertion that the ICTY is incapable of providing the accused with either a fair trial, or protection of his fundamental human rights, is not directly expressed under Rule 72(A)(i). However, it is a matter of argument to show the flaws that follow from

an unlawful establishment of the Tribunal. The accused is implicitly asserting bias. To this issue, the *Amici Curiae* observe that a ban on any communication between the accused and the media, while being in the UN Detention Unit, could be said to violate his right to privacy and his freedom of expression. A prohibition based on Rule 66(A) of the Rules of Detention [as amended on 29 November 1999] without showing reasonable grounds could be a violation of human rights. Compare the fact that the indictment against the accused is published and The Prosecutor and The President of the ICTY have made statements about the case to the media. The accused thereby has a reasonable interest to communicate with the media to protect his honour and reputation and moreover to inform the public about his vision on the indictment. This is within the scope of internationally recognised Human Rights . Freedom of expression includes freedom of speech and to impart information through any media.

> *See* Article 12 – Right to privacy; and Article 18 - Freedom of speech, of the Universal Declaration of Human Rights; Proclamation of the General Assembly of the United Nation of 10 December 1948, Articles 17 – Right of privacy; Article 18 – Freedom of thought; and Article 19 – Freedom of expression, of the International Covenant on Civil and Political Rights, and the corresponding Resolution adopted by the General Assembly on 19 December 1966; and Article 8 – Right to respect for private and family life; Article – 9 Freedom of thought, conscience and religion; Article 10 -Freedom of expression; and Article 14 – Prohibition of discrimination, of the European Convention on Human Rights.
> *See Annexe 2 hereof for texts.*

A ban upon <u>any</u> detainee of <u>any</u> communication with the media initiated by the Prosecution without proper showing of grounds can easily be understood to be an expression of lack of independence of the ICTY. This would be so, when the prohibition cannot be characterised as a lawful interference necessary (pressing need) to protect (proportionally) a legitimate aim. Note the observation of the Presiding Judge that "*the Rules of Detention provide that there should not be communication with the press. Those are the Rules and they must be followed. They don't discriminate against you. They are applied to <u>all</u> the accused who are in the detention*" *See:* Transcript 30 August 2001, p. 20, lines 21-5, p. 21, lines 1-8.

Personal jurisdiction

12 *Introduction*

The accused contends that the ICTY has no competence to prosecute him, because of his status as (former) President of the Federal Republic of Yugoslavia [Preliminary Protective Motion, section 5 of par. 8 on p. 5]. He further disputes the personal jurisdiction of the ICTY over him, because of his illegal surrender by the government of the Republic of Serbia was in violation of domestic law [Preliminary Protective Motion, section 5 of par. 8 on p. 5 and Memorandum, p. 21-22].

13. *Head of State*

Article 7(2) of the Statute stipulates that the official position of any accused person, whether as Head of State or Government or as a responsible Government official shall not relieve such person of criminal responsibility. The contention of lack of personal jurisdiction by the accused, as set out in paragraph 12 of this motion, denies the validity of the article. The implied argument of the accused is that Heads of States are immune under international law for criminal responsibility for acts committed in their capacity as Head of State. Such immunity is supposed to be customary under international law. The immunity has by custom included former Heads of State. Otherwise the immunity would be to no effect if a former Head of State could be prosecuted for acts committed in his former capacity.

14. *International law and domestic law*

Previous international instruments to prosecute Heads of State drafted in the past have never been put into effect. There is no precedent for the prosecution of (former) heads of State on an international level. The treaty of Sèvres, providing for the possibility of prosecution of the Head of State of Turkey for the Armenian Genocide of 1915, was signed on 10 August 1920, but never ratified. The Treaties of Neuilly-sur-Seine, St. Germain-en-Laye and of Trianon, providing comparable provisions in relation to Bulgaria, Austria and Hungary respectively, were never implemented. The Treaty of Versailles of 28 June 1919 did not lead to the prosecution of the German Kaiser after World War I. The Nuremberg Principles, declared by the General Assembly of the United Nations in 1950, expressed the aspiration of the members of the United Nation at that time, but were not affirmed and adopted in law.

On a national level there are only a few precedents, like the extradition case of Senator Pinochet and the case of Noriega. Criminal responsibility on a national level of (former) Heads of States, however, does not necessarily reflect responsibility under international law. Authoritative as national case law may be, those pronouncements do not carry, in the field of international law, the weight which they may bring to bear upon national judiciaries [*See* Tadic Interlocutory Appeal Decision, para. 55, p.29]. It was declared in the Tadic Interlocutory Appeal at an international level as not preventing the plea of violation of sovereignty itself [*ibidem* para 55, p.29].

15. *Unlawful surrender*

In his Alternative Preliminary Motion of 9 August 2001, paragraph 8, the accused asserts he was unlawfully surrendered in violation of his constitutional rights under the Federal Republic of Yugoslavia and the Republic of Serbia. He thereby raises a number of issues.

The first, is the power of a State entity within the Yugoslav Federation to extradite or transfer nationals to an International Tribunal. The arrest warrants of the ICTY dated 24 May 1999 and 22 January 2001 were forwarded to the authorities of the Federal Republic of Yugoslavia. They were not issued to the Government of Serbia, but it was the Government of Serbia that transferred the accused to the ICTY. That Government had not been empowered to act in such a manner and derogate from the lawful rights of the accused which were subject on the matter of his transfer to the ICTY, to the jurisdiction of the FRY.

The re-issued arrest warrant of 22 January 2001, was received by personal service on the Federal Minister of Justice on 6 April 2001 in Belgrade. On 3 May 2001, the President of the District Court In Belgrade announced, that pursuant to Article 519 paragraph 1 of the Law of Criminal Procedure, the indictment of the ICTY dated 22 May 1999 and Decision on the Review of the Indictment dated 24 May 1999 had been served on the accused. The announcement stated he was being allowed to become acquainted with their content. By letter dated the 21 May 2001 the Minister of Justice for FRY confirmed to the Registrar of the ICTY, the fact that the service of the indictment had taken place, but this was later than expected. The Federal Minister

cited that the delay was due to legal procedures stipulated for the service of documents on detained persons and the deterioration of the accused's health, he having been in hospital. At this time the accused was in custody, having been arrested on 1 April 2001 on suspicion of an offence committed under the criminal law of the Republic of Serbia. These matters were unrelated to the ICTY indictment. However, before any further steps had been taken through the FRY criminal procedures the accused was removed from his custody by the Serbian authorities on the 28 June 2001, without any apparent legal provisions having been lawfully executed by them and transferred to the ICTY.

The current status of the criminal legal proceedings under which he had been detained, are not known by the amici curiae. There is no information as to whether at the time of the removal of the accused from custody by the Serbian Government and delivery to the OTP of the ICTY, those proceedings were discontinued against him, or he was just transferred. The period for which he was remanded in custody was still extant until 1 July 2001.

Moreover, the Serbian government was under no international obligation to co-operate with the Tribunal. Article 34 of the Vienna Convention on the Law of Treaties provides that a State can not be bound by a treaty to which it is not a party. The Republic of Serbia is not a member of the United Nations and therefore not bound by the UN Charter and consequently not bound by Article 29 of the Statute. Although, it is the case that under the Dayton Accord of 1995, the accused as President of Serbia (not of FRY) signed a treaty that recognised the ICTY. Further, on 10 November 2000 the General Assembly of the United Nations under Resolution A/RES/55/12 officially approved the application of FRY to become a member of the U.N.

The second issue is the protection of nationals under the Federal Constitution of Yugoslavia. Article 17(3) *juncto* Article 18 of the Federal Constitution does not provide for the extradition or transfer of Yugoslav citizens to an international body.

See Annexe 3.

The third issue is the right of access to a court by a national in custody to challenge the lawfulness of his extradition or transfer abroad. The Government of Serbia did not await the decision of the Federal Constitutional Court seized with the matter nor did it respect the provisional decision of that court not to transfer the accused to the ICTY awaiting their decision. The domestic authorities clearly violated domestic law with the transfer of the accused to the Tribunal.

In these circumstances the accused is challenging his transfer as being an abuse of process. That the valid and appropriate legal procedures of a State were bypassed and he was subject to an unlawful transfer to the ICTY. As with any national legal system the Tribunal is bound to uphold the Rule of Law. This includes a duty to annul any abuses of power that are carried out in its name, which are of sufficient gravity as to call into question the justice of the procedures that were used. The Appeals Chamber in *The Prosecutor v Barayagwiza Case No. ICTR-97-19-AR72, Decision 3 November 1999,* acknowledged that the Tribunals were able to invoke the abuse of process doctrine. In that case it led to an order for the release of the accused and dismissal of charges against him. Subsequently this order was revoked by a Review Decision *31 March 2000,* as breaches by the Prosecutor were not as they had previously believed them to be and therefore the remedy for the accused was deemed not to merit the original order.

16. *International conventions*

The following international legal conventions and treaties set-out the general principles relating to legality of arrests:

Universal Declaration of Human Rights
Article 9
No-one shall be subject to arbitrary arrest, detention or exile.

International Covenant on Civil and Political Rights
Article 9 (1)
Everyone has the right to liberty and security of person. No-one shall be subjected to arbitrary arrest and detention. No-one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
Article 9 (4)
Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay

on the lawfulness of his detention and order his release if his detention is unlawful.

European Convention on Human Rights
Article 5 (1)
Everyone has the right to liberty and security of person. No-one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.

See Annexe 2.

The ICTY has been caused to consider issues of arrest in *The Prosecutor v Dokmanovic Case No. IT-95-13a-PT Decision on the Motion for Release by the Accused Slavko Dokmanovic.* The Trial Chamber in that case held a hearing to determine the validity of the arrest. The accused had been lured into arrest by the OTP, which was held not to have violated principles of international law by its conduct (see para. 88).

National jurisdictions, in determining this issue have dismissed proceedings against an accused if the violation of rights has merited such egregious measures. *See United States of America v Toscanino 500 F.2d 267 (1974); R v Horseferry Road Magistrates' Court, ex parte Bennett (1994) 98 Cr.App.R. 114.* Those cases concerned kidnapping which avoided the use of extradition procedures. The extent of any violation of rights may be proportionate to the remedy.

See Annexe 4

Territorial jurisdiction

17. *Introduction*

The accused denies the territorial jurisdiction of the Tribunal because of the arbitrary and discriminatory limitation of the territorial jurisdiction of the Tribunal to The Former Yugoslavia [Preliminary Protective Motion, p. 4 and 5 – sections 3 and 4 of paragraph 8, Memorandum, p. 4-7].

The accused contends that the limitation to the territory of The Former Yugoslavia is a political choice with a discriminatory character. To argue this assertion, the accused should be allowed to raise political arguments to show his case.

Further arguments

18. *Res judicata.*

In her response to the motion of the accused [Prosecution's Response to the Preliminary Protective Motion of the accused, 16 August 2001] the Prosecutor notes that the objections of the accused under Rule 72(B)(i) cover the same issues as dealt with by *Tadic Interlocutory Appeal Decision.* Indeed, the arguments of the accused resemble the arguments raised in the *Tadic case* and it is true that those issues have extensively been addressed in *Tadic Interlocutory Appeal Decision.* Yet, the accused has the right to raise the same or comparable objections for the benefit of a decision on the merits of his case. The *Amici Curiae* submit that the case law of the Appeals Chamber is not *eo ipso* binding, but rather a matter of guidance for the Trial Chamber.

> *Discussion:* Prosecutor v Aleksovski, IT-95-17/1-A, Appeals Chamber 24 March 2000, para 89 – 115.

The Trial Chamber may arrive at findings different to those of the Appeals Chamber in the *Tadic* case.

Test of Independence

19. *Introduction*

A critical aspect of the ICTY decisions on jurisdiction as far as its establishment was challenged is the fact that the Judges of the Tribunal had to review their own competence. The amici curiae, submit that there is an alternative method to test the judicial validity of the ICTY that avoids the criticisms of self-determination of validity.

20. *Advisory Opinion*

As early as 1947, General Assembly Resolution 171 [doc A/346, A/C.6/164 and A/C.6/165) recommended the United Nations organs and the specialised agencies to make more frequent use of the International Court of Justice (ICJ). This was in the framework of its advisory competence for the resolution of difficult and important points of law encountered in the course of U.N. activities where questions of principle were raised. This includes points of law relating to the interpretation of the Charter of the United Nations or the constitutions of the specialised Ag4encies. The Charter is after all a treaty liable to interpretation under the rules of international law and an organ for which the ICJ has statutory competence.

Article 96 of the UN Charter provides:

(1) The General Assembly or the Security Council may request the International court of Justice to give an advisory opinion on any legal question.

(2) Other organs of the United Nations and specialised agencies, which may at any time be so authorised by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities

Article 65 of the ICJ Statute provides:

(1) The court may give an advisory opinion on any legal question at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such request.

(2) Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.

The ICTY is a subsidiary organ of the Security Council and as such it may be argued that it has an inherent authority to request an advisory opinion of the ICJ. Or it may have to obtain an authorisation to do so by the General Assembly. All principal organs of the UN (except for the Secretary-General) have been given such authorisation and there are no legal impediments that would bar a request of the ICTY for such authorisation. Ultimately the Security Council may, on behalf of the ICTY, request for an advisory opinion.

The advisory opinion from the ICJ should concern the competence of the of the Security Council to set up a judicial organ, i.e. the ICTY, and all matters related to its establishment, including the power to interfere with internal matters of a Sovereign State. The determination of such issues should not be through either, the ICTY itself which is a subsidiary organ of the body under review, nor the Security Council whose power has been challenged. It is the principal judicial body within the framework of the U.N. Charter, the ICJ whose proper function is to determine such issues.

21. *Time*

There remains the time factor which, in this case, is crucial. Experience has shown that the Court is perfectly capable of acting speedily in the performance of its duties. [*Examples:* of such cases are: United States Diplomatic and Consular staff in Teheran; Frontier dispute Burkina Faso/ Republic of Mali and the Application of the Genocide Convention Bosnia and Herzegovina v. Yugoslavia].

Conclusion

By reason of the foregoing the accused seeks dismissal of the charges against him and his immediate release.

Michail Wladimiroff
Steven Kay QC
Branislav Tapuslovic ,

as Amici Curiae.

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  (ii) allege defects in the form of the indictment;
  (iii) seek the severance of counts joined in one indictment under Rule 49 or seek separate trials under Rule 82(B); or
  (iv) raise objections based on the refusal of request for assignment of counsel made under Rule 45(C)

shall be in writing and brought not later than thirty days after disclosure by the prosecutor to the defence of all material and statements referred to in Rule 66(A)(i) and shall be disposed of not later than sixty days after they were filed and before the commencement of the opening statements provided for in Rule 84.

(B) [*et cetera*]

(C) [*et cetera*]

(D) For the purpose of paragraphs (A)(i) and (B)(i), a motion challenging jurisdiction refers exclusively to a motion which challenges an indictment on the ground that it does not relate to:
  (i) any of the persons indicated in Articles 1, 6, 7 and 9 of the Statute;
  (ii) the territories indicated in Articles 1, 8 and 9 of the Statute;
  (iii) the period indicated in Articles 1, 8 and 9 of the Statute;
  (iv) any of the violations indicated in Articles 2, 3, 4, 5 and 7 of the Statute.

4. *Illegal foundation.*

In the Tadic case the Appeals Chamber examined under the old Rule 72 [as amended up to 15 June 1995] the argument of the Prosecution that the validity of the creation of the tribunal should be distinguished from its jurisdiction. The learned judges considered such narrow interpretation of the concept of jurisdiction to fall foul of a modern vision of the administration of justice. It was held that an attack on the validity of the establishment of the ICTY was to be a plea against its jurisdiction that fell within the scope of the (former) Rule 72 [Tadic Interlocutory Appeal Decision, para. 10-12).

The restating of Rule 72 does not, in the opinion of the *Amici Curiae*, invalidate the finding that the issue is preliminary to and fundamental to all other aspects of jurisdiction. It is therefore submitted that the examination of a challenge to the jurisdiction of the Tribunal based on the invalidity of its establishment by the Security Council falls within the scope of Rule 72 [*Compare*: Tadic Interlocutory Appeal Decision, para. 22].

5. *Scope of argument.*

The *Amici Curiae* recall the arguments in the Tadic Interlocutory Appeal Decision that led to the finding that the judges were not barred from examination of a jurisdictional plea by the possible political or non-justiciable character of the issues it may raise [*Ibidem* para. 23-25]. The establishment unlawfully of the Tribunal may negatively effect the impartiality and independency of it and consequently cripple its capacity to provide the accused with a fair trial and/or to guarantee his human rights. This is in so far as it is submitted that such complaints are also a part of the issues within the scope of Rule 72.

6. *Fair treatment.*

A fair *treatment* of the accused, who is unfamiliar with the law and practices of the ICTY and who is not assisted by a defence counsel, reasonably necessitates the most extensive interpretation of the scope of his objections. Thereby, affording the accused the benefit of arguments that are not explicitly raised by him, but which are inherent to the point of his objections and argument. Accordingly, it is submitted that a fair interpretation of Rule 72 requires an inclusion of all arguments raised in his Motion and the Memorandum with the Appendix thereto. The Trial Chamber is reasonably bound to consider all arguments under Rule 72.

7. *Admissibility*

The Preliminary Protective Motion filed by the accused on 9 August 2001 was limited to paragraph 8 of that Motion by the notice of the accused to the Registrar on the same date. The Motion, as limited by the accused, deals with jurisdiction and contains issues and arguments that should be understood to fall under the scope of Rule 72. The Memorandum with appendix filed by the accused on 30 August 2001 is clearly not a new Motion replacing the initial Motion but is an explanation of the

motion filed on 9 august 2001. The filing of that motion complies with the final clause of Rule 72(A) since not *all* material and statements referred to in Rule 66(A)(i) had been disclosed to the accused *in a language which he understands* by 9 August 2001.

> *Rule 66(A)(i) provides:*
>
> (A) Subject to the provisions of Rules 53 and 69, the Prosecutor shall make available to the defence in a language which the accused understands
>
> (i) within thirty days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused;

The initial appearance of the accused was held on 3 July 2001 and documents were served on him on 10 July 2001, 17 July 2001, 27 July 2001 and 3 August 2001. On *10* August 2001 the Prosecutor filed a Notice of Compliance with Rule 66(A)(i). A number of the documents made available to the accused, though, were in English. That language is not a language the accused understands in the meaning of the Statute and the Rules [*see* The Decision on Prosecution Motion for Permission to Disclose Witness Statements in English of 19 September 2001]. It is therefore submitted that the motion on jurisdiction of the accused was filed in due time.

> *See* the Transcript of the Status Conference of 30 August, p. 15, lines 12-14: (prosecution:) *"My understanding is that the time for which he has to file any motion under Rule 72 is 30 days. From the 10th of August, time is running [et cetera]."*

Illegal foundation

8. *Introduction.*

At his initial appearance the accused rejected the legality of the ICTY [Transcript 3 July 2001, p. 2, lines 3-6. and the Note of 2 July 2001]. On 9 August 2001 the accused filed a Preliminary Protective Motion in which he (alternatively) denies the legality of the ICTY *inter alia* because of a lack of authority and power of the United Nations and the Security Counsel to establish an International Criminal Court [Preliminary Protective Motion, p. 3-5]. At the Status Conference of 30 August 2001 the accused produced written arguments on the illegality of the ICTY [Transcript 30 August 2001,

p. 17, lines 24 -p. 18, lines 1-12,] in the form of a Memorandum, [p. 1-7, Appendix, p. 5-10]. Further notable remarks on the establishment of the Tribunal are to be found in the Transcript of 30 August 2001, p 18, lines 21-25, p. 21, lines 23-25 and p.22, lines 1-2.

9. *Constitutionality*

The accused contends that the ICTY, to be duly established by law, should have been created either by treaty or by amendment of the Charter of the United Nations, but not by resolution of the Security Council. The accused has stated that "It is *(The Tribunal)* illegal being not appointed by the U.N. General Assembly [*et cetera*]" [see Transcript 3 July 2001, p. 2, lines 3-6]. The *Amici Curiae* submit that the arguments of the accused on the constitutionality should reasonably be extended to include the Defence arguments as summarised in paragraphs 27, 32, 41, 43, 44 and 55 of the Tadic Interlocutory Appeal Decision. The issues therein raised upon the constitutionality were set-out fully by the Appeals Chamber before addressing each argument. The *Amici curiae* request all these arguments be considered as inserted in the arguments of the accused.

See Annexe 1 hereof.

10. *Independence*

The accused further contends that by reason of its establishment by the Security Council, the political nature of the foundation of the ICTY bars its capability to function as an independent Tribunal. The ICTY must be considered on this matter in relation to all its organs, being the Judges, Prosecutor and Registrar. Pursuant to paragraph 25 of the Tadic Interlocutory Appeal Decision, the accused should be allowed to argue political and non-justiciable arguments to show the lack of independency of the Tribunal.

The issue he is raising here concerns the apparent lack of independence of the Prosecutor in the decision to issue an indictment against him in the first place. On 31 March 1998, The Security Council "urged" the Prosecutor to investigate "violence in Kosovo that may fall within the jurisdiction". [See U.N. Doc. S/RES/1160, 31 March 1998 para 17]. Acting upon that exhortation the investigation was commenced.

A fundamental principle for the validity of any judicial organ is its independence. The ICTY as a subsidiary organ of the Security Council must have such a characteristic. This was a declaration that was claimed would be a feature of the ICTY in the Report of the Secretary General which created it. See U.N. Doc S/25704, para 28: "This organ would, of course, have to perform its functions independently of political considerations; it would not be subject to the authority or control of the Security Council with regard to the performance of its judicial functions."

> Article 16(2) of the Statute cites:
>
> The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.

In the decision on the *Issuance of Subpoenae Duces Tecum, Prosecutor v Blaškic,* [IT-95-14-PT, 18 July 1997 para 23] the Trial Chamber held: "As a subsidiary organ of a judicial nature, it can not be overemphasised that a fundamental prerequisite for its fair and effective functioning is its capacity to act autonomously". The Appeals Chamber in Tadic Interlocutory Appeal Decision, para 45 affirmed: "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."

A breach of that independence which causes an investigation and leads to a subsequent indictment , could be criticised as being in mala fides. Accordingly, it is the duty of the Court to ensure once an issue is raised, that the prosecution of an accused has not been instigated as an abuse of power. A finding of lack of independence resulting in such abuse could lead to dismissal of charges.

11. *Fair Trial and protection of human rights*

The assertion that the ICTY is incapable of providing the accused with either a fair trial, or protection of his fundamental human rights, is not directly expressed under Rule 72(A)(i). However, it is a matter of argument to show the flaws that follow from

an unlawful establishment of the Tribunal. The accused is implicitly asserting bias. To this issue, the *Amici Curiae* observe that a ban on any communication between the accused and the media, while being in the UN Detention Unit, could be said to violate his right to privacy and his freedom of expression. A prohibition based on Rule 66(A) of the Rules of Detention [as amended on 29 November 1999] without showing reasonable grounds could be a violation of human rights. Compare the fact that the indictment against the accused is published and The Prosecutor and The President of the ICTY have made statements about the case to the media. The accused thereby has a reasonable interest to communicate with the media to protect his honour and reputation and moreover to inform the public about his vision on the indictment. This is within the scope of internationally recognised Human Rights . Freedom of expression includes freedom of speech and to impart information through any media.

> *See* Article 12 – Right to privacy; and Article 18 - Freedom of speech, of the Universal Declaration of Human Rights; Proclamation of the General Assembly of the United Nation of 10 December 1948, Articles 17 – Right of privacy; Article 18 – Freedom of thought; and Article 19 – Freedom of expression, of the International Covenant on Civil and Political Rights, and the corresponding Resolution adopted by the General Assembly on 19 December 1966; and Article 8 – Right to respect for private and family life; Article – 9 Freedom of thought, conscience and religion; Article 10 -Freedom of expression; and Article 14 – Prohibition of discrimination, of the European Convention on Human Rights.
> *See Annexe 2 hereof for texts.*

A ban upon <u>any</u> detainee of <u>any</u> communication with the media initiated by the Prosecution without proper showing of grounds can easily be understood to be an expression of lack of independence of the ICTY. This would be so, when the prohibition cannot be characterised as a lawful interference necessary (pressing need) to protect (proportionally) a legitimate aim. Note the observation of the Presiding Judge that *"the Rules of Detention provide that there should not be communication with the press. Those are the Rules and they must be followed. They don't discriminate against you. They are applied to <u>all</u> the accused who are in the detention" See:* Transcript 30 August 2001, p. 20, lines 21-5, p. 21, lines 1-8.

Personal jurisdiction

12 *Introduction*

The accused contends that the ICTY has no competence to prosecute him, because of his status as (former) President of the Federal Republic of Yugoslavia [Preliminary Protective Motion, section 5 of par. 8 on p. 5]. He further disputes the personal jurisdiction of the ICTY over him, because of his illegal surrender by the government of the Republic of Serbia was in violation of domestic law [Preliminary Protective Motion, section 5 of par. 8 on p. 5 and Memorandum, p. 21-22].

13. *Head of State*

Article 7(2) of the Statute stipulates that the official position of any accused person, whether as Head of State or Government or as a responsible Government official shall not relieve such person of criminal responsibility. The contention of lack of personal jurisdiction by the accused, as set out in paragraph 12 of this motion, denies the validity of the article. The implied argument of the accused is that Heads of States are immune under international law for criminal responsibility for acts committed in their capacity as Head of State. Such immunity is supposed to be customary under international law. The immunity has by custom included former Heads of State. Otherwise the immunity would be to no effect if a former Head of State could be prosecuted for acts committed in his former capacity.

14. *International law and domestic law*

Previous international instruments to prosecute Heads of State drafted in the past have never been put into effect. There is no precedent for the prosecution of (former) heads of State on an international level. The treaty of Sèvres, providing for the possibility of prosecution of the Head of State of Turkey for the Armenian Genocide of 1915, was signed on 10 August 1920, but never ratified. The Treaties of Neuilly-sur-Seine, St. Germain-en-Laye and of Trianon, providing comparable provisions in relation to Bulgaria, Austria and Hungary respectively, were never implemented. The Treaty of Versailles of 28 June 1919 did not lead to the prosecution of the German Kaiser after World War I. The Nuremberg Principles, declared by the General Assembly of the United Nations in 1950, expressed the aspiration of the members of the United Nation at that time, but were not affirmed and adopted in law.

On a national level there are only a few precedents, like the extradition case of Senator Pinochet and the case of Noriega. Criminal responsibility on a national level of (former) Heads of States, however, does not necessarily reflect responsibility under international law. Authoritative as national case law may be, those pronouncements do not carry, in the field of international law, the weight which they may bring to bear upon national judiciaries [*See* Tadic Interlocutory Appeal Decision, para. 55, p.29]. It was declared in the Tadic Interlocutory Appeal at an international level as not preventing the plea of violation of sovereignty itself [*ibidem* para 55, p.29].

15. *Unlawful surrender*

In his Alternative Preliminary Motion of 9 August 2001, paragraph 8, the accused asserts he was unlawfully surrendered in violation of his constitutional rights under the Federal Republic of Yugoslavia and the Republic of Serbia. He thereby raises a number of issues.

The first, is the power of a State entity within the Yugoslav Federation to extradite or transfer nationals to an International Tribunal. The arrest warrants of the ICTY dated 24 May 1999 and 22 January 2001 were forwarded to the authorities of the Federal Republic of Yugoslavia. They were not issued to the Government of Serbia, but it was the Government of Serbia that transferred the accused to the ICTY. That Government had not been empowered to act in such a manner and derogate from the lawful rights of the accused which were subject on the matter of his transfer to the ICTY, to the jurisdiction of the FRY.

The re-issued arrest warrant of 22 January 2001, was received by personal service on the Federal Minister of Justice on 6 April 2001 in Belgrade. On 3 May 2001, the President of the District Court In Belgrade announced, that pursuant to Article 519 paragraph 1 of the Law of Criminal Procedure, the indictment of the ICTY dated 22 May 1999 and Decision on the Review of the Indictment dated 24 May 1999 had been served on the accused. The announcement stated he was being allowed to become acquainted with their content. By letter dated the 21 May 2001 the Minister of Justice for FRY confirmed to the Registrar of the ICTY, the fact that the service of the indictment had taken place, but this was later than expected. The Federal Minister

cited that the delay was due to legal procedures stipulated for the service of documents on detained persons and the deterioration of the accused's health, he having been in hospital. At this time the accused was in custody, having been arrested on 1 April 2001 on suspicion of an offence committed under the criminal law of the Republic of Serbia. These matters were unrelated to the ICTY indictment. However, before any further steps had been taken through the FRY criminal procedures the accused was removed from his custody by the Serbian authorities on the 28 June 2001, without any apparent legal provisions having been lawfully executed by them and transferred to the ICTY.

The current status of the criminal legal proceedings under which he had been detained, are not known by the amici curiae. There is no information as to whether at the time of the removal of the accused from custody by the Serbian Government and delivery to the OTP of the ICTY, those proceedings were discontinued against him, or he was just transferred. The period for which he was remanded in custody was still extant until 1 July 2001.

Moreover, the Serbian government was under no international obligation to co-operate with the Tribunal. Article 34 of the Vienna Convention on the Law of Treaties provides that a State can not be bound by a treaty to which it is not a party. The Republic of Serbia is not a member of the United Nations and therefore not bound by the UN Charter and consequently not bound by Article 29 of the Statute. Although, it is the case that under the Dayton Accord of 1995, the accused as President of Serbia (not of FRY) signed a treaty that recognised the ICTY. Further, on 10 November 2000 the General Assembly of the United Nations under Resolution A/RES/55/12 officially approved the application of FRY to become a member of the U.N.

The second issue is the protection of nationals under the Federal Constitution of Yugoslavia. Article 17(3) *juncto* Article 18 of the Federal Constitution does not provide for the extradition or transfer of Yugoslav citizens to an international body.

See Annexe 3.

The third issue is the right of access to a court by a national in custody to challenge the lawfulness of his extradition or transfer abroad. The Government of Serbia did not await the decision of the Federal Constitutional Court seized with the matter nor did it respect the provisional decision of that court not to transfer the accused to the ICTY awaiting their decision. The domestic authorities clearly violated domestic law with the transfer of the accused to the Tribunal.

In these circumstances the accused is challenging his transfer as being an abuse of process. That the valid and appropriate legal procedures of a State were bypassed and he was subject to an unlawful transfer to the ICTY. As with any national legal system the Tribunal is bound to uphold the Rule of Law. This includes a duty to annul any abuses of power that are carried out in its name, which are of sufficient gravity as to call into question the justice of the procedures that were used. The Appeals Chamber in *The Prosecutor v Barayagwiza Case No. ICTR-97-19-AR72, Decision 3 November 1999,* acknowledged that the Tribunals were able to invoke the abuse of process doctrine. In that case it led to an order for the release of the accused and dismissal of charges against him. Subsequently this order was revoked by a Review Decision *31 March 2000,* as breaches by the Prosecutor were not as they had previously believed them to be and therefore the remedy for the accused was deemed not to merit the original order.

16. *International conventions*

The following international legal conventions and treaties set-out the general principles relating to legality of arrests:

Universal Declaration of Human Rights
Article 9
No-one shall be subject to arbitrary arrest, detention or exile.

International Covenant on Civil and Political Rights
Article 9 (1)
Everyone has the right to liberty and security of person. No-one shall be subjected to arbitrary arrest and detention. No-one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
Article 9 (4)
Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay

on the lawfulness of his detention and order his release if his detention is unlawful.

European Convention on Human Rights
Article 5 (1)
Everyone has the right to liberty and security of person. No-one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.

See Annexe 2.

The ICTY has been caused to consider issues of arrest in *The Prosecutor v Dokmanovic Case No. IT-95-13a-PT Decision on the Motion for Release by the Accused Slavko Dokmanovic*. The Trial Chamber in that case held a hearing to determine the validity of the arrest. The accused had been lured into arrest by the OTP, which was held not to have violated principles of international law by its conduct (see para. 88).

National jurisdictions, in determining this issue have dismissed proceedings against an accused if the violation of rights has merited such egregious measures. *See United States of America v Toscanino 500 F.2d 267 (1974); R v Horseferry Road Magistrates' Court, ex parte Bennett (1994) 98 Cr.App.R. 114.* Those cases concerned kidnapping which avoided the use of extradition procedures. The extent of any violation of rights may be proportionate to the remedy.

See Annexe 4

Territorial jurisdiction

17. *Introduction*

The accused denies the territorial jurisdiction of the Tribunal because of the arbitrary and discriminatory limitation of the territorial jurisdiction of the Tribunal to The Former Yugoslavia [Preliminary Protective Motion, p. 4 and 5 – sections 3 and 4 of paragraph 8, Memorandum, p. 4-7].

The accused contends that the limitation to the territory of The Former Yugoslavia is a political choice with a discriminatory character. To argue this assertion, the accused should be allowed to raise political arguments to show his case.

Further arguments

18. *Res judicata.*

In her response to the motion of the accused [Prosecution's Response to the Preliminary Protective Motion of the accused, 16 August 2001] the Prosecutor notes that the objections of the accused under Rule 72(B)(i) cover the same issues as dealt with by *Tadic Interlocutory Appeal Decision.* Indeed, the arguments of the accused resemble the arguments raised in the *Tadic case* and it is true that those issues have extensively been addressed in *Tadic Interlocutory Appeal Decision.* Yet, the accused has the right to raise the same or comparable objections for the benefit of a decision on the merits of his case. The *Amici Curiae* submit that the case law of the Appeals Chamber is not *eo ipso* binding, but rather a matter of guidance for the Trial Chamber.

Discussion: Prosecutor v Aleksovski, IT-95-17/1-A, Appeals Chamber 24 March 2000, para 89 – 115.

The Trial Chamber may arrive at findings different to those of the Appeals Chamber in the *Tadic* case.

Test of Independence

19. *Introduction*

A critical aspect of the ICTY decisions on jurisdiction as far as its establishment was challenged is the fact that the Judges of the Tribunal had to review their own competence. The amici curiae, submit that there is an alternative method to test the judicial validity of the ICTY that avoids the criticisms of self-determination of validity.

20. *Advisory Opinion*

As early as 1947, General Assembly Resolution 171 [doc A/346, A/C.6/164 and A/C.6/165) recommended the United Nations organs and the specialised agencies to make more frequent use of the International Court of Justice (ICJ). This was in the framework of its advisory competence for the resolution of difficult and important points of law encountered in the course of U.N. activities where questions of principle were raised. This includes points of law relating to the interpretation of the Charter of the United Nations or the constitutions of the specialised Ag4encies. The Charter is after all a treaty liable to interpretation under the rules of international law and an organ for which the ICJ has statutory competence.

Article 96 of the UN Charter provides:

(1) The General Assembly or the Security Council may request the International court of Justice to give an advisory opinion on any legal question.

(2) Other organs of the United Nations and specialised agencies, which may at any time be so authorised by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities

Article 65 of the ICJ Statute provides:

(1) The court may give an advisory opinion on any legal question at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such request.

(2) Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.

The ICTY is a subsidiary organ of the Security Council and as such it may be argued that it has an inherent authority to request an advisory opinion of the ICJ. Or it may have to obtain an authorisation to do so by the General Assembly. All principal organs of the UN (except for the Secretary-General) have been given such authorisation and there are no legal impediments that would bar a request of the ICTY for such authorisation. Ultimately the Security Council may, on behalf of the ICTY, request for an advisory opinion.

The advisory opinion from the ICJ should concern the competence of the of the Security Council to set up a judicial organ, i.e. the ICTY, and all matters related to its establishment, including the power to interfere with internal matters of a Sovereign State. The determination of such issues should not be through either, the ICTY itself which is a subsidiary organ of the body under review, nor the Security Council whose power has been challenged. It is the principal judicial body within the framework of the U.N. Charter, the ICJ whose proper function is to determine such issues.

21. *Time*

There remains the time factor which, in this case, is crucial. Experience has shown that the Court is perfectly capable of acting speedily in the performance of its duties. [*Examples:* of such cases are: United States Diplomatic and Consular staff in Teheran; Frontier dispute Burkina Faso/Republic of Mali and the Application of the Genocide Convention Bosnia and Herzegovina v. Yugoslavia].

Conclusion

By reason of the foregoing the accused seeks dismissal of the charges against him and his immediate release.

Michail Wladimiroff
Steven Kay QC
Branislav Tapuslovic ,

as Amici Curiae.

IT-99-37-PT
D 4672-D 4680
19 OCTOBER 2001

4672

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case no. IT-99-37-PT

IN THE TRIAL CHAMBER

Before: Judge Richard May, *Presiding*
Judge Patrick Robinson
Judge Mohammed El Habib Fassi Fihri

Registrar: Mr. Hans Holthuis

Date filed: 19 October 2001

THE PROSECUTOR

v.

SLOBODAN MILOŠEVIC

AMICI CURIAE BRIEF ON JURISDICTION

Office of the Prosecutor:

Ms. Carla Del Ponte
Mr. Dirk Ryneveld QC
Ms. Cristina Romano
Mr. Milbert Shin
Mr. Daniel Saxon
Ms. Julia Baly
Mr. Daryl A. Mundis

The accused:

Mr. Slobodan Miloševic

Amici Curiae:

Mr. Steven Kay QC
Mr. Branislav Tapuškovic
Prof. Michaïl Wladimiroff

ANNEXE 1

IT-94-37-PT

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D 6491 - D 6413 ~~9mcf~~

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-94-1-AR72

Date: 2 October 1995

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Cassese, Presiding**
Judge Li
Judge Deschênes
Judge Abi-Saab
Judge Sidhwa

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Decision of: **2 October 1995**

THE PROSECUTOR

v.

DUŠKO TADIĆ a/k/a/ "DULE"

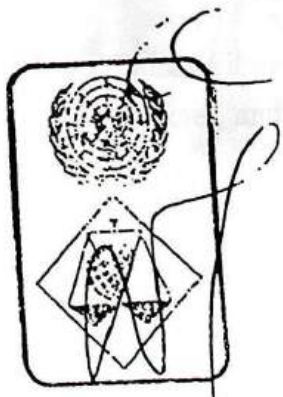
DECISION ON THE DEFENCE MOTION FOR INTERLOCUTORY APPEAL ON JURISDICTION

The Office of the Prosecutor:

Mr. Richard Goldstone, Prosecutor
Mr. Grant Niemann
Mr. Alan Tieger
Mr. Michael Keegan
Ms. Brenda Hollis
Mr. William Fenrick

Counsel for the Accused:

Mr. Michail Wladimiroff
Mr. Alphons Orie
Mr. Milan Vujin
Mr. Krstan Simić



27. The Trial Chamber summarized the claims of the Appellant as follows:

> "It is said that, to be duly established by law, the International Tribunal should have been created either by treaty, the consensual act of nations, or by amendment of the Charter of the United Nations, not by resolution of the Security Council. Called in aid of this general proposition are a number of considerations: that before the creation of the International Tribunal in 1993 it was never envisaged that such an ad hoc criminal tribunal might be set up; that the General Assembly, whose participation would at least have guaranteed full representation of the international community, was not involved in its creation; that it was never intended by the Charter that the Security Council should, under Chapter VII, establish a judicial body, let alone a criminal tribunal; that the Security Council had been inconsistent in creating this Tribunal while not taking a similar step in the case of other areas of conflict in which violations of international humanitarian law may have occurred; that the establishment of the International Tribunal had neither promoted, nor was capable of promoting, international peace, as the current situation in the former Yugoslavia demonstrates; that the Security Council could not, in any event, create criminal liability on the part of individuals and that this is what its creation of the International Tribunal did; that there existed and exists no such international emergency as would justify the action of the Security Council; that no political organ such as the Security Council is capable of establishing an independent and impartial tribunal; that there is an inherent defect in the creation, after the event, of ad hoc tribunals to try particular types of offences and, finally, that to give the International Tribunal primacy over national courts is, in any event and in itself, inherently wrong." (Decision at Trial, at para. 2.)

These arguments raise a series of constitutional issues which all turn on the limits of the power of the Security Council under Chapter VII of the Charter of the United Nations and determining what action or measures can be taken under this Chapter, particularly the establishment of an international criminal tribunal. Put in the interrogative, they can be formulated as follows:

1. was there really a threat to the peace justifying the invocation of Chapter VII as a legal basis for the establishment of the International Tribunal?

2. assuming such a threat existed, was the Security Council authorized, with a view to restoring or maintaining peace, to take any measures at its own discretion, or was it bound to choose among those expressly provided for in Articles 41 and 42 (and possibly Article 40 as well)?

3. in the latter case, how can the establishment of an international criminal tribunal be justified, as it does not figure among the ones mentioned in those Articles, and is of a different nature?

3. The Establishment Of The International Tribunal As A Measure Under Chapter VII

32. As with the determination of the existence of a threat to the peace, a breach of the peace or an act of aggression, the Security Council has a very wide margin of discretion under Article 39 to choose the appropriate course of action and to evaluate the suitability of the measures chosen, as well as their potential contribution to the restoration or maintenance of peace. But here again, this discretion is not unfettered; moreover, it is limited to the measures provided for in Articles 41 and 42. Indeed, in the case at hand, this last point serves as a basis for the Appellant's contention of invalidity of the establishment of the International Tribunal.

In its resolution 827, the Security Council considers that "in the particular circumstances of the former Yugoslavia", the establishment of the International Tribunal "would contribute to the restoration and maintenance of peace" and indicates that, in establishing it, the Security Council was acting under Chapter VII (S.C. Res. 827, U.N. Doc. S/RES/827 (1993)). However, it did not specify a particular Article as a basis for this action.

Appellant has attacked the legality of this decision at different stages before the Trial Chamber as well as before this Chamber on at least three grounds:

a) that the establishment of such a tribunal was never contemplated by the framers of the Charter as one of the measures to be taken under Chapter VII; as witnessed by the fact that it figures nowhere in the provisions of that Chapter, and more particularly in Articles 41 and 42 which detail these measures;

b) that the Security Council is constitutionally or inherently incapable of creating a judicial organ, as it is conceived in the Charter as an executive organ, hence not possessed of judicial powers which can be exercised through a subsidiary organ;

c) that the establishment of the International Tribunal has neither promoted, nor was capable of promoting, international peace, as demonstrated by the current situation in the former Yugoslavia.

(a) What Article of Chapter VII Serves As A Basis For The Establishment Of A Tribunal?

33. The establishment of an international criminal tribunal is not expressly mentioned among the enforcement measures provided for in Chapter VII, and more particularly in Articles 41 and 42.

4. Was The Establishment Of The International Tribunal Contrary To The General Principle Whereby Courts Must Be "Established By Law"?

41. Appellant challenges the establishment of the International Tribunal by contending that it has not been established by law. The entitlement of an individual to have a criminal charge against him determined by a tribunal which has been established by law is provided in Article 14, paragraph 1, of the International Covenant on Civil and Political Rights. It provides:

> "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." (ICCPR, art. 14, para. 1.)

Similar provisions can be found in Article 6(1) of the European Convention on Human Rights, which states:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law [. . .]"(European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, art. 6, para. 1, 213 U.N.T.S. 222 (hereinafter *ECHR*))

and in Article 8(1) of the American Convention on Human Rights, which provides:

> "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law." (American Convention on Human Rights, 22 November 1969, art. 8, para. 1, O.A.S. Treaty Series No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. L/V/II.23 doc. rev. 2 (hereinafter *ACHR*).)

Appellant argues that the right to have a criminal charge determined by a tribunal established by law is one which forms part of international law as a "general principle of law recognized by civilized nations", one of the sources of international law in Article 38 of the Statute of the International Court of Justice. In support of this assertion, Appellant emphasises the fundamental nature of the "fair trial" or "due process" guarantees afforded in the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights. Appellant asserts that they are minimum requirements in international law for the administration of criminal justice.

42. For the reasons outlined below, Appellant has not satisfied this Chamber that the requirements laid down in these three conventions must apply not only in the context of national legal systems but also with respect to proceedings conducted before an international court. This

Chamber is, however, satisfied that the principle that a tribunal must be established by law, as explained below, is a general principle of law imposing an international obligation which only applies to the administration of criminal justice in a municipal setting. It follows from this principle that it is incumbent on all States to organize their system of criminal justice in such a way as to ensure that all individuals are guaranteed the right to have a criminal charge determined by a tribunal established by law. This does not entail however that, by contrast, an international criminal court could be set up at the mere whim of a group of governments. Such a court ought to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments. Then the court may be said to be "established by law".

43. Indeed, there are three possible interpretations of the term "established by law". First, as Appellant argues, "established by law" could mean established by a legislature. Appellant claims that the International Tribunal is the product of a "mere executive order" and not of a "decision making process under democratic control, necessary to create a judicial organisation in a democratic society". Therefore Appellant maintains that the International Tribunal not been "established by law". (Defence Appeal Brief, at para. 5.4.)

The case law applying the words "established by law" in the European Convention on Human Rights has favoured this interpretation of the expression. This case law bears out the view that the relevant provision is intended to ensure that tribunals in a democratic society must not depend on the discretion of the executive; rather they should be regulated by law emanating from Parliament. (*See* Zand v. Austria, App. No. 7360/76, 15 Eur. Comm'n H.R. Dec. & Rep. 70, at 80 (1979); Piersack v. Belgium, App. No. 8692/79, 47 Eur. Ct. H.R. (ser. B) at 12 (1981); Crociani, Palmiotti, Tanassi and D'Ovidio v. Italy, App. Nos. 8603/79, 8722/79, 8723/79 & 8729/79 (joined) 22 Eur. Comm'n H.R. Dec. & Rep. 147, at 219 (1981).)

Or, put another way, the guarantee is intended to ensure that the administration of justice is not a matter of executive discretion, but is regulated by laws made by the legislature.

It is clear that the legislative, executive and judicial division of powers which is largely followed in most municipal systems does not apply to the international setting nor, more specifically, to the setting of an international organization such as the United Nations. Among the principal organs of the United Nations the divisions between judicial, executive and legislative functions are not clear cut. Regarding the judicial function, the International Court of Justice is clearly the "principal judicial organ" (*see* United Nations Charter, art. 92). There is, however, no legislature, in the technical sense of the term, in the United Nations system and, more generally, no Parliament in the world community. That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects.

It is clearly impossible to classify the organs of the United Nations into the above-discussed divisions which exist in the national law of States. Indeed, Appellant has agreed that the constitutional structure of the United Nations does not follow the division of powers often found in national constitutions. Consequently the separation of powers element of the requirement that a tribunal be "established by law" finds no application in an international law setting. The aforementioned principle can only impose an obligation on States concerning the functioning of their own national systems.

44. A second possible interpretation is that the words "established by law" refer to establishment of international courts by a body which, though not a Parliament, has a limited power to take binding decisions. In our view, one such body is the Security Council when, acting under Chapter VII of the United Nations Charter, it makes decisions binding by virtue of Article 25 of the Charter.

According to Appellant, however, there must be something more for a tribunal to be "established by law". Appellant takes the position that, given the differences between the United Nations system and national division of powers, discussed above, the conclusion must be that the United Nations system is not capable of creating the International Tribunal unless there is an amendment to the United Nations Charter. We disagree. It does not follow from the fact that the United Nations has no legislature that the Security Council is not empowered to set up this International Tribunal if it is acting pursuant to an authority found within its constitution, the United Nations Charter. As set out above (paras. 28-40) we are of the view that the Security Council was endowed with the power to create this International Tribunal as a measure under Chapter VII in the light of its determination that there exists a threat to the peace.

In addition, the establishment of the International Tribunal has been repeatedly approved and endorsed by the "representative" organ of the United Nations, the General Assembly: this body not only participated in its setting up, by electing the Judges and approving the budget, but also expressed its satisfaction with, and encouragement of the activities of the International Tribunal in various resolutions. (*See* G.A. Res. 48/88 (20 December 1993) and G.A. Res. 48/143 (20 December 1993), G.A. Res. 49/10 (8 November 1994) and G.A. Res. 49/205 (23 December 1994).)

45. The third possible interpretation of the requirement that the International Tribunal be "established by law" is that its establishment must be in accordance with the rule of law. This appears to be the most sensible and most likely meaning of the term in the context of international law. 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

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ANNEXE 2

APPENDIX C

Universal Declaration of Human Rights

(relevant extracts)

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3

Everyone has the right to life, liberty and security of person.

Article 4

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6

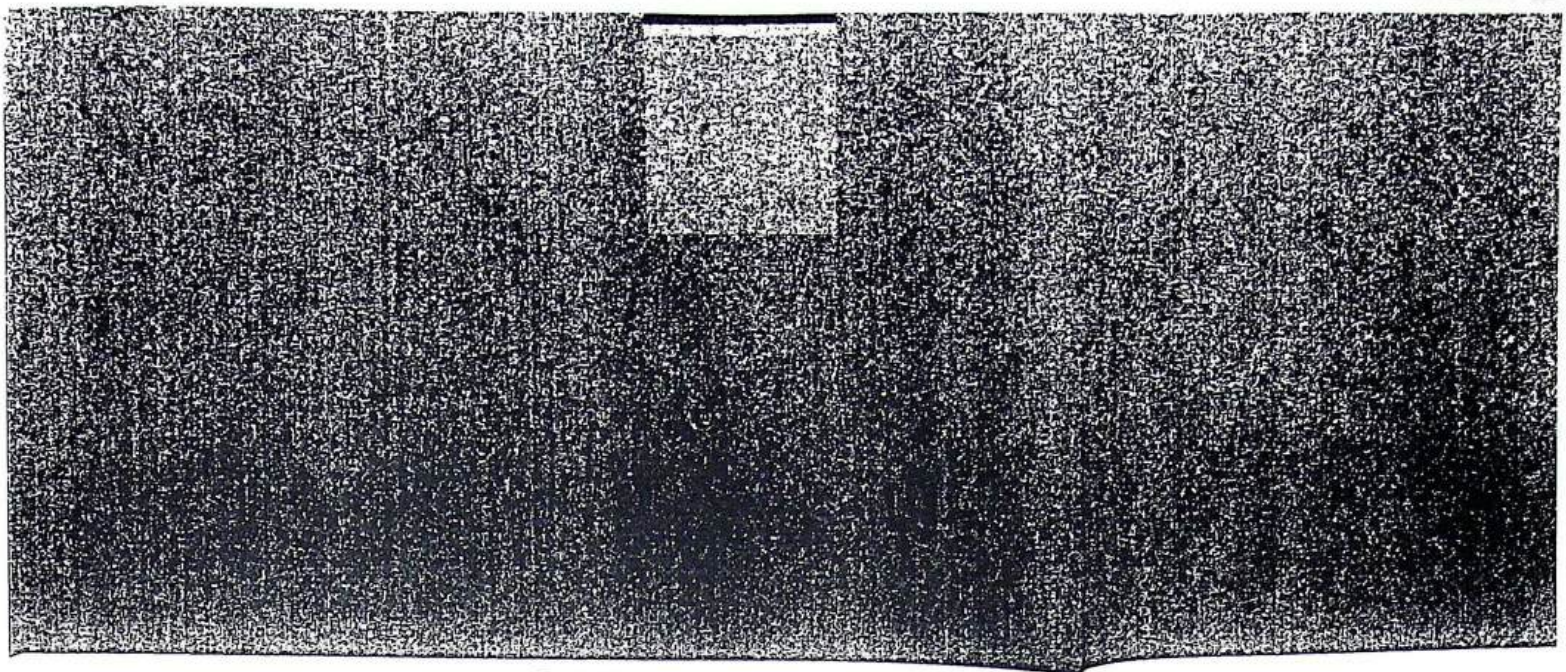
Everyone has the right to recognition everywhere as a person before the law.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.



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Article 9
No one shall be subjected to arbitrary arrest, detention or exile.

Article 10
Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11
Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12
No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13
Everyone has the right to freedom of movement and residence within the borders of each State. Everyone has the right to leave any country, including his own, and to return to his country.

Article 14
Everyone has the right to seek and to enjoy in other countries asylum from persecution. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15
Everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16
Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

Marriage shall be entered into only with the free and full consent of the intending spouses. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17
Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.

Article 18
Everyone has the right to freedom of thc
right includes freedom to change his rel
alone or in community with others and
religion or belief in teaching, practice, v

Article 19
Everyone has the right to freedom of
includes freedom to hold opinions with
and impart information and ideas thr
frontiers.

Article 20
Everyone has the right to freedom of pe
one may be compelled to belong to an

Article 21
Everyone has the right to take part
directly or through freely chosen repre

Everyone has the right to equal ac
The will of the people shall be the basis
will shall be expressed in periodic and
universal and equal suffrage and sl
equivalent free voting procedures.

Article 22
Everyone, as a member of society, ha
entitled to realization, through nat
operation and in accordance with the
State, of the economic, social and c
dignity and the free development of h

Article 23
Everyone has the right to work, to fre
favourable conditions of work and t
Everyone, without any discrimination
work.

Everyone who works has the righ
ensuring for himself and his family a
and supplemented, if necessary, by
Everyone has the right to form and t
of his interests.

Article 24
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Article 25
Everyone has the right to a standar
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of his property.

Article 18

Everyone has the right to freedom of thought, conscience and religion: this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

Everyone has the right to freedom of peaceful assembly and association. No one may be compelled to belong to an association.

Article 21

Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

Everyone has the right to equal access to public service in his country. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23

Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. Everyone, without any discrimination, has the right to equal pay for equal work.

Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing

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The United Nations INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

PREAMBLE

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART 1

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

3. Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
4. Any work or service which forms part of normal civil obligations.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone 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 shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2.
    1. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;
    2. Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation.

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

country.

Article 15

• No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. if, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.
• Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
    1. For respect of the rights or reputations of others;
    2. For the protection of national security or of public order (ordre public), or of public health or morals.

APPENDIX B

European Convention on Human Rights

(relevant extracts)

Article 1[1] – Obligation to respect human rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

SECTION I – RIGHTS AND FREEDOMS

Article 2[1] – Right to life

(1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

(2) Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

a in defence of any person from unlawful violence;

b in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3[1] – Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 4[1] – Prohibition of slavery and forced labour

(1) No one shall be held in slavery or servitude.

(2) No one shall be required to perform forced or compulsory labour.

(3) For the purpose of this article the term 'forced or compulsory labour' shall not include:

a any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

b any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

c any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

d any work or service which forms part of normal civic obligations.

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conviction by a competent court;
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to secure the fulfilment of any

erson effected for the purpose of
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offence or when it is reasonably
committing an offence or fleeing

der for the purpose of educational
for the purpose of bringing him

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ɔerson to prevent his effecting an
ɔr of a person against whom action
tion or extradition.
ıed promptly, in a language which
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ɔlicly but the press and public may
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atic society, where the interests of
e life of the parties so require, or to
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(3) Everyone charged with a criminal offence has the following minimum rights:
   a to be informed promptly, in a language which he understands and in detail of the nature and cause of the accusation against him;
   b to have adequate time and facilities for the preparation of his defence;
   c to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
   d to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   e to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7[1] – No punishment without law

(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

(2) This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 8[1] – Right to respect for private and family life

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

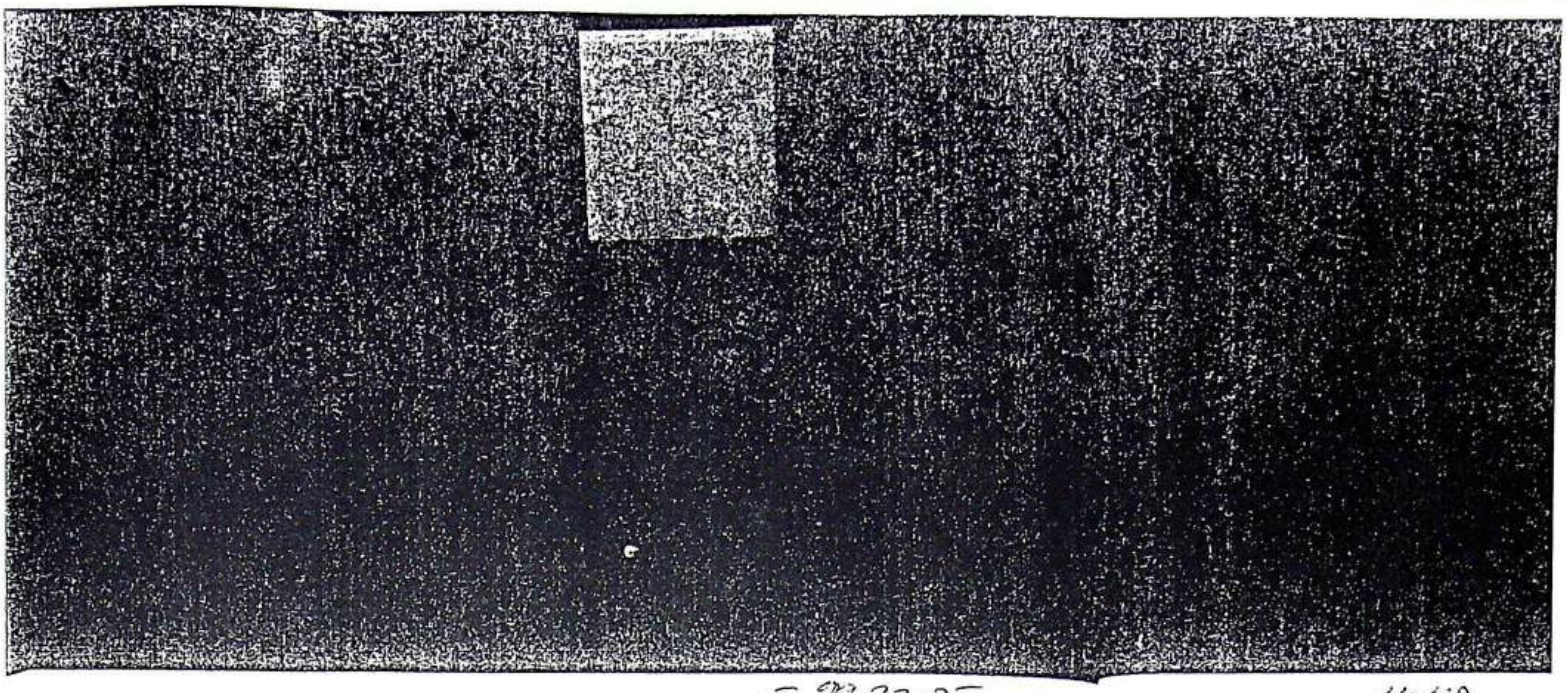
Article 9[1] – Freedom of thought, conscience and religion

(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10[1] – Freedom of expression

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This



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article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11[1] – Freedom of assembly and association

(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

(2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 12[1] – Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 13[1] – Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 14[1] – Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 15[1] – Derogation in time of emergency

(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

(2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

(3) Any High Contracting Party availin keep the Secretary General of the C measures which it has taken and th the Secretary General of the Counc ceased to operate and the provisions executed.

Article 16[1] – Restrictions on poli

Nothing in Articles 10, 11 and 14 s Contracting Parties from imposing aliens.

Article 17[1] – Prohibition of abus

Nothing in this Convention may b group or person any right to engage at the destruction of any of the rig their limitation to a greater extent t

Article 18[1] – Limitation on use o

The restrictions permitted under freedoms shall not be applied for they have been prescribed.

SECTION II – EUROPEAN

Article 19 – Establishment of th

To ensure the observance of the Contracting Parties in the Convent be set up a European Court of Hun Court'. It shall function on a perm

Article 20 – Number of judges

The Court shall consist of a num Contracting Parties.

Article 21 – Criteria for office

(1) The judges shall be of high mora qualifications required for appo jurisconsults of recognised compe

(2) The judges shall sit on the Court i

(3) During their term of office the jud is incompatible with their indepen of a full-time office: all questio paragraph shall be decided by the

Article 22 – Election of judges

(1) The judges shall be elected by the each High Contracting Party by a candidates nominated by the Hig

ANNEXE 3

ANNEXE 4

(1994)
98 Cr.App.R.

R. v. HORSEFERRY ROAD MAGISTRATES' COURT (RESPONDENTS), ex parte BENNETT (APPELLANT)

HOUSE OF LORDS (Lord Griffiths, Lord Bridge of Harwich, Lord Oliver of Aylmerton, Lord Lowry and Lord Slynn of Hadley): March 3, 4, 8, 9, June 24, 1993.

Justices - Committal Proceedings - Jurisdiction - Defendant Removed from South Africa to England - Collusion Alleged Between South African Authorities and English Police - Arrest in England Lawful - Whether Court had Power to Inquire into Circumstances of Defendant's Presence in Jurisdiction - Whether Court Empowered to Refuse Trial Where Abuse of Process Shown - Whether Jurisdiction Vested in Justices.

The appellant, a New Zealand citizen, was alleged to have committed criminal offences in England. He was traced to South Africa by the English police and forcibly returned to England. As there was no extradition treaty between the two countries, although under section 15 of the Extradition Act 1989 in a particular case extradition could be arranged, none was initiated. The appellant claimed he had been kidnapped from South Africa as a result of collusion between the South African and British police and returned to England, where he was arrested and brought before a magistrates' court to be committed to the Crown Court for trial. He sought an adjournment to challenge the court's jurisdiction, which was refused and he was committed for trial. The appellant thereupon sought judicial review of the magistrates' court decision. The Divisional Court of Queen's Bench refused the application holding that the English court had no power to inquire into the circumstances under which a person had been brought within the jurisdiction. On appeal therefrom to the House of Lords.

Held, allowing the appeal (Lord Oliver dissenting) that for the maintenance of the rule of law where an accused person had been brought back to the territorial jurisdiction of the English court by forcibly abducting him from another country in violation of international law and the laws of the state from which he had been taken

and in disregard of the extradition procedures, the High Court had power, in the exercise of its supervisory jurisdiction, to inquire into the circumstances by which such a person was brought within the jurisdiction; and if satisfied that there had been a disregard of extradition procedures, it may stay the prosecution of the accused person as an abuse of process and order his release. Accordingly, the case would be remitted to the Divisional Court for reconsideration.

Hartley [1978] 2 N.Z.L.R. 199, dictum of Woodhouse J. in *Maevao v. Dept. of Labour* [1980] N.Z.L.R. 464, 475, 476, (1982) 75 Cr.App.R. 24, *S. v. Ebrahim* 1991 (2) S.A. 553 and dictum of Stevens J. in *U.S. v. Alvarez-Machain* (1992) 119 L.Ed. 2d 441, 446, 447 applied. (1986) 82 Cr.App.R. 85, [1986] Q.B. 95 not followed.

Per curiam: Justices, whether sitting as examining magistrates or exercising their summary jurisdiction have power to exercise control over their proceedings through the abuse of process jurisdiction. However, such power should be strictly confined to matters directly affecting the fairness of the trial of the particular accused with whom they were dealing and did not extend to the wider supervisory jurisdiction of upholding the rule of law, such as delay or unfair manipulation of court procedures. In the case of deliberate abuse of extradition procedures where the proper forum was the Divisional Court, the justices should allow an ajournment so that an application can be made to the Divisional Court.

[1983] 1 W.L.R. 108 applied.

(1993) 97 Cr.App.R. 29 reversed.

Appeal.

The appellant, Paul James Bennett, appealed with leave of the Appellate Committee of the House of Lords (Lord Keith of Kinkel, Lord Goff of Chieveley and Lord Mustill) given on December 3, 1992, from an order dated July 31, 1992, of the Divisional Court (Woolf L.J. and Pill J.) (1993) 97 Cr.App.R. 29 dismissing his motion for judicial review of decisions of the Horseferry Road Magistrates' Court on May 22, 1991, refusing him an adjournment, to enable him to challenge the jurisdiction of the Court to hear committal proceedings, and committing him for trial at the Crown Court at Southwark.

The Divisional Court had certified under section 1(2) of the Administration of Justice Act 1960, that the following point of law was involved in its decision, *i.e.*

> "Whether in the exercise of its supervisory jurisdiction the court has power to inquire into the circumstances by which a person has been brought within the jurisdiction and if so what remedy is available if any to prevent his trial where that person has been lawfully arrested within the jurisdiction for a crime committed within the jurisdiction."

The facts appear in the opinion of Lord Griffiths.

The appeal was argued on March 3, 4, 8 and 9, 1993, when the following additional cases were cited: *Alladice* (1988) 87 Cr.App.R. 380, *Attorney-General v. Case* (1822) 11 Price 345, *Attorney-General v. Dorkings* (1822) 12 Price 156, *Attorney-General v. Golder* (1823) 12 Price 335, *Barbuit's case* (1737) Cas.T.Talb. 281, *Barlow v. Hall* (1794) 1 Anst. 461, *Barton v. Commonwealth of Australia* (1974) 131 C.L.R. 477, *Betesh* (1975) 30 C.C.C. (2d) 233, *Birch v. Prodger* (1804) 1 Bos. & Pul. N.R. 135, *Birmingham Justices, ex p. Lamb* [1983] 1 W.L.R. 339, *Bow Street Stipendiary Magistrate, ex p. D.P.P.* (1989) 91 Cr.App.R. 283, *Brentford Justices, ex p. Wong* (1981) 73 Cr.App.R. 67, [1981] Q.B. 445, *Brown v. Lizars* (1905) 2 C.L.R. 837, *Canale* (1990) 91 Cr.App.R. 1, [1990] 2 All E.R. 187, *Canterbury and St. Augustine Justices, ex p. Turner* (1983) 147 J.P. 193, *Card v. Salmon* [1953] 1 Q.B. 392, *Carden*

(1879) 5 Q.B.D. 1, *Clerk to Medway Justices, ex p. Department of Health and Social Services* [1986] Crim.L.R. 686, *Crneck, Bradley and Shelley* (1980) 116 D.L.R. (3d) 675, *Governor of Brixton Prison, ex p. Soblen* [1963] 2 Q.B. 243, *Governor of Pentonville Prison, ex p. Alves* [1993] A.C. 284, *Governor of Pentonville Prison, ex p. Osman (No. 3)* (1990) 91 Cr.App.R. 409, [1990] 1 W.L.R. 878, *Grays Justices, ex p. Graham* (1982) 75 Cr.App.R. 229, [1982] Q.B. 1239, *Manchester City Stipendiary Magistrate, ex p. Snelson* (1977) 66 Cr.App.R. 44, [1977] 1 W.L.R. 911, *Oxford City Justices, ex p. Berry* (1987) 85 Cr.App.R. 89, [1988] Q.B. 507, *Sattler* (1858) Dears & Bell 539, *Walsh* (1989) 91 Cr.App.R. 161, Davies [1906] 1 K.B. 323, *Garrett* (1917) 86 L.J.K.B. 894, *Governor of Brixton Prison, ex p. Servini* [1914] 1 K.B. 77, *Rochin v. California* 342 U.S. 165 (1952), *Re Sampson* (1987) 84 Cr.App.R. 376, [1987] 1 W.L.R. 194, *Silverman v. United States* 365 U.S. 505 (1961), *Simms v. Moore* (1970) 54 Cr.App.R. 347, [1970] 2 Q.B. 327, *Smalley v. Crown Court at Warwick* (1985) 80 Cr.App.R. 205, [1980] A.C. 622, *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] Q.B. 529, *Triquet v. Bath* (1764) 3 Burr. 1478, *United States, ex rel. Lujan v. Gengler* 510 F. 2d 62 (1975), *United States v. Rauscher* 119 U.S. 407 (1886), *United States v. Russell* 411 U.S. 423 (1973), *Wemyss v. Hopkins* (1875) 39 J.P. 549and *Wong Sun v. United States* 371 U.S. 471 (1983).

Alan Newman, Q.C. and *Brian Jubb* for the defendant appellant.
Colin Nicholls, Q.C. and *Robert Fischel* for the respondent.
Their Lordships took time for consideration.
June 24. The following opinions were handed down.

LORD GRIFFITHS: My Lords, The appellant is a New Zealand citizen who is wanted for criminal offences which it is alleged he committed in connection with the purchase of a helicopter in this country in 1989. The essence of the case against him is that he raised the finance to purchase the helicopter by a series of false pretences and has defaulted on the repayments.

The English police eventually traced the appellant and the helicopter to South Africa. The police, after consulting with the Crown Prosecution Service, decided not to request the return of the appellant through the extradition process. The affidavit of Detective Sergeant Martin Davies of the Metropolitan Police of New Scotland Yard deposes as follows:

> "I originally considered seeking the extradition of the applicant from South Africa. I conferred with the Crown Prosecution Service, and it was decided that this course of action should not be pursued. There are no formal extradition provisions in force between the United Kingdom and the Republic of South Africa and any extradition would have to be by way of special extradition arrangements under section 15 of the Extradition Act 1989. No proceedings for the applicant's extradition were ever initiated."

It is the appellant's case that, having taken the decision not to employ the extradition process, the English police colluded with the South African police to have the appellant arrested in South Africa and forcibly returned to this country against his will. The appellant deposes that he was arrested by two South African detectives on January 28, 1991, at Lanseria South Africa, who fixed a civil restraint order on the helicopter on behalf of the United Kingdom finance company and told the appellant that he was wanted by Scotland Yard and he was being taken to England. Thereafter he was held in police custody until he was placed on an aeroplane in Johannesburg ostensibly to be deported to New Zealand via Taipei. At Taipei, when he attempted to disembark, he was restrained by two men who identified themselves as South African police and said that they had orders to return

him to South Africa and then to the United Kingdom and hand him over to Scotland Yard. He was returned to South Africa and held in custody until he was placed, handcuffed to the seat, on a flight from Johannesburg on February 21, arriving at Heathrow on the morning of February 22, when he was immediately arrested by three police officers including Detective Sergeant Davies. He further deposes that he was placed on this flight in defiance of an order of the Supreme Court of South Africa obtained by a lawyer on his behalf on the afternoon of February 21.

The English police, through Sergeant Davies, deny that they were in any way involved with the South African police in returning the appellant to this country. They say that they had been informed that there were a number of warrants for the appellant's arrest in existence in Australia and New Zealand and that they requested the South African police to deport the appellant to either Australia or New Zealand and it was only on February 20 that the English police were informed by the South African police that the appellant was to be repatriated to New Zealand by being placed on a flight to Heathrow from whence he would then fly on to New Zealand. Sergeant Davies does, however, depose in a second affidavit as follows:

> "1. Further to my affidavit sworn in the abovementioned proceedings on November 29, 1991, my earliest communications with the South African authorities following the applicant's arrest were with the South African police with a view to his repatriation to New Zealand or deportation to Australia and his subsequent extradition from one of those countries to England. I discussed with the South African police the question as to whether the applicant would be returned via the United Kingdom and I was informed by them that he might be returned via London. I sought advice from the Crown Prosecution Service and from the Special Branch of the Metropolitan Police as to what the position would be if he were so returned. I informed the South African police by telephone that if the applicant were returned via London he would be arrested on arrival. Subsequently I was informed by the South African police that the applicant could not be repatriated to New Zealand via Heathrow . . .
> "4. I now recollect that it was on February 20 and not on February 21 as I stated in my previous affidavit, that the South African police informed me on the telephone that the applicant was to be returned to New Zealand via Heathrow. On the same day I consulted the Crown Prosecution Service and it was decided that the English police would arrest the applicant on his arrival at Heathrow."

It is not for your Lordships to pass judgment on where truth lies at this stage of the proceedings but for the purpose of testing the submission of the respondents that a court has no jurisdiction to inquire into such matters it must be assumed that the English police took a deliberate decision not to pursue extradition procedures but to persuade the South African police to arrest and forcibly return the appellant to this country, under the pretext of deporting him to New Zealand via Heathrow so that he could be arrested at Heathrow and tried for the offences of dishonesty he is alleged to have committed in 1989. I shall also assume that the Crown Prosecution Service were consulted and approved of the behaviour of the police.

On May 22, 1991, the appellant was brought before a stipendiary magistrate for the purpose of committal proceedings. Counsel for the appellant requested an adjournment to permit him to challenge the jurisdiction of the magistrates' court. The application was refused and the appellant was committed for trial to the Southwark Crown Court on five offences of dishonesty. The appellant obtained leave to bring proceedings for judicial review to challenge the decision of the magistrate. On July 22, 1992, the Divisional Court ruled that as a preliminary issue the court would consider whether there was jurisdiction vested in the Divisional

Court to inquire into the circumstances by which the appellant had come to be within the jurisdiction of the courts of England and Wales.

On July 31, 1992, the Divisional Court held that even if the evidence showed collusion between the Metropolitan Police and the South African police in kidnapping the appellant and securing his enforced illegal removal from the Republic of South Africa there was no jurisdiction vested in the Court to inquire into the circumstances by which the appellant came to be within the jurisdiction and accordingly dismissed the application for judicial review. The Divisional Court has certified the following question of law:

> "Whether in the exercise of its supervisory jurisdiction the court has power to inquire into the circumstances by which a person has been brought within the jurisdiction and if so what remedy is available if any to prevent his trial where that person has been lawfully arrested within the jurisdiction for a crime committed within the jurisdiction."

The Divisional Court in this case was faced with conflicting decisions of the Divisional Court in earlier cases. In *Bow Street Magistrates, ex p. Mackeson* (1982) 75 Cr.App.R. 24 the facts were as follows. The applicant was a British citizen who had left this country at the end of 1977 and in 1979 was working as a schoolteacher in Zimbabwe-Rhodesia. In May 1979 he was wanted by the Metropolitan Police for offences of fraud that he was alleged to have committed before he left this country. The Metropolitan Police were aware that no extradition was lawfully possible at that time because the Zimbabwe-Rhodesia Government was in rebellion against the Crown. The Metropolitan Police therefore told the authorities in Zimbabwe-Rhodesia that the applicant was wanted in England in connection with fraud charges with the result that he was arrested and a deportation order made against him. The applicant brought proceedings in Zimbabwe-Rhodesia for the deportation order to be set aside which succeeded at first instance but the decision was set aside on appeal. No attempt was made to use the extradition process to secure the return of the applicant when Zimbabwe-Rhodesia returned to direct rule under the Crown in December 1979. On April 17, 1980, the applicant was placed upon a plane by the police in Zimbabwe-Rhodesia and arrested on his arrival at Gatwick by the Metropolitan Police on April 17, 1980. No evidence was offered in respect of the fraud charges but further charges were alleged against him under the Theft Acts. The applicant applied for an order of prohibition to prevent the hearing of committal proceedings against him in the magistrates' court on those charges.

On these facts Lord Lane C.J. giving the judgment of the Divisional Court held, on the authority of *Officer Commanding Depot Battalion, R.A.S.C., Colchester, ex p. Elliott* [1949] 1 All E.R. 373, that the Court had jurisdiction to try the applicant. He said at p. 32:

> "Whatever the reason for the applicant being at Gatwick Airport on the tarmac, whether his arrival there had been obtained by fraud or illegal means, he was there. He was subject to arrest by the police force of this country. Consequently the mere fact that his arrival there may have been procured by illegality did not in any way oust the jurisdiction of the court. That aspect of the matter is simple."

On the question of whether the Court could or would exercise a discretion in favour of the applicant to order his release from custody, Lord Lane C.J. relied upon a passage in the judgment of Woodhouse J. in *Hartley* [1978] 2 N.Z.L.R. 199, a decision of the Court of Appeal of New Zealand. In that case the New Zealand police had obtained the return of a man named Bennett from Australia to New Zealand where he was wanted on a charge of murder, merely by telephoning to the Australian

police and asking them to arrest Bennett and put him on an aeroplane back to New Zealand, which they had done. Lord Lane C.J. cited the following extract from the judgment of Woodhouse J. [1978] 2 N.Z.L.R. 199, 216-217:

> "There are explicit statutory directions that surround the extradition procedure. The procedure is widely known. It is frequently used by the police in the performance of their duty. For the protection of the public the statute rightly demands the sanction of recognised court processes before any person who is thought to be a fugitive offender can properly be surrendered from one country to another. And in our opinion there can be no possible question here of the court turning a blind eye to action of the New Zealand police which has deliberately ignored those imperative requirements of the statute. Some may say that in the present case a New Zealand citizen attempted to avoid a criminal responsibility by leaving the country: that his subsequent conviction has demonstrated the utility of the short cut adopted by the police to have him brought back. But this must never become an area where it will be sufficient to consider that the end has justified the means. The issues raised by this affair are basic to the whole concept of freedom in society. On the basis for reciprocity for similar favours earlier received are police officers here in New Zealand to feel free or even obliged at the request of their counterparts overseas to spirit New Zealand or other citizens out of the country on the basis of mere suspicion, conveyed perhaps by telephone, that some crime has been committed elsewhere? In the High Court of Australia Griffith C.J. referred to extradition as a 'great prerogative power, supposed to be an incident of sovereignty' and then rejected any suggestion that 'it could be put in motion by any constable who thought he knew the law of a foreign country, and thought it desirable that a person whom he suspected of having offended against that law should be surrendered to that country to be punished': *Brown v. Lizars* (1905) 2 C.L.R. 837, 852. The reasons are obvious.
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> "We have said that if the issue in the present case is to be considered merely in terms of jurisdiction then Bennett, being in New Zealand, could certainly be brought to trial and dealt with by the courts of this country. But we are equally satisfied that the means which were adopted to make that trial possible are so much at variance with the statute, and so much in conflict with one of the most important principles of the rule of law, that if application had been made at the trial on this ground, after the facts had been established by the evidence on the voir dire, the judge would probably have been justified in exercising his discretion under section 347(3) or under the inherent jurisdiction to direct that the accused be discharged."

Lord Lane C.J. followed that passage and exercised the Court's discretion to order prohibition against the magistrates' court and to discharge the applicant.

Ex p. Mackeson (1982) 75 Cr. App. R. 24, was followed by the Divisional Court in *Guildford Justices, ex p. Healy* [1983] 1 W.L.R. 108.

In *Plymouth Justices, ex p. Driver* (1986) 82 Cr.App.R. 85, [1986] Q.B. 95, a differently constituted Divisional Court after hearing argument containing more elaborate citation of authority declined to follow *ex p. Mackeson* and held that the Court had no power to inquire into the circumstance in which a person was found within the jurisdiction for the purpose of refusing to try him.

The Divisional Court regarded the law as settled by a trilogy of cases. *Ex p. Scott (Susannah)* (1829) 9 B. & C. 446, *Sinclair v. H.M. Advocate* (1890) 17 R.(J.) 38 and *Officer Commanding Depot Battalion, R.A.S.C., Colchester, ex p. Elliott* [1949] 1 All E.R. 373. These cases undoubtedly show that at the time they were decided the

judges were not prepared to enquire into the circumstances in which a person came within the jurisdiction. In *ex p. Scott (Susannah)*, Lord Tenterden C.J. granted a warrant for the apprehension of Scott so that she might appear and plead to a bill of indictment charging her with perjury. Ruthven, the police officer to whom the warrant was directed arrested Scott in Brussels. She applied to the British Ambassador for assistance but he refused to interfere and Ruthven brought her to Ostend and then to England. A rule nisi was obtained for a habeas corpus to bring up Scott in order that she might be discharged. In giving judgment, Lord Tenterden C.J. said, (1829) 9 B. & C. 446, 448:

> "The question, therefore, is this, whether if a person charged with a crime is found in this country, it is the duty of the court to take care that such a party shall be amenable to justice, or whether we are to consider the circumstances under which she was brought here. I thought, and still continue to think, that we cannot inquire into them."

In *Sinclair v. H.M. Advocate* (1890) 17 R.(J.) 38 the sheriff substitute of Lanarkshire granted a warrant to a Glasgow sheriff officer to arrest Sinclair for breach of trust and embezzlement and to receive him into custody from the government of Spain. The accused was brought before the sheriff substitute on this warrant and committed to prison to await his trial. He brought a bill of suspension in Portugal by the Portuguese authorities without a warrant; that he had been put by them on board an English ship in the Tagus, and there had been taken into custody by a Glasgow detective officer without the production of a warrant; but during the voyage to London the vessel had been in the port of Vigo, in Spain, for several hours: that the complainer had demanded to be allowed to land there but had been prevented by the officer; that on arriving in London he was not taken before a magistrate, nor was the warrant endorsed, but he was brought direct to Scotland, and there committed to prison, and no warrant was ever produced or exhibited to him. It was held that these allegations did not set forth any facts to affect the validity of the commitment by the sheriff substitute, which proceeded upon a proper warrant.

In the course of his judgment, the Lord Justice-Clerk said, at pp. 40-42:

> "There are three stages of procedure in this case—first, there are the proceedings abroad where the complainer was arrested; second, there are the proceedings on the journey to this country; and third, the proceedings here. As regards the proceedings abroad and where the complainer was arrested, they may or may not have been regular, formal, and in accordance with the laws of Portugal and Spain, but we know nothing about them. What we do know is that two friendly powers agreed to give assistance to this country so as to bring to justice a person properly charged by the authorities in this country with a crime. If the Government of Portugal or of Spain has done anything illegal or irregular in arresting and delivering over the complainer his remedy is to proceed against these Governments. That is not a matter for our consideration at all, and we cannot be the judges of the regularity of such proceedings.
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> In point of fact the complainer was put on board a British vessel which was at that time in the roads at the mouth of the Tagus, and given into the custody of a person who held a warrant to receive him, and who did so receive him. This warrant was perfectly regular, as also his commitment to stand his trial on a charge of embezzlement. If there was any irregularity in the granting of execution of these warrants the person committing such irregularity would be liable in an action of damages if any damage was caused. But that cannot affect the proceedings of a public authority here. The public authority here did nothing

wrong. The warrants given to the officer to detain the prisoner were quite formal, and it is not said that he did anything wrong.
It is said that the Government of Portugal did something wrong, and that the authorities in this country are not to be entitled to obtain any advantage from this alleged wrongdoing. As I have said, we cannot be the judges of the wrongdoing of the Government of Portugal. What we have here is that a person has been delivered to a properly authorised officer in this country, and is now to be tried on a charge of embezzlement in this country. He is therefore properly before the court of a competent jurisdiction on a proper warrant. I do not think we can go behind this. There has been no improper dealing with the complainer by the authorities in this country, or by their officer, to induce him to put himself in the position of being arrested, as was the case in two of the cases cited. They were civil cases in which the procedure was at the instance of a private party for his own private ends, and the court very properly held that a person could not take advantage of his own wrongdoing. But that is not the case here. . . .
No irregularity, then, involving suspension can be said to have taken place on his arrival in London and on his journey here. But even if the proceedings here were irregular I am of opinion that where a court of competent jurisdiction has a prisoner before it upon a competent complaint they must proceed to try him, no matter what happened before, even although he may have been harshly treated by a foreign government, and irregularly dealt with by a subordinate officer."

Lord M'Laren stated his view in the following terms, at pp. 43-44.

"With regard to the competency of the proceedings in Portugal, I think this is a matter with which we really have nothing to do. The extradition of a fugitive is an act of sovereignty on the part of the state who surrenders him. Each country has its own ideas and its own rules in such matters. Generally it is done under treaty arrangements, but if a state refuses to bind itself by treaty, and prefers to deal with each case on its merits, we must be content to receive the fugitive on these conditions, and we have neither title nor interest to inquire as to the regularity of proceedings under which he is apprehended and given over to the official sent out to receive him into custody . . .
I am of opinion with your Lordships that, when a fugitive is brought before a magistrate in Scotland on a proper warrant, the magistrate has jursidiction, and is bound to exercise it without any consideration of the means which have been used to bring him from the foreign country into the jurisdiction.
In a case of substantial infringement of right this court will always give redress, but the public interest in the punishment of crime is not to be prejudiced by irregularities on the part of inferior officers of the law in relation to the prisoner's apprehension and detention."

In *Officer Commanding Depot Battalion R.A.S.C., Colchester, ex p. Elliott* [1949] 1 All E.R. 373, a deserter from the R.A.S.C. was arrested in Belgium by British officers accompanied by two Belgian police officers. He was brought to this country where he was charged with desertion and detained in Colchester barracks. He applied for a writ of habeas corpus which was issued and on the return of the writ he submitted that his arrest was illegal because the British authorities had no power to arrest him in Belgium and his arrest was contrary to Belgian law. Dealing with this submission Lord Goddard C.J. said, at p. 376:

"The point with regard to the arrest in Belgium is entirely false. If a person is arrested abroad and he is brought before a court in this country charged with an offence which that court has jurisdiction to hear, it is no answer for him to say,

he being then in lawful custody in this country: 'I was arrested contrary to the laws of the state of A or the state of B where I was actually arrested.' He is in custody before the court which has jurisdiction to try him. What is it suggested that the court can do? The court cannot dismiss the charge of one without its being heard. He is charged with an offence against English law, the law applicable to the case. If he has been arrested in a foreign country and detained improperly from the time that he was first arrested until the time he lands in this country, he may have a remedy against the persons who arrested and detained him, but that does not entitle him to be discharged, though it may influence the court if they think there was something irregular or improper in the arrest."

Lord Goddard C.J. then reviewed the decisions in *ex p. Scott (Susannah)* (1829) 9 B. & C. 446, and *Sinclair v. H.M. Advocate* (1890) 17 R.(J.) 38, and after citing the passage in the speech of Lord M'Laren which I have already cited, Lord Goddard C.J. continued, at pp. 377-378:

"That, again, is a perfectly clear and unambiguous statement of the law administered in Scotland. It shows that the law of both countries is exactly the same on this point and that we have no power to go into the question, once a prisoner is in lawful custody in this country, of the circumstances in which he may have been brought here. The circumstances in which the applicant may have been arrested in Belgium are no concern of this court."

There were also cited to the Divisional Court a number of authorities from the United States which showed that United States courts have not regarded the constitutional right to "due process" as preventing a court in the United States from trying an accused who has been kidnapped in a foreign country and forcibly abducted into the United States. (See *Ker v. Illinois* 119 U.S. 436 (1886) and *United States of America v. Sobell* 142 Supp. 515 (1956); 244 F. 2d 520 (1957).)

Relying on this line of authority the Divisional Court declined to follow *ex p. Mackeson* (1982) 75 Cr.App.R. 24, and held that it had no power to enquire into the circumstances in which the applicant was brought within the jurisdiction.

In the present case the Divisional Court approved the decision in *ex p. Driver* (1986) 82 Cr.App.R. 85, [1986] Q.B. 95 and in giving the leading judgment of the Court Woolf L.J. said (1993) 97 Cr.App.R. 29, 32:

"However, quite apart from authority, I am bound to say it seems to me that the approach of Stephen Brown L.J. [in *Plymouth Justices, ex p. Driver* (*supra*), in general, must be correct. The power which the court is exercising, and the power which the court was purporting to exercise, in *ex p. Mackeson* is one which is based upon the inherent power of the court to protect itself against the abuse of its own process. If the matters which are being relied upon have nothing to do with that process but only explain how a person comes to be within the jurisdiction so that that process can commence, it seems to me difficult to see how the process of the *court* (and I emphasise the word 'court') can be abused by the fact that a person may or may not have been brought in this country improperly."

However, in a later passage Woolf L.J. drew a distinction between improper behaviour by the police and the prosecution itself, he said (at p. 33):

"Speaking for myself, I am not satisfied there could not be some form of residual discretion which in limited circumstances would enable a court to intervene, not on the basis of an abuse of process but on some other basis which in the

appropriate circumstances could avail a person in a situation where he contends that the prosecution are involved in improper conduct."

Your Lordships have been urged by the respondents to uphold the decision of the Divisional Court and the nub of their submission is that the role of the judge is confined to the forensic process. The judge, it is said, is concerned to see that the accused has a fair trial and that the process of the court is not manipulated to his disadvantage so that the trial itself is unfair: but the wider issues of the rule of law and the behaviour of those charged with its enforcement, be they police or prosecuting authority, are not the concern of the judiciary unless they impinge directly on the trial process. In support of this submission your Lordships have been referred to *R. v. Sang* (1979) 69 Cr.App.R. 282, [1980] A.C. 402 and those passages in the speeches of Lord Diplock at p. 290 and pp. 436-437 and Lord Scarman at pp. 305, 306 and pp. 454-455, which emphasise that the role of the judge is confined to the forensic process and that it is not part of the judge's function to exercise disciplinary powers over the police or the prosecution.

The respondents have also relied upon the United States authorities in which the Supreme Court has consistently refused to regard forcible abduction from a foreign country as a violation of the right to trial by due process of law guaranteed by the Fourteenth Amendment to the Constitution. See in particular the majority opinion in *United States v. Humberto Alvarez- Machain* 119 L.Ed. 2d 441 (1992) reasserting the Ker-Frisbie Rule. I do not, however, find these decisions particularly helpful, because they deal with the issue of whether or not an accused acquires a constitutional defence to the *jurisdiction* of the United States courts and not to the question whether, assuming the court has jurisdiction, it has a discretion to refuse to try the accused. See *Ker v. Illinois*, 119 U.S. 436, 444 (1886).

The respondents also cited two Canadian cases decided at the turn of the century, *Whiteside* (1904) 8 Can.Cr.Cas. 478 and *Walton* (1905) 10 Can.Cr.Cas. 269 which show that the Canadian courts followed the English and American courts in accepting jurisdiction in criminal cases regardless of the circumstances in which the accused was brought within the jurisdiction of the Canadian court. We have also had our attention brought to the New Zealand decision in *Moevao v. Department of Labour* [1980] 1 N.Z.L.R. 464, in which Richmond P. expressed reservations about the correctness of his view that the prosecution in *Hartley* [1978] 2 N.Z.L.R. 199 was an abuse of the process of the court and Woodhouse J. reaffirmed his view to that effect.

The appellant contends for a wider interpretation of the court's jurisdiction to prevent an abuse of process and relies particularly upon the judgment of Woodhouse J. in *Hartley*, the powerful dissent of the minority in *United States v. Humberto Alvarez-Machain* and the decision of the South African Court of Appeal in *S. v. Ebrahim* 1991 (2) S.A. 553, the headnote of which reads:

"The appellant, a member of the military wing of the African National Congress who had fled South Africa while under a restriction order, had been abducted from his home in Mbabane, Swaziland, by persons acting as agents of the South African State, and taken back to South Africa, where he was handed over to the police and detained in terms of security legislation. He was subsequently charged with treason in a Circuit Local Division, which convicted and sentenced him to 20 years' imprisonment. The appellant had prior to pleading launched an application for an order to the effect that the court lacked jurisdiction to try the case in as much as his abduction was in breach of international law and thus unlawful. The application was dismissed and the trial continued.

The Court, on appeal against the dismissal of the above application, held, after a

thorough investigation of the relevant South African and common law, that the issue as to the effect of the abduction on the jurisdiction of the trial court was still governed by the Roman and Roman-Dutch common law which regarded the removal of a person from an area of jurisdiction in which he had been illegally arrested to another area as tantamount to abduction and thus constituted a serious injustice. A court before which such a person was brought also lacked jurisdiction to try him, even where such a person had been abducted by agents of the authority governing the area of jurisdiction of the said court. The court further held that the above rules embodied several fundamental legal principles, *viz.* those that maintained and promoted human rights, good relations between states and the sound administration of justice: the individual had to be protected against unlawful detention and against abduction, the limits of territorial jurisdiction and the sovereignty of states had to be respected, the fairness of the legal process guaranteed and the abuse thereof prevented so as to protect and promote the integrity of the judicial system. The state was bound by these rules and had to come to court with clean hands, as it were, when it was itself a party to proceedings and this requirement was clearly not satisfied when the state was involved in the abduction of persons across the country's borders.

It was accordingly held that the court a quo had lacked jurisdiction to try the appellant and his application should therefore have succeeded. As the appellant should never have been tried by the court a quo, the consequences of the trial had to be undone and the appeal disposed of as one against conviction and sentence. Both the conviction and sentence were accordingly set aside."

In answer to the respondent's reliance upon *R. v. Sang* (1979) 69 Cr.App.R. 282, [1980] A.C. 402 the appellant points to section 78 of the Police and Criminal Evidence Act 1984 which enlarges a judge's discretion to exclude evidence obtained by unfair means.

As one would hope, the number of reported cases in which a court has had to exercise a jurisdiction to prevent abuse of process are comparatively rare. They are usually confined to cases in which the conduct of the prosecution has been such as to prevent a fair trial of the accused. In *Derby Crown Court, ex p. Brooks* (1984) 80 Cr.App.R. 164, Sir Roger Ormrod said, at pp. 168-169:

"The power to stop a prosecution arises only when it is an abuse of a process of the court. It may be an abuse of process if either (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality, or (b) on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable . . .

The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness to both the defendant and the prosecution."

There have, however, also been cases in which although the fairness of the trial itself was not in question the courts have regarded it as so unfair to try the accused for the offence that it amounted to an abuse of process. In *Chu Piu-wing v. Attorney-General* [1984] H.K.L.R. 411 the Hong Kong Court of Appeal allowed an appeal against a conviction for contempt of court for refusing to obey a subpoena *ad testificandum* on the ground that the witness had been assured by the Independent Commission Against Corruption that he would not be required to give evidence, McMullin V.-P. said, at pp. 417-418:

"There is a clear public interest to be observed in holding officials of the state to promises made by them in full understanding of what is entailed by the bargain."

And in a recent decision of the Divisional Court in *Croydon Justices, ex p. Dean*, (*ante*, p. 76), the committal of the accused on a charge of doing acts to impede the apprehension of another contrary to section 4(1) of the Criminal Law Act 1967 was quashed on the ground that he had been assured by the police that he would not be prosecuted for any offence connected with their murder investigation and in the circumstances it was an abuse of process to prosecute him in breach of that promise.

Your Lordships are now invited to extend the concept of abuse of process a stage further. In the present case there is no suggestion that the appellant cannot have a fair trial, nor could it be suggested that it would have been unfair to try him if he had been returned to this country through extradition procedures. If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.

My Lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law. The great growth of administrative law during the latter half of this century has occurred because of the recognition by the judiciary and Parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended. So also should it be in the field of criminal law and if it comes to the attention of the court that there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it.

Let us consider the position in the context of extradition. Extradition procedures are designed not only to ensure that criminals are returned from one country to another but also to protect the rights of those who are accused of crimes by the requesting country. Thus sufficient evidence has to be produced to show a prima facie case against the accused and the rule of speciality protects the accused from being tried for any crime other than that for which he was extradited. If a practice developed in which the police or prosecuting authorities of this country ignored extradition procedures and secured the return of an accused by a mere request to police colleagues in another country they would be flouting the extradition procedures and depriving the accused of the safeguards built into the extradition process for his benefit. It is to my mind unthinkable that in such circumstances the court should declare itself to be powerless and stand idly by; I echo the words of Lord Devlin in *Connelly v. Director of Public Prosecutions* (1964) 48 Cr.App.R. 183, 268, [1964] A.C. 1254, 1354:

"The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused."

The courts, of course, have no power to apply direct discipline to the police or the prosecuting authorities, but they can refuse to allow them to take advantage of abuse of power by regarding their behaviour as an abuse of process and thus preventing a prosecution.

In my view your Lordships should now declare that where process of law is available to return an accused to this country through extradition procedures our courts will refuse to try him if he has been forcibly brought within our jurisdiction in disregard of those procedures by a process to which our own police, prosecuting or other executive authorities have been a knowing party.

If extradition is not available very different considerations will arise on which I express no opinion.

The question then arises as to the appropriate court to exercise this aspect of the abuse of process of jurisdiction. It was submitted on behalf of the respondents that the examining magistrates have no power to stay proceedings on the ground of abuse of process and reliance was placed on the decisions of this House in *Sinclair v. D.P.P.* (1991) 93 Cr.App.R. 329, [1991] 2 A.C. 64 and *Atkinson v. United States of America Government* [1971] A.C. 197, which established that in extradition proceedings a magistrate has no power to refuse to commit an accused on the grounds of abuse of process. But the reason underlying those decisions is that the Secretary of State has the power to refuse to surrender the accused if it would be unjust or oppressive to do so; and now under the Extradition Act 1989 an express power to this effect has been conferred upon the High Court.

Your Lordships have not previously had to consider whether justices, and in particular committing justices, have the power to refuse to try or commit a case upon the grounds that it would be an abuse of process to do so. Although doubts were expressed by Viscount Dilhorne as to the existence of such a power in *D.P.P. v. Humphrys* (1976) 63 Cr.App.R. 95, 106 [1977] A.C. 1, 26, there is a formidable body of authority that recognises this power in the justices.

In *Mills v. Cooper* [1967] 2 Q.B. 459, Lord Parker C.J., hearing an appeal from justices who had dismissed an information on the grounds that the proceedings were oppressive and an abuse of the process of the Court said, at p. 467E:

> "So far as the ground upon which they did dismiss the information was concerned, every court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the court."

Diplock L.J. expressed his agreement with this view, at p. 470F. In *Canterbury and St. Augustine Justices, ex p. Klisiak* (1981) 72 Cr.App.R. 250, [1982] Q.B. 398, 411F, Lord Lane C.J. was prepared to assume such a jurisdiction. In *West London Stipendiary Magistrate, ex p. Anderson* (1984) 80 Cr.App.R. 143, Robert Goff L.J., reviewing the position at that date said, at p. 149:

> "There was at one time some doubt whether magistrates had jurisdiction to decline to allow a criminal prosecution to proceed on the ground that it amounted to an abuse of the process of the court: see *D.P.P. v. Humphrys* (1976) 63 Cr.App.R. 95, 144; [1977] A.C. 1, 19, *per* Viscount Dilhorne. However, a line of authority which has developed since that case has clearly established that magistrates do indeed have such a jurisdiction: see in particular *Brentford Justices, ex p. Wong* (1981) 73 Cr.App.R. 67; [1981] Q.B. 445; *Watford Justices, ex p. Outrim* (1982) [1983] R.T.R. 26; *Grays Justices, ex p. Graham* (1982) 75 Cr.App.R. 229, [1982] 3 All E.R. 653. The power has, however, been described by the Lord Chief Justice as being 'very strictly confined': see *Oxford City Justices, ex p. Smith* (1982) 75 Cr.App.R. 200, 204."

The power has recently and most comprehensively been considered and affirmed by the Divisional Court in *Telford Justices, ex p. Badhan* (1991) 93 Cr.App.R. 171, 172, [1991] 2 Q.B. 78, 81.

Provided it is appreciated by magistrates that this is a power to be most sparingly exercised, of which they have received more than sufficient judicial warning (see, for example, Lord Lane C.J. in *Oxford City Justices, ex p. Smith* (1982) 75 Cr.App.R. 200 and Ackner L.J. in *Horsham Justices, ex p. Reeves (Note)* (1982) 75 Cr.App.R. 236) it appears to me to be a beneficial development and I am unpersuaded that

there are any sufficient reasons to overrule a long line of authority developed by successive Lord Chief Justices and judges in the Divisional Court who are daily in much closer touch with the work in the magistrates' court than your Lordships. Nor do I see any force in an argument developed by the respondents which sought to equate abuse of process with contempt of court. I would accordingly affirm the power of the magistrates, whether sitting as committing justices or exercising their summary jurisdiction, to exercise control over their proceedings through an abuse of process jurisdiction. However, in the case of magistrates this power should be strictly confined to matters directly affecting the fairness of the trial of the particular accused with whom they are dealing, such as delay or unfair manipulation of court procedures. Although it may be convenient to label the wider supervisory jurisdiction with which we are concerned in this appeal under the head of abuse of process, it is in fact a horse of a very different colour from the narrower issues that arise when considering domestic criminal trial procedures. I adhere to the view I expressed in *Guildford Justices, ex p. Healy* [1983] 1 W.L.R. 108 that this wider responsibility for upholding the rule of law must be that of the High Court and that if a serious question arises as to the deliberate abuse of extradition procedures a magistrate should allow an adjournment so that an application can be made to the Divisional Court which I regard as the proper forum in which such a decision should be taken.

I would answer the certified question as follows: The High Court in the exercise of its supervisory jurisdiction has power to enquire into the circumstances by which a person has been brought within the jurisdiction and if satisfied that it was in disregard of extradition procedures it may stay the prosecution and order the release of the accused.

Accordingly I would allow this appeal and remit the case to the Divisional Court for further consideration.

LORD BRIDGE OF HARWICH: My Lords, This appeal raises an important question of principle. When a person is arrested and charged with a criminal offence, is it a valid ground of objection to the exercise of the court's jurisdiction to try him that the prosecuting authority secured the prisoner's presence within the territorial jurisdiction of the court by forcibly abducting him from within the jurisdiction of some other state, in violation of international law, in violation of the laws of the state from which he was abducted, in violation of whatever rights he enjoyed under the laws of that state and in disregard of available procedures to secure his lawful extradition to this country from the state where he was residing? This is to state the issue very starkly, perhaps some may think tendentiously. But because this appeal has to be determined on the basis of assumed facts, your Lordships, as it seems to me, cannot avoid grappling with the issue in this stark form.

In this country and in Scotland the mainstream of authority, as the careful review in the speech of my noble and learned friend Lord Griffiths shows, appears to give a negative answer to the question posed, holding that the courts have no power to examine the circumstances in which a prisoner was brought within the jurisdiction. I fully recognise the cogency of the arguments which can be adduced in support of this view, sustained as they are by the public interest in the prosecution and punishment of crime. But none of the previous authorities is binding on your Lordships' House and, if there is another important principle of law which ought to influence the answer to the question posed, then your Lordships are at liberty, indeed under a duty, to examine it and, if it transpires that this is an area where two valid principles of law come into conflict, it must, in my opinion, be for your Lordships to decide as a matter of principle which of the two conflicting principles of law ought to prevail.

When we look to see how other jurisdictions have answered a question analogous to that before the House in terms of their own legal systems, the most striking example of an affirmative answer is the decision of the South African Court of Appeal in *S. v. Ebrahim* 1991 (2) S.A. 553 allowing an appeal against his conviction for treason by a member of the African National Congress on the sole ground that he had been abducted from Swaziland, outside the jurisdiction of the South African court, by persons acting as agents of the South African state. This decision, as the summary in the headnote shows, resulted from the application of:

> ". . . several fundamental legal principles: *viz.* those that maintained and promoted human rights, good relations between States and the sound administration of justice: the individual had to be protected against unlawful detention and against abduction, the limits of territorial jurisdiction and the sovereignty of States had to be respected, the fairness of the legal process guaranteed and the abuse thereof prevented so as to protect and promote the dignity and integrity of the judicial system. The State was bound by these rules and had to come to Court with clean hands, as it were, when it was itself a party to proceedings and this requirement was clearly not satisfied when the State was involved in the abduction of persons across the country's borders."

In the United States, the authorities reveal a conflict of judicial opinion. The doctrine established by Supreme Court decisions in 1886, *Ker v. Illinois* 119 U.S. 436, and in 1952, *Frisbie v. Collins* 342 U.S. 519, accords substantially in its effect with the doctrine of the early English authorities. But more recently this doctrine has been powerfully challenged. In *United States v. Toscanino* 500 F. 2d 267, 268 (1974)the defendant, an Italian citizen, who had been convicted in the New York District Court of a drug conspiracy, alleged that the court had "acquired jurisdiction over him unlawfully through the conduct of American agents who had kidnapped him in Uruguay . . . tortured him and abducted him to the United States for the purpose of prosecuting him" there. The lower court having held that these allegations were immaterial to the exercise of its jurisdiction to try him, provided he was physically present at the time of trial, he appealed to the United States Court of Appeals Second Circuit. The effect of the court's decision is sufficiently summarised in the headnote. The Court held:

> ". . . that federal district court's criminal process would be abused or degraded if it was executed against defendant Italian citizen, who alleged that he was brought into the United States from Uruguay after being kidnapped, and such abuse could not be tolerated without debasing the processes of justice so that defendant was entitled to a hearing on his allegations. . . . Government should be denied the right to exploit its own illegal conduct, and when an accused is kidnapped and forcibly brought within the jurisdiction, court's acquisition of power over his person represents the fruits of the government's exploitation of its own misconduct."

The most recent decision of the United States Supreme Court in *United States v. Alvarez-Machain* 119 L.Ed. 2d 441 (1992) concerned a Mexican citizen indicted for the murder of an agent of the Drug Enforcement Administration (D.E.A.). The District Court had held that other D.E.A. agents had been responsible for the defendant's abduction from Mexico; that this had been in violation of the extradition treaty between Mexico and the United States; and that the accused should be discharged and repatriated to Mexico. This decision was affirmed by the United States Court of Appeals, Ninth Circuit, but reversed by the Supreme Court by a majority of six to three. The opinions related primarily to the question whether the

abduction was a breach of the treaty. The majority held that the abduction, although "shocking," involved no breach of the treaty and relied on the earlier decisions in the cases of *Ker* 119 U.S. 436 (1886), and *Frisbie* 342 U.S. 519 (1952), for the view that the abduction was irrelevant to the exercise of the court's criminal jurisdiction. The dissenting opinion of Stevens J., in which Blackmun and O'Connor JJ. joined, held that the abduction was both in breach of the treaty and in violation of general principles of international law and distinguished the earlier authorities as having no application to a case where the abduction in violation of international law was carried out on the authority of the executive branch of the United States Government. The minority opinion was that this was an infringement of the rule of law which it was the court's duty to uphold. After referring to the South African decision in *S. v. Ebrahim*, Stevens J. writes in the final paragraph of his opinion, at pp. 466-467:

> "The Court of Appeal of South Africa—indeed, I suspect most courts throughout the civilised world—will be deeply disturbed by the 'monstrous' decision the Court announces today. For every nation that has an interest in preserving the rule of law is affected, directly or indirectly, by a decision of this character."

In the common law jurisdiction closest to our own, the opinion expressed by Woodhouse J. in the New Zealand case of *Hartley* [1978] 2 N.Z.L.R. 199, in which he describes the issue as "basic to the whole concept of freedom in society," has already been cited by my noble and learned friend Lord Griffiths and I need not repeat it. In the later case of *Moevao v. Department of Labour* [1980] 1 N.Z.L.R. 464, 475-476, Woodhouse J. cited the relevant passage from his own judgment in *Hartley* and added:

> "It is not always easy to decide whether some injustice involves the further consequence that a prosecution associated with it should be regarded as an abuse of process. And in this regard the Courts have been careful to avoid confusing their own role with the executive responsibility for deciding upon a prosecution. In the *Connelly* case Lord Devlin referred to those matters and then, as I have said, he went on to speak of the importance of the Courts accepting what he described as their 'inescapable duty to secure fair treatment for those who come or are brought before them.' He said that 'the courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused' [1964] A.C. 1254, 1353 . . .
> Those remarks involve an important statement of constitutional principle. They assert the independent strength of the judiciary to protect the law by protecting its own purposes and function. It is essential to keep in mind that it is 'the process of law,' to used Lord Devlin's phrase, that is the issue. It is not something limited to the conventional practices or procedures of the Court system. It is the function and purpose of the Courts as a separate part of the constitutional machinery that must be protected from abuse rather than the particular processes that are used within the machine. It may be that the shorthand phrase 'abuse of process' by itself does not give sufficient emphasis to the principle that in this context the Court must react not so much against an abuse of the procedure that has been built up to enable the determination of a criminal charge as against the much wider and more serious abuse of the criminal jurisdiction in general. It is for reasons of this kind that I remain of the opinion that the trial Judge would have been entirely justified in the *Hartley* case in stopping the prosecution against the man Bennett."

Whatever differences there may be between the legal systems of South Africa, the United States, New Zealand and this country, many of the basic principles to which they seek to give effect stem from common roots. There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself. When it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by partipating in violations of international law and of the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, I think that respect for the rule of law demands that the court take cognisance of that circumstance. To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is, to my mind, an insular and unacceptable view. Having then taken cognisance of the lawlessness it would again appear to me to be a wholly inadequate response for the court to hold that the only remedy lies in civil proceedings at the suit of the defendant or in disciplinary or criminal proceedings against the individual officers of the law enforcement agency who were concerned in the illegal action taken. Since the prosecution could never have been brought if the defendant had not been illegally abducted, the whole proceeding is tainted. If a resident in another country is properly extradited here, the time when the prosecution commences is the time when the authorities here set the extradition process in motion. By parity of reasoning, if the authorities, instead of proceeding by way of extradition, have resorted to abduction, that is the effective commencement of the prosecution process and is the illegal foundation on which it rests. It is apt, in my view, to describe these circumstances, in the language used by Woodhouse J. in *Moevao v. The Department of Labour* [1980] 1 N.Z.L.R. 464, 467, as an "abuse of the criminal jurisdiction in general" or indeed, in the language of Mansfield J. in *United States v. Toscanino*, 500 F. 2d 267 (1974), as a "degradation" of the court's criminal process. To hold that in these circumstances the court may decline to exercise its jurisdiction on the ground that its process has been abused may be an extension of the doctrine of abuse of process but is, in my view, a wholly proper and necessary one.

For these reasons and for the reasons given in the speech of my noble and learned friend Lord Griffiths, with which I fully agree, I would allow the appeal.

LORD OLIVER OF AYLMERTON: My Lords, A citizen whose rights have been infringed by unlawful or overenthusiastic action on the part of an executive functionary has a remedy by way of recourse to the courts in civil proceedings. It may not be an ideal remedy. It may not always be a remedy which is easily available to the person injured. It may not even, certainly in his estimation, be an adequate remedy. But it is the remedy which the law provides to the citizen who chooses to invoke it. The question raised by this appeal is whether, in addition to such remedies as may be available in civil proceedings, the court should assume the duty of overseeing, controlling and punishing an abuse of executive power leading up to properly instituted criminal proceedings not by means of the conventional remedies invoked at the instance of the person claiming to have been injured by such abuse but by restraining the further prosecution of those proceedings. The results of the assumption of such a jurisdiction are threefold; and they are surprising. First, the trial put in train by a charge which has been properly laid will not take place and the person charged (if guilty) will escape a just punishment; secondly, the civil remedies available to that person will remain enforceable; and thirdly, the public interest in the prosecution and punishment of crime will have been defeated not by a necessary process of penalising those responsible for executive abuse but simply for the purpose of manifesting judicial disapproval.

It is, of course, axiomatic that a person charged with having committed a criminal

offence should receive a fair trial and that, if he cannot be tried fairly for that offence, he should not be tried for it at all. But it is also axiomatic that there is a strong public interest in the prosecution and punishment of crime. Absent any suggestion of unfairness or oppression in the trial process, an application to the court charged with the trial of a criminal offence (to which it may be convenient to refer by the shorthand expression "a criminal court"), whether that application be made at the trial or at earlier committal proceedings, to order the discontinuance of the prosecution and the discharge of the accused on the ground of some anterior executive activity in which the court is in no way implicated requires to be justified by some very cogent reason.

Making, as I do, every assumption in favour of the appellant as regards the veracity of the evidence which he has adduced and the implications sought to be drawn from it, I discern no such cogent reason in the instant case. I do not consider that, either as a matter of established law or as a matter of principle, a criminal court should be concerned to entertain questions as to the propriety of anterior executive acts of the law enforcement agencies which have no bearing upon the fairness or propriety of the trial process or the ability of the accused to defend himself against charges properly brought against him.

I have had the advantage of reading in draft the speech delivered by my noble and learned friend Lord Griffiths and I gratefully acknowledge and adopt his recitation of the relevant authorities and the conflict of judicial opinion which arises from them. Your Lordships have, in addition, been referred in the course of argument to a number of reports of civil cases of respectable antiquity in which persons originally unlawfully detained have been released from custody in the exercise of the court's undoubted jurisdiction to prevent abuses of its own process. But those were cases in which parties to civil proceedings had sought to take advantage of their own wrong in securing the unlawful detention of another party by serving proceedings for civil arrest upon him whilst unlawfully detained. In the case of a person charged with the commission of a criminal offence following an allegedly irregular initial detention, there was, until the case of *Bow Street Magistrates' Court, ex p. Mackeson* (1981) 75 Cr.App.R. 24 an unbroken line of authority in the United Kingdom dating from the early nineteenth century for the proposition perhaps most pithily expressed by Lord Goddard C.J. in *Officer Commanding Depot Battalion, R.A.S.C., Colchester, ex p. Elliott* [1949] 1 All E.R. 373 that once a person is in lawful custody in this country the court has no power and is not concerned to inquire into the circumstances in which he may have been brought here. *Ex p. Mackeson* and *Guildford Justices, ex p. Healy* [1983] 1 W.L.R. 108 which impliedly followed it, were to the contrary effect, but in a reserved judgment of the Divisional Court delivered by Stephen Brown L.J. in *Plymouth Justices, ex p. Driver* [1986] Q.B. 95, in which all the relevant authorities were fully reviewed, that court followed the earlier line of authority and rejected the decision in *ex p. Mackeson* as having been decided *per incuriam*. *Ex p. Driver* was followed by the Divisional Court in the instant case in rejecting the appellant's claim that the criminal court had jurisdiction to consider and pass judgment upon the circumstances in which he had been brought within the jurisdiction.

The appellant invites this House now to say that the decision in *ex p. Mackeson* is to be preferred and that a criminal court's undoubted jurisdiction to prevent abuses of its own process should be extended, if indeed it does not already extend, to embrace a much wider jurisdiction to oversee what is referred to generally as "the administration of justice," in the broadest sense of the term, including the executive acts of law-enforcement agencies occurring before the process of the court has been invoked at all and having no bearing whatever upon the fairness of the trial.

I have to say that I am firmly of the opinion that, whether such a course be properly described as legislation or merely as pushing forward the frontiers of the common law, the invitation is one which ought to be resisted. For my part, I see neither any inexorable logic calling for such an extension nor any social need for it; and it seems to me to be a course which will be productive of a good deal of inconvenience and uncertainty.

I can, perhaps, best explain my reluctance to embark upon such a course by postulating and seeking to answer two questions:

First, does a criminal court have, or should it have, any *general* duty or any power to investigate and oversee executive abuses on the part of law-enforcement officers not affecting either the fairness of the trial process or the bona fides of the charge which it is called upon to try and occurring prior to the institution of the criminal proceedings and to order the discontinuance of such proceedings and the discharge of the accused if it is satisfied that such abuses have taken place? Secondly, if there is no such general jurisdiction and if the executive abuse alleged consists of the repatriation of the accused from a foreign country through acts which are unlawful in the country in which they occurred, is there some special quality in this form of executive abuse which gives rise to or which calls for the creation of such a jurisdiction in this particular case?

So far as the first question is concerned, I know of no authority for the existence of any such general supervisory jurisdiction in a criminal court. It is not, of course, in dispute that the court has power to prevent the abuse of its own process and that must, I would accept, include power to investigate the bona fides of the charge which it is called upon to try and to decline to entertain a charge instituted in bad faith or oppressively—for instance, if the accused's co-operation in the investigation of a crime has been secured by an executive undertaking that no prosecution will take place. Thus, I would not for a moment wish to suggest any doubt as to the correctness of a decision such as that in the recent case of *Croydon Justices, ex p. Dean* (*ante*, p. 76), [1993] 3 W.L.R. 198, where the Court quashed committal proceedings instituted after an undertaking given to the accused by police officers that he would not be prosecuted. In such a case doubt is cast both upon the bona fides of the prosecution and on the fairness of the process to an accused who has been invited to prejudice his own position on the faith of the undertaking. Where however, there is no suggestion that the charge is other than bona fide or that there is any unfairness in the trial process, the duty of the criminal court is simply to try the case and I can see no ground upon which it can claim a discretion, or upon which it ought properly to be invited, to discontinue the proceedings and discharge an accused who is properly charged simply because of some alleged anterior excess or unlawful act on the part of the executive officers concerned with his apprehension and detention. That is not for a moment to suggest that such abuses, if they occur, are unimportant or are to be lightly accepted; but they are acts for which, if they are unlawful, the accused has the same remedies as those available to any other citizen whose legal rights have been infringed. If they are not only unlawful but are criminal as well, they are themselves remediable by criminal prosecution. That a judge may disapprove of or even be rightly outraged by the manner in which an accused has been apprehended or by his treatment whilst in custody cannot, however, provide a ground for declining to perform the public duty of insuring that, once properly charged he is tried fairly according to law.

In *R. v. Sang* (1979) 69 Cr.App.R. 282, 306, [1980] A.C. 402, 454, Lord Scarman observed:

"Judges are not responsible for the bringing or abandonment of prosecutions;

nor have they the right to adjudicate in a way which indirectly usurps the functions of the legislature or jury."

Those words were used in the context of a suggested discretion to prevent a prosecution because of judicial disapproval of the way in which admissible evidence had been obtained, but they are equally applicable to other executive acts which may incur judicial disapprobation. Experience shows that allegations of abusive use of executive power in the apprehension of those accused of criminal offences are far from rare. They may take the form of allegations of illegal entry on private premises, of damage to property, of the use of excessive force or even of ill-treatment or violence whilst in custody. So far as there is substance in such allegations, such abuses are disgraceful and regrettable and they may, no doubt, be said to reflect very ill on the administration of justice in the broadest sense of that term. But they provide no justification nor, so far as I am aware, is there any authority for the proposition that wrongful treatment of an accused, having no bearing upon the fairness of the trial process, entitles him to demand that he be not tried for an offence with which he has been properly charged. Indeed, any such general jurisdiction of a criminal court to investigate and adjudicate upon antecedent executive acts would be productive of hopeless uncertainty. It clearly cannot be the case that every excessive use of executive power entitles the accused to be exonerated. But then at what point and at what degree of outrage is the criminal court to undertake an enquiry and, if satisfied, to take upon itself the responsibility of refusing further to try the case?

If, then, it be right, as I believe that it is, that there neither is nor should be any general discretion in a criminal court to enquire into the conduct of executive officers before and leading up to the institution of criminal proceedings, the second question which I have ventured to postulate arises. Where, with the connivance or at the instigation of executive officers in this country, an accused person who has taken refuge in a foreign country is brought as a result of activity unlawful in that country within the jurisdiction of an English court and is then lawfully detained and charged, is there some special quality attaching to the unlawful and abusive activity abroad which confers or ought to confer on the criminal court a discretion which it would not otherwise possess?

The matter can, perhaps, best be illustrated by a hypothetical example of two terrorists, A and B, who, having detonated a bomb in London, make their way to Dover with a view to escaping abroad. A, as a result of a quarrel with a ticket inspector, is wrongfully detained by the railway police and whilst still in wrongful custody is duly arrested for the terrorist offence and subsequently charged. B, having successfully boarded a Channel ferry, is recognised as he steps ashore in Calais by two off-duty constables returning from holiday who seize him on the quayside and take him back on board keeping him under restraint until the ferry returns to Dover where he is arrested and charged. Now nobody would, I think, suggest for a moment that the trial of A should not proceed, simply because, as a result of a wrongful arrest and detention, he has been prevented from making good his escape, although he has in fact been put in the position of being charged and brought to trial only by reason of an unlawful abuse of executive power. What, then, distinguishes the case of B and confers on the criminal court in his case a discretion to stay his trial and discharge him which the court does not possess in the case of A? I can see only two possible justifications for the suggestion that the court ought, in B's case, to have such a discretion. First, it may be argued that, as a matter of international comity an English court ought to signify its disapproval of the invasion of the protective rights of a foreign state over those who come within its jurisdiction by declining to try a person who has been wrongfully removed from the protection of that state through the

instrumentality of persons for whose actions the authorities of this country are responsible. I do not find this argument persuasive. An English criminal court is not concerned nor is it in a position to investigate the legality under foreign law of acts committed on foreign soil and in any event any complaint of an invasion of the sovereignty of a foreign state is, as it seems to me, a matter which can only properly be pursued on a diplomatic level between the government of the United Kingdom and the government of that state.

Secondly, it may be argued that the unlawful activity of which complaint is made, because it results in the accused being brought within a jurisdiction from which he would otherwise have escaped, is invested with a special character because it infringes some "right" of the accused in English law to be repatriated only through a process of extradition by the state under whose protection he has succeeded in placing himself. Now it is, of course, perfectly true that the Extradition Act 1989 contains, in section 6(4), an inhibition upon extradition from the United Kingdom unless provision is made by the receiving state that the person extradited will not, without the consent of the Secretary of State, be dealt with for (in broad terms) offences other than those in respect of which his extradition has been ordered. That provision is mirrored in section 18 of the Act which provides that the person extradited to the United Kingdom from a foreign state will not be triable for (again in broad terms) offences other than those for which he has been extradited unless he has first had an opportunity of leaving the United Kingdom. Thus, a person who is returned only as a result of extradition proceedings enjoys, as a result of this statutory inhibition, an advantage over one who elects to return voluntarily or who is otherwise induced to return within the jurisdiction. But these are provisions inserted in the Act for the purpose of giving effect to reciprocal treaty arrangements for extradition. I cannot, for my part, regard them as conferring upon a person who is fortunate enough successfully to flee the jurisdiction some "right" in English law which is invaded if he is brought or induced to come back within the jurisdiction otherwise than by an extradition process, much less a right the invasion of which a criminal court is entitled or bound to treat as vitiating the process commenced by a charge properly brought. It is not suggested for a moment that if, as a result of perhaps unlawful police action abroad—for instance, in securing the deportation of the accused without proper authority—in which officers of the United Kingdom authorities are in no way involved, an accused person is found here and duly charged, the illegality of what may have occurred abroad entitles the criminal court here to discontinue the prosecution and discharge the accused. Yet in such a case the advantage which the accused might have derived from the extradition process is likewise destroyed. No "right" of his in English law has been infringed, though he may well have some remedy in the foreign court against those responsible for his wrongful deportation. What is said to make the critical difference is the prior involvement of officers of the executive authorities of the United Kingdom. But the arrest and detention of the accused are not part of the trial process upon which the criminal court has the duty to embark. Of course, executive officers are subject to the jurisdiction of the courts. If they act unlawfully, they may and should be civilly liable. If they act criminally, they may and should be prosecuted. But I can see no reason why the antecedent activities, whatever the degree of outrage or affront they may occasion, should be thought to justify the assumption by a criminal court of a jurisdiction to terminate a properly instituted criminal process which it is its duty to try.

I would only add that if, contrary to my opinion, such an extended jurisdiction over executive abuse does exist, I entirely concur with what has fallen from my noble and learned friend Lord Griffiths with regard to the appropriate court to exercise such

jurisdiction. I would dismiss the appeal and answer the certified question in the negative.

LORD LOWRY: My Lords, Having had the advantage of reading in draft the speeches of your Lordships, I accept the conclusion of my noble and learned friends Lord Griffiths and Lord Bridge of Harwich that the court has a discretion to stay as an abuse of process criminal proceedings brought against an accused person who has been brought before the court by abduction in a foreign country participated in or encouraged by British authorities. Recognising, however, the clear and forceful reasoning of my noble and learned friend Lord Oliver of Aylmerton to the contrary, I venture to contribute some observations of my own.

The first essential is to define abuse of process, which in my opinion must mean abuse of the process of the court which is to try the accused. *Archbold* (1992 ed.) at paragraph 4.44 calls it "a misuse or improper manipulation of the process of the court." In *Rourke v. R.* (1977) 76 D.L.R. (3d) 193 Laskin C.J.C. said at p. 205, "The court is entitled to protect its process from abuse" and also referred at p. 207 to "the danger of generalising the application of the doctrine of abuse of process." In *Moevao v. Department of Labour* [1980] 1 N.Z.L.R. 464, Woodhouse J. spoke approvingly of "the much wider and more serious abuse of the criminal jurisdiction in general," whereas Richmond P., giving expression to reservations about the view in which he had concurred in *Hartley* [1978] 2 N.Z.L.R. 199, referred at p. 470 to the need to establish "that the process of the court is itself being wrongly made use of." I think that the words used by Woodhouse J. involve a danger that the doctrine of abuse of process will be too widely applied and I prefer the narrower definition adopted by the President. The question still remains what circumstances antecedent to the trial will produce a situation in which the process of the court of trial will have been abused if the trial proceeds.

Whether the proposed trial will be an unfair trial is not the only test of abuse of process. The proof of a previous conviction or acquittal on the same charge means that it will be unfair to try the accused but not that he is about to receive an unfair trial. Again, in *Grays JJ., ex p. Low* (1989) 88 Cr.App.R. 291 it was held to be an abuse of process to prosecute a summons where the accused had already been bound over and the summons had been withdrawn, while in *Horsham JJ., ex p. Reeves* (1982) 75 Cr.App.R. 236 it was held to be an abuse of process to pursue charges when the magistrates had already found "no case to answer." It would, I submit, be generally conceded that for the Crown to go back on a promise of immunity given to an accomplice who is willing to give evidence against his confederates would be unacceptable to the proposed court of trial, although the trial itself could be fairly conducted. And to proceed in respect of a non-extraditable offence against an accused who has with the connivance of our authorities been unlawfully brought within the jurisdiction from a country with which we have an extradition treaty need not involve an unfair trial, but this consideration would not in my opinion be an answer to an application to stay the proceedings on the grounds of abuse of process.

This last example, though admittedly not based on authority, foreshadows my conclusion that a court would have power to stay the present proceedings against the appellant, assuming the facts alleged to be proved, because I consider that a court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case. I agree that prima facie it is the duty of a court to try a person who is charged before it with an offence which the court has power to try

and therefore that the jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons. The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct. Accordingly, if the prosecuting authorities have been guilty of culpable delay but the prospect of a fair trial has not been prejudiced, the court ought not to stay the proceedings merely "*pour encourager les autres.*"

Your Lordships have comprehensively reviewed the authorities and therefore I will be content to highlight the features which have led me to conclude in favour of the appellant. The Court in *ex p. Mackeson* (1982) 75 Cr.App.R. 24, while quite clear that there was jurisdiction to try the applicant, relied on *Hartley* [1978] 2 N.Z.L.R. 199 for the existence of a discretion to make an order of prohibition. Woodhouse J. in *Hartley* had also recognised the *jurisdiction* to try Bennett, but expressed the court's conclusion that to do so in the circumstances offended against "one of the most important principles of the rule of law." The Court's decision in *ex p. Driver* (1986) 82 Cr.App.R. 85, [1986] Q.B. 95 to the contrary effect was influenced by *ex p. Scott (Susannah)* (1829) 9 B. & C. 446, *Sinclair v. H.M. Advocate* (1890) 17 R.(J.) 38 and *Officer Commanding Depot Battalion R.A.S.C. Colchester, ex p. Elliott* [1949] 1 All E.R. 373. *Scott* and *Sinclair* were decisions on jurisdiction and formed the basis of the decision in *ex p. Elliott*, in which there was an application for a writ of habeas corpus, based on the allegation that the applicant was not subject to military law and that he was wrongfully held in custody. My noble and learned friend Lord Griffiths has described the argument advanced by the applicant and the manner in which Lord Goddard C.J. dealt with that argument in the court's judgment by reference to the cases of *Scott* and *Sinclair*. Then, having disposed of an argument based on provisions of the Army Act relating to arrest, the Lord Chief Justice came to "The only point in which there was any substance . . . whether there has been such delay that this court ought to interfere" (p. 379A). Neither in the discussion and rejection of this point nor anywhere else in the judgment does the question of abuse of process arise and, as the judgment put it at p. 379F,

> "What we were asked to do in the present case, and the most we could have been asked to do, was to admit the prisoner to bail until the court was ready to try him."

This brief review strengthens my inclination to prefer *ex p. Mackeson* to *ex p. Driver* and to the Divisional Court's judgment on the main point in the present case, since I consider that the true guidance is to be found not in the jurisdictional cases but in *Hartley*. My noble and learned friend Lord Griffiths has already pointed out that the United States authorities, in which opinion is divided, have involved a discussion of *jurisdiction* and the interpretation of the Fourteenth Amendment.

While on the subject of due process, I might take note of a subsidiary argument by the respondent: the use by the prosecution of evidence which has been unlawfully or dishonestly obtained is regarded in the United States as a violation of due process ("the fruit of the poisoned tree"), but the preponderant American view is in favour of trying accused persons even when their presence in court has been unlawfully obtained; therefore *a fortiori* the view in this jurisdiction ought to favour trying such accused persons, having regard to the more tolerant common law attitude here to unlawfully obtained evidence, as shown by *R. v. Sang* (*supra*). My answer is that I would consider it a dangerous and question-begging process to rely on this chain of reasoning, particularly where the constitutional meaning of "due process" is one of the factors. As your Lordships have noted, the respondent also relied on *R.* v. *Sang* directly in order to support the argument that it does not matter whether the accused comes to be within the jurisdiction by fair means or foul.

The philosophy which inspires the proposition that a court may stay proceedings brought against a person who has been unlawfully abducted in a foreign country is expressed, so far as existing authority is concerned, in the passages cited by my noble and learned friend Lord Bridge of Harwich. The view there expressed is that the court, in order to protect its own process from being degraded and misused, must have the power to stay proceedings which have come before it and have only been made possible by acts which offend the courts' conscience as being contrary to the rule of law. Those acts by providing a morally unacceptable foundation for the exercise of jurisdiction over the suspect taint the proposed trial and, if tolerated, will mean that the court's process has been abused. Therefore, although the power of the court is rightly confined to its inherent power to protect itself against the abuse of its own process, I respectfully cannot agree that the facts relied on in cases such as the present case (as alleged) "have nothing to do with that process" just because they are not part of the process. They are the indispensable foundation for the holding of the trial.

The implications for international law, as represented by extradition treaties, are significant. If a suspect is extradited from a foreign country to this country he cannot be tried for an offence which is different from that specified in the warrant and, subject always to the treaty's express provisions, cannot be tried for a political offence. But, if he is kidnapped in the foreign country and brought here, he may be charged with any offence, including a political offence. If British officialdom at any level has participated in or encouraged the kidnapping, it seems to represent a grave contravention of international law, the comity of nations and the rule of law generally if our courts allow themselves to be used by the executive to try an offence which the courts would not be dealing with if the rule of law had prevailed.

It may be said that a guilty accused finding himself in the circumstances predicated is not deserving of much sympathy, but the principle involved goes beyond the scope of such a pragmatic observation and even beyond the rights of those victims who are or may be innocent. It affects the proper administration of justice according to the rule of law and with respect to international law. For a comparison of public and private interests in the criminal arena I refer to an observation of Lord Reading C.J. in a different context in *Lee Kun* [1916] 1 K.B. 337, 341:

> ". . . the trial of a person for a criminal offence is not a contest of private interests in which the rights of parties can be waived at pleasure. The prosecution of criminals and the administration of the criminal law are matters which concern the State."

If proceedings are stayed when wrongful conduct is proved, the result will not only be a sign of judicial disapproval but will discourage similar conduct in future and thus will tend to maintain the purity of the stream of justice. No "floodgates" argument applies because the executive can stop the flood at source by refraining from impropriety.

I regard it as essential to the rule of law that the court should not have to make available its process and thereby endorse (on what I am confident will be a very few occasions) unworthy conduct when it is proved against the executive or its agents, however humble in rank. And, remembering that it is not jurisdiction which is in issue but the exercise of a discretion to stay proceedings, while speaking of "unworthy conduct," I would not expect a court to stay the proceedings of every trial which has been preceded by a venial irregularity. If it be objected that my preferred solution replaces certainty by uncertainty, the latter quality is inseparable from judicial discretion. And, if the principles are clear and, as I trust, the cases few, the prospect is not really daunting. Nor do I consider that your Lordships ought to be

deterred from deciding in favour of discretion by the difficulty, which may sometimes arise, of proving the necessary facts.

I would now pose and try to answer three questions.

(1) What is the position if without intervention by the British authorities a "wanted man" is wrongfully transported from a foreign country to this jurisdiction?

The Court here is not concerned with irregularities abroad in which our executive (at any level) was not involved and the question of staying criminal proceedings, as proposed in a case like the present, does not arise. It seems to me, however, that in practice the transporting of a wanted man to the United Kingdom from elsewhere (by whatever method) will nearly always take place in consequence of a request by the executive here.

(2) Why should the court not stay for abuse of process if the accused has been wrongfully arrested in the United Kingdom (which is not alleged to have happened in the instant case)?

A person wrongfully arrested here can seek release by applying for a writ of habeas corpus but, once released, can be lawfully arrested, charged and brought to trial. His earlier wrongful arrest is not essentially connected with his proposal trial and the proceedings against him will not be stayed as an abuse of process.

(3) If at common law the rule in *R. v. Sang* applies to let in admissible evidence obtained by wrongful conduct on the part of the executive, why does similar reasoning not prevail where the presence of the accused has been procured by wrongful conduct in which the executive is involved?

R. v. Sang exemplifies a common law rule of evidence, as explained by the speeches in that case, which applied to all admissible evidence except confessions and certain evidence produced by confessions (as to which see *Lam Chi-Ming v. R.* (1991) 93 Cr.App.R. 358, [1991] 2 A.C. 212.) The abuse of process which brings into play the discretion to stay proceedings arises from wrongful conduct by the executive in an international context. Secondly, although there is no discretion at common law to exclude evidence (except confession evidence) by reason of wrongful conduct, there is discretion to stay proceedings as an abuse of process (see *Connelly v. D.P.P.* (1964) 48 Cr.App.R. 183, [1964] A.C. 1254) and the alleged facts of the instant case are but one example of the need for that discretion.

It has been suggested that, since the executive conduct complained of invades the rights of other countries and of persons under their protection and detracts from international comity, the remedy lies not with the courts but in the field of diplomacy. I would answer that the court must jealously protect its own process from misuse *by the executive* and that this necessity gives particular point to the observation of Lord Devlin (which my noble and learned friend Lord Griffiths has already noted) in *Connelly v. D.P.P.* at p. 268 and p. 1354:

> "The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused."

I now turn to the question of procedure. The appellant, having been committed for trial, applied for an order of certiorari to quash the order for committal on the ground that the magistrates refused to adjourn the committal proceedings "to enable the point of abuse of process to be argued," presumably in the Divisional Court of the Queen's Bench Division. Although I feel obliged to consider the procedure which was followed in this case and that which follows from the conclusion of the majority of your Lordships, I preface my remarks by saying that I agree with the answer to the certified question, and also with the order, which my noble and learned friend Lord Griffiths has proposed.

In *ex p. Mackeson* (1982) 75 Cr.App.R. 24 the applicant applied to the Divisional

magistrates rejected the request of the accused to adjourn while he made a *Mackeson* application and instead proceeded to commit him for trial.

My Lords, I am satisfied that, on the facts found in *Mackeson*, it was both lawful and appropriate to make an order of prohibition directed to the magistrates' court. While that court had *jurisdiction* to entertain committal proceedings, the High Court decided that to permit the criminal proceedings against the accused to continue would be an abuse of process of the court (of trial); it would therefore be equally an abuse of process to permit proceedings in the magistrates' court to be conducted (or, once embarked on, continued) with a view to committing the accused to the Crown Court for trial, which would be oppressive to the accused and a waste of the court's time. A parallel is found in the order made in *Telford JJ., ex p. Badhan* (1991) 93 Cr.App.R. 171, [1991] 2 Q.B. 78, where the Divisional Court prohibited the magistrates from further hearing committal proceedings on the ground that, by reason of the prejudice caused by delay, to proceed against the accused would amount to an abuse of process. In my view, the fact that the decision and order are made by the High Court, although the Crown Court is the proposed court of trial, makes no difference. It is the function of the High Court to exercise supervisory jurisdiction over inferior courts, including the magistrates' court. It is, moreover, noteworthy that the function of directing or giving consent to preferment of a "voluntary" bill of indictment can only be performed by a *High Court judge* in England and Wales (or by the direction of the Criminal Division of the Court of Appeal): see Administration of Justice (Miscellaneous Provisions) Act 1933, section 2(2), which continues in force unamended since the transfer of criminal jurisdiction on indictment to the Crown Court in 1971. What I have said is not, of course, intended to detract from the power of the court of trial itself, as the primary forum, to stay proceedings as an abuse of process, but the convenience of staying the proceedings at an earlier stage is obvious, when that can properly be done.

Short of allowing the proceedings to reach the Crown Court, the merit of having the case considered by the High Court in preference to the examining magistrate or magistrates is clear. In any event, notwithstanding dicta to the contrary, I would, on the authority of *Grassby v. R.* (1989) 168 C.L.R. 1, a decision of the High Court of Australia, and of cases there cited (to which I shall presently refer), not be easily persuaded that *examining magistrates* have jurisdiction to stay committal proceedings for abuse of process. (I say nothing about the power of magistrates when sitting to try a case as a court of summary jurisdiction, as in *Mills v. Cooper* [1967] 2 Q.B. 459.)

My Lords, as I have said, the remedy sought is an order of certiorari. I prefer to consider that remedy according to the conventional, perhaps now "old-fashioned," principles enunciated in *R. (Martin) v. Mahony* [1910] 2 I.R. 695, *Nat Bell Liquors* [1922] 2 A.C. 128 and *Northumberland Compensation Appeal Tribunal, ex p. Shaw* [1952] 1 K.B. 338, without seeking to justify the making of an order in this case by reference to more recent views, including views based on dicta uttered in this House. As I see it, the magistrates here, understandably but erroneously relying on *ex p. Driver*, acted prematurely and therefore without jurisdiction when they proceeded to hear and determine the committal proceedings without first allowing the appellant to make to the Divisional Court an application which (subject to *ex p. Driver*) was on its face at least worthy of consideration. Having, however innocently, neglected an essential preliminary step (namely the adjournment decreed by *ex p. Healy*), the magistrates incurred the liability to have their order of committal quashed. For an example of proceedings in which a condition precedent to jurisdiction was omitted, I refer to *In re McC. (a minor)* [1985] A.C. 528. I would be in favour of remitting the case to the Divisional Court to reconsider it in the light of your Lordships' opinions,

since one alternative would be to refuse an order of certiorari because an application to stay the proceedings can perfectly well be made to the court of trial, and the decision (relating to trial on indictment) would not, it seems, be reviewable: *Re Ashton* [1993] 2 W.L.R. 846. The other, and perhaps more convenient, course would be for the Divisional Court now to hear the application for a stay. If that were decided in favour of the appellant, the court could make an order of certiorari and such other order, if any, as might be needed to prevent the proceedings in the magistrates' court from going ahead. It seems to me that, by analogy with proceedings which are terminated by reason of irregular procedures, the appellant, if he succeeds, would have to be given an opportunity to "escape" but, subject to that, I can see nothing to prevent him from being properly pursued in the future, for example by ad hoc extradition under section 15.

Since the resolution of the point is not essential to your Lordships' decision of the appeal, I shall be brief in my discussion of whether the examining magistrates can stay committal proceedings as an abuse of process.

In *Grassby v. R.* (*supra*), the accused was charged with criminal defamation and the examining magistrate stayed the committal proceedings on the ground of abuse of process. The Crown appealed to the Court of Criminal Appeal of New South Wales, which set aside the stay. The accused sought special leave to appeal from that decision. The High Court granted special leave but dismissed the appeal (which involved another point, namely the refusal of a member of the Court of Criminal Appeal to disqualify himself). Dawson J. delivered the leading judgment, holding that a committing magistrate has no power to stay the proceedings as an abuse of process. All the other members of the court, presided over by Mason C.J., agreed except Deane J. who considered that, if the magistrate concluded (in the words of the Act) that "a jury would not be likely to convict" because the *trial court* was likely to stay the proceedings for abuse of process, he should then discharge the accused. The judge, however, agreed in the result on the facts and his dissent was based only on his interpretation of section 41(6) of the Justices Act.

Dawson J. said at p. 10 that the magistrate's power to stay for abuse of process "has been denied upon the highest authority in the United Kingdom." He referred to *Connelly v. D.P.P.* (1964) 48 Cr.App.R. 183, [1964] A.C. 1254 and continued:

> "See also *Mills v. Cooper* [1967] 2 Q.B. 459, *per* Lord Parker C.J. Whether such comments were correct in relation to inferior courts exercising ordinary judicial functions has been doubted (see *R. v. Humphrys* [1977] A.C. 1 *per* Viscount Dilhorne, *per* Lord Salmon; to the contrary, *West London Stipendiary Magistrate, ex p. Anderson* (1984) 80 Cr.App.R. 143, but it is clear that they do not extend to a magistrate hearing committal proceedings. In *Atkinson v. Government of the United States of America* [1971] A.C. 197, 231 Lord Reid (with whom Lords MacDermott and Guest agreed) said:
>
> 'The question is whether, if there is evidence sufficient to justify committal, the magistrate can refuse to commit on any other ground such as that committal would be oppressive or contrary to natural justice. The appellant argues that every court in England has power to refuse to allow a criminal case to proceed if it appears that justice so requires.
>
> The appellant argues that this was established, if it had been in doubt, by the decision of this House in *Connelly v. Director of Public Prosecutions* . . . Whatever may be the proper interpretation of the speeches in *Connelly*'s case . . . with regard to the extent of the power of a trial judge to stop a case, I cannot regard this case as any authority for the proposition that magistrates have power to refuse to commit an accused for trial on the

ground that it would be unjust or oppressive to require him to be tried. And that proposition has no support in practice or in principle. In my view, once a magistrate decides that there is sufficient evidence to justify committal he must commit the accused for trial."

In *Sinclair v. D.P.P.* (1991) 93 Cr.App.R. 329, [1991] 2 A.C. 64, another extradition case, Lord Ackner in his illuminating speech pointed out at p. 78E that Lord Reid's view of the magistrate's power to refuse to commit for trial by reason of abuse of process was *obiter*. Nonetheless, a view expressed by such a high authority commands respect, and Lord Reid was making his point as an integral link in his argument, to show that in extradition proceedings a magistrate has no such power.

Dawson J. observed that it has been consistently held that committal proceedings do not constitute a judicial inquiry but are conducted in the exercise of a judicial or ministerial function. Citing seven Australian cases, he continued at p. 11:

"The explanation is largely to be found in history. A magistrate in conducting committal proceedings is exercising the powers of a justice of the peace. Justices originally acted, in the absence of an organised police force, in the apprehension and arrest of suspected offenders. Following the Statutes of Philip and Mary of 1554 and 1555 (1 & 2 Ph. & M., c.13; 2 & 3 Ph. & M., c.10), they were required to act upon information and to examine both the accused and the witnesses against him. The inquiry was conducted in secret and one of its main purposes was to obtain evidence to present to a grand jury. The role of the justices was thus inquisitorial and of a purely administrative nature. It was the grand jury, not the justices, who determined whether the accused should stand trial.

With the establishment of an organised police force in England in 1829, the role of the justices underwent change. The most significant factor in this change was in the Indictable Offences Act 1848 (U.K.) (11 & 12 Vict. c.42), 'Sir John Jervis's Act,' which provided for witnesses appearing before the justices to be examined in the presence of the accused and to be cross-examined by the accused or his counsel."

After an interesting and valuable historical review the judge said, at pp. 15-16:

"The fact that a magistrate sits as a court and is under a duty to act fairly does not, however, carry with it any inherent power. Indeed, in my view, the nature of a magistrates' court is such that it has no powers which might properly be described as inherent even when it is exercising judicial functions. *A fortiori* that must be the case when its functions are of an administrative character. In *Forbes, ex p. Bevan*, Menzies J. pointed out that:

'"Inherent jurisdiction" is the power which a court has simply because it is a court of a particular description. Thus the Courts of Common Law without the aid of any authorising provision had inherent jurisdiction to prevent abuse of their process and to punish for contempt. Inherent jurisdiction is not something derived by implication from statutory provisions conferring particular jurisdiction; if such a provision is to be considered as conferring more than is actually expressed that further jurisdiction is conferred by implication according to accepted standards of statutory construction and it would be inaccurate to describe it as "inherent jurisdiction," which, as the name indicates, requires no authorising provision. Courts of unlimited jurisdiction have "inherent jurisdiction."'

Then, having emphasised the distinction between inherent jurisdiction and jurisdiction by implication, Dawson J. observed at p. 17:

"The fact that in the conduct of committal proceedings a magistrate is performing a ministerial or administrative function is, of course, no bar to the existence of implied powers, if such are necessary for the effective exercise of the powers which are expressly conferred upon him. The latter are now to be found in section 41 of the Justices Act. But the scheme of that section, far from requiring the implication of a general power to stay proceedings, is such as to impose an obligation upon the magistrate to dispose of the information which brings the defendant before him by discharging the defendant as to it or by committing him for trial."

Having referred to section 41 of the Justices Act, the learned judge then said at p. 18:

"There is no room in the face of these statutory obligations, couched as they are in mandatory terms, for the implication of a discretionary power to terminate the proceedings in a manner other than that provided. Nor is this surprising. True it is that a person committed for trial is exposed to trial in a way in which he would otherwise not be, but the ultimate determination whether he does in fact stand trial does not rest with the magistrate. The power to order a stay where there is an abuse of the process of the trial court is not to be found in the committing magistrate and the considerations which would guide the exercise of that power have little relevance to the function which the magistrate is required to perform."

It would, of course, be convenient (as well as correct, in my view) if the examining magistrates *could not* stay for abuse of process, because judicial review of a decision to stay would be a most inadequate remedy if the real ground of review was simply that the magistrates had erred in their exercise of discretion. Moreover, their decision would not bind the court of trial, if the Attorney-General were to prefer a voluntary bill.

For the reasons already mentioned and also for the reasons given by my noble and learned friends I would allow the appeal.

LORD SLYNN OF HADLEY: My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends Lord Griffiths, Lord Bridge of Harwich and Lord Oliver of Aylmerton. Despite the powerful reasons adverted to by Lord Oliver of Aylmerton I agree with Lord Griffiths that the question should be answered in the way he proposes. It does not seem to me to be right in principle that, when a person is brought within the jurisdiction in the way alleged in this case (which for present purposes must be assumed to be true) and charged, the court should not be competent to investigate the illegality alleged, and if satisfied as to the illegality to refuse to proceed to trial. I would accordingly allow the appeal.

Appeal allowed.
Case remitted to Divisional Court for further consideration.

Solicitors: Hallinan, Blackburn Gittings and Nott, for the appellant. Crown Prosecution Service.

knowledged facts tending to prove his guilt. United States v. Rouse, 452 F.2d 311, 313 (5th Cir. 1971); *see* McCormick, Evidence 310 (1970).

[10] We find no merit in DiZenzo's second assignment of error, which deals with the government's amendment of its bill of particulars changing the date of the crime. Allowance of the amendment was well within the bounds of discretion delineated by Rule 7(f) of the Federal Rules of Criminal Procedure.[3]

Affirmed.

UNITED STATES of America, Appellee,

v.

Francisco TOSCANINO, Appellant.

No. 746, Docket 73-2732.

United States Court of Appeals, Second Circuit.

Argued Feb. 13, 1974.

Decided May 15, 1974.

As Amended on Denial of Rehearing Aug. 21, 1974.

Rehearing En Banc Denied Oct. 8, 1974.

Defendant was convicted in United States District Court for the Eastern District of New York, Jacob Mishler, Chief Judge, of conspiracy to import and distribute narcotics, and he appealed. The Court of Appeals, Mansfield, Circuit Judge, held that federal district court's criminal process would be abused or degraded if it was executed against defendant Italian citizen, who alleged that he was brought into the United States from Uruguay after being kidnapped, and such abuse could not be tolerated without debasing the processes of justice, so that defendant was entitled to a hearing on his allegations.

Case remanded for further proceedings.

Robert P. Anderson, Circuit Judge, concurred in result and filed opinion.

1. Constitutional Law ⇐257

Requirement of due process in obtaining a conviction extends to the pretrial conduct of law enforcement authorities.

2. Criminal Law ⇐99

Government should be denied the right to exploit its own illegal conduct, and when an accused is kidnapped and forcibly brought within the jurisdiction, court's acquisition of power over his person represents the fruits of the Government's exploitation of its own misconduct.

3. Searches and Seizures ⇐7(1)

An illegal arrest constitutes a "seizure" of the person in violation of the Fourth Amendment. U.S.C.A.Const. Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

4. Constitutional Law ⇐257

Due process requires the court to divest itself of jurisdiction over the person of a defendant where such jurisdiction has been acquired as a result of the Government's deliberate, unnecessary and unreasonable invasion of accused's constitutional rights.

5. Courts ⇐403

Supervisory power of Court of Appeals over the administration of criminal justice in the district courts within its jurisdiction is not limited to the admission or exclusion of evidence, but may be

"Powell—When you gonna get some more?
"DiZenzo—Thursday, I told you that. I told you that last night, what were you drunk?"

3. Rule 7 provides in part:
"A bill of particulars may be amended at any time subject to such conditions as justice requires." *See generally* 8 Moore's Federal Practice § 7.06 [1].

exercised in any manner necessary to remedy abuses of a district court's process.

6. Constitutional Law ⇐257

Due process rights of defendant, an Italian citizen, would be violated, and federal district court's criminal process would be abused and degraded if it were executed against defendant, who had allegedly been brought into the United States after he was kidnapped from Uruguay, tortured in Brazil, and drugged before being put aboard an airliner bound for the United States, which abduction would have violated treaties to which the United States was a party, and defendant was entitled to a hearing in respect to such allegations. Treaty with Uruguay, 35 Stat. 2028; United Nations Charter, art. 2, 59 Stat. 1035; U.S.C.A.Const. Amend. 14.

7. Telecommunications ⇐492

Federal statute governing wiretapping and eavesdropping has no application outside of the United States. 18 U.S.C.A. § 2518.

8. Constitutional Law ⇐82

The Bill of Rights has extraterritorial application to the conduct abroad of federal agents directed against United States citizens.

9. International Law ⇐10.8

The United States Constitution applies only to the conduct abroad of agents acting on behalf of the United States; it does not govern the independent conduct of foreign officials in their own country.

10. Searches and Seizures ⇐7(11)

Aliens who are the victims of unreasonable seizures conducted by United States officials beyond the continental limits of the United States may invoke the Fourth Amendment. U.S.C.A.Const. Amend. 4.

11. Criminal Law ⇐394.5(2)

Defendant Italian citizen, who allegedly was kidnapped from Uruguay and taken to the United States, and who alleged that he was the victim of unlawful wiretapping conducted at the direction of United States employees in violation of his constitutional rights, was entitled to invoke statute providing, inter alia, that upon a claim by party aggrieved that evidence was inadmissible because it is primary product of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act. 18 U.S.C.A. § 3504.

Ivan S. Fisher, New York City (Alan Scribner, Krieger, Fisher, Metzger & Scribner, New York City, of counsel), for appellant.

Thomas P. Puccio, Asst. U. S. Atty. (Edward J. Boyd, V, U. S. Atty., E. D. N. Y., L. Kevin Sheridan, Asst. U. S. Atty., Brooklyn, N. Y., of counsel), for appellee.

Before ANDERSON, MANSFIELD and OAKES, Circuit Judges.

MANSFIELD, Circuit Judge:

Francisco Toscanino appeals from a narcotics conviction entered against him in the Eastern District of New York by Chief Judge Jacob Mishler after a jury trial. Toscanino was sentenced to 20 years in prison and fined $20,000. He contends that the court acquired jurisdiction over him unlawfully through the conduct of American agents who kidnapped him in Uruguay, used illegal electronic surveillance, tortured him and abducted him to the United States for the purpose of prosecuting him here. We remand the case to the district court for further proceedings in which the government will be required to respond to his allegations concerning the methods by which he was brought into the Eastern District and the use of electronic surveillance to gather evidence against him.

Toscanino, who is a citizen of Italy, and four others were charged with conspiracy to import narcotics into the United States in violation of 21 U.S.C. §§ 173 and 174 in a one count indictment returned by a grand jury sitting in the Eastern District on February 22, 1973. The other defendants were Armando Nicolay, Segundo Coronel, Roberto Arenas and Umberto Coronel. Also named as a conspirator but not as a defendant was one Hosvep Caramian. At a joint trial of all the defendants (except for Nicolay who had fled to Argentina), which began on May 22, 1973, the only government witness against Toscanino was Caramian[1] who testified that he met with Toscanino in Montevideo, Uruguay, during the summer of 1970 and agreed to find buyers for a shipment of heroin into the United States, which would be delivered by Nicolay. Caramian testified further that in November, 1970, he left Uruguay and came to the United States where he met with Arenas and the Coronel brothers who agreed to buy the heroin. On November 30, 1970, Caramian received part of Toscanino's shipment delivered by Nicolay in Miami, Florida, but ultimate distribution of the narcotics was intercepted by government agents who posed as buyers from Arenas and the Coronel brothers. Toscanino, testifying in his own behalf, denied any knowledge of these transactions. On June 5, 1973, the jury returned a verdict of guilty against him and all the other defendants.

Toscanino does not question the sufficiency of the evidence or claim any error with respect to the conduct of the trial itself. His principal argument, which he voiced prior to trial and again after the jury verdict was returned, is that the entire proceedings in the district court against him were void because his presence within the territorial jurisdiction of the court had been illegally obtained. He alleged that he had been kidnapped from his home in Montevideo, Uruguay, and brought into the Eastern District only after he had been detained for three weeks of interrogation accompanied by physical torture in Brazil. He offered to prove the following:

"On or about January 6, 1973 Francisco Toscanino was lured from his home in Montevideo, Uruguay by a telephone call. This call had been placed by or at the direction of Hugo Campos Hermedia. Hermedia was at that time and still is a member of the police in Montevideo, Uruguay. In this effort, however, and those that will follow in this offer, Hermedia was acting *ultra vires* in that he was the paid agent of the United States government. . . .

". . . The telephone call ruse succeeded in bringing Toscanino and his wife, seven months pregnant at the time, to an area near a deserted bowling alley in the City of Montevideo. Upon their arrival there Hermedia together with six associates abducted Toscanino. This was accomplished in full view of Toscanino's terrified wife by knocking him unconscious with a gun and throwing him into the rear seat of Hermedia's car. Thereupon Toscanino, bound and blindfolded, was driven to the Uruguayan-Brazilian border by a circuitous route. . . .

"At one point during the long trip to the Brazilian border discussion was had among Toscanino's captors as to changing the license plates of the abductor's car in order to avoid detection by the Uruguayan authorities. At another point the abductor's car was abruptly brought to a halt, and Toscanino was ordered to get out. He was brought to an apparently secluded place and told to lie perfectly still or he would be shot then and there. Although his blindfold prevented him from seeing, Toscanino could feel the barrel of the gun against his head and could hear the rumbling noises of what appeared to be an Uruguayan military convoy. A short time after the noise of the convoy had died away, Toscanino was placed in another vehicle and whisked to the border. There by pre-arrangement and again at the connivance of the United States government, the car was met by a group of Brazilians who

1. At the time of Toscanino's trial, Caramian was already serving an 18-year sentence for narcotics violations and bail jumping.

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took custody of the body of Francisco Toscanino.

"At no time had there been any formal or informal request on the part of the United States of the government of Uruguay for the extradition of Francisco Toscanino nor was there any legal basis to justify this rank criminal enterprise. In fact, the Uruguayan government claims that it had no prior knowledge of the kidnapping nor did it consent thereto and had indeed condemned this kind of apprehension as alien to its laws.

"Once in the custody of Brazilians, Toscanino was brought to Porto Alegre where he was held incommunicado for eleven hours. His requests to consult with counsel, the Italian Consulate, and his family were all denied. During this time he was denied all food and water.

"Later that same day Toscanino was brought to Brasilia. . . . For seventeen days Toscanino was incessantly tortured and interrogated. Throughout this entire period the United States government and the United States Attorney for the Eastern District of New York prosecuting this case was aware of the interrogation and did in fact receive reports as to its progress. Furthermore, during this period of torture and interrogation a member of the United States Department of Justice, Bureau of Narcotics and Dangerous Drugs was present at one or more intervals and actually participated in portions of the interrogation. . . . [Toscanino's] captors denied him sleep and all forms of nourishment for days at a time. Nourishment was provided intravenously in a manner precisely equal to an amount necessary to keep him alive. Reminiscent of the horror stories told by our military men who returned from Korea and China, Toscanino was forced to walk up and down a hallway for seven or eight hours at a time. When he could no longer stand he was kicked and beaten but all in a manner contrived to punish without scarring. When he would not answer, his fingers were pinched with metal pliers. Alcohol was flushed into his eyes and nose and other fluids . . . were forced up his anal passage. Incredibly, these agents of the United States government attached electrodes to Toscanino's earlobes, toes, and genitals. Jarring jolts of electricity were shot throughout his body, rendering him unconsious for indeterminate periods of time but again leaving no physical scars.

"Finally on or about January 25, 1973 Toscanino was brought to Rio de Janeiro where he was drugged by Brazilian-American agents and placed on Pan American Airways Flight # 202 destined for the waiting arms of the United States government. On or about January 26, 1973 he woke in the United States, was arrested on the aircraft, and was brought immediately to Thomas Puccio, Assistant United States Attorney.

"At no time during the government's seizure of Toscanino did it ever attempt to accomplish its goal through any lawful channels whatever. From start to finish the government unlawfully, willingly and deliberately embarked upon a brazenly criminal scheme violating the laws of three separate countries."

The government prosecutor neither affirmed nor denied these allegations but claimed they were immaterial to the district court's power to proceed.

Toscanino alleged further that, prior to his forcible abduction from Montevideo, American officials bribed an employee of the public telephone company to conduct electronic surveillance of him and that the results of the surveillance were given to American agents and forwarded to government prosecutors in New York. According to Toscanino, the telephone company employee was eventually arrested in Uruguay for illegal eavesdropping and was indicted and imprisoned. In connection with these latter allegations Toscanino moved, pursuant to 18 U.S.C. § 3504,[2] to compel the government to affirm or deny whether in fact there had been any electronic surveillance of him in Uruguay.

Toscanino's motion for an order vacating the verdict, dismissing the indictment and ordering his return to Uruguay was denied by the district court on November 2, 1973, without a hearing. Relying principally on the decisions of the Supreme Court in Ker v. Illinois, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1886), and Frisbie v. Collins, 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed. 541 (1952), the court held that the manner in which Toscanino was brought into the territory of the United States was immaterial to the court's power to proceed, provided he was physically present at the time of trial. Concerning the wiretap allegations, the court asked the prosecutor to represent whether there had actually been any electronic surveillance of Toscanino in Uruguay. The prosecutor responded that "[i]n no way was electronic surveillance used or the fruits of electronic surveillance." The court then ruled that no hearing was required on the wiretap allegations and denied the motion to vacate the verdict on that ground. From these rulings Toscanino appeals.

Alleged Forcible Abduction From Uruguay

In an era marked by a sharp increase in kidnapping activities, both here and abroad, see, e. g., New York Times, Jan. 5, 1974, at 25, col. 6, Dec. 13, 1973, at 2, col. 5, Oct. 17, 1973, at 14, col. 5, we face the question as we must in the state of the pleadings, of whether a federal court must assume jurisdiction over the person of a defendant who is illegally apprehended abroad and forcibly abducted by government agents to the United States for the purpose of facing criminal charges here. The answer necessitates a review and appraisal of two Supreme Court decisions, heavily relied upon by the government and by the district court, Ker v. Illinois, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1888), and Frisbie v. Collins, 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed. 541 (1952). For years these two cases have been the mainstay of a doctrine to the effect that the government's power to prosecute a defendant is not impaired by the illegality of the method by which it acquires control over him. This teaching originated almost 90 years ago in *Ker*. While residing in Peru, Ker was indicted by an Illinois grand jury for larceny and embezzlement. At the request of the Governor of Illinois the President, invoking the current treaty of extradition between the United States and Peru, issued a warrant authorizing a Pinkerton agent to take custody of Ker from the authorities of Peru. The warrant, however was never served, probably for the reason that by the time the agent arrived there armed forces of Chile, then at war with Peru, were in control of Lima. See Ker v. Illinois Revisited, 47 Am.J.Int'l L. 678 (1953). Instead Ker was forcibly abducted by the agent, placed aboard an American vessel and eventually taken to the United States, where he was tried and convicted in Illinois. The Supreme Court rejected Ker's argument that he was entitled by virtue of the treaty with Peru to a right of asylum there and held that the abduction of Ker did not violate the Due Process Clause of the Four

2. 18 U.S.C. § 3504 provides:
"(a) In any trial, hearing, or other proceeding in or before any court . . . of the United States
(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;
. . . . . .
(b) As used in this section 'unlawful act' means any act the use of any electronic, mechanical, or other device (as defined in section 2510(5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto."

teenth Amendment (then less than 20 years old), which was construed as merely requiring that the party be regularly indicted and brought to trial "according to the forms and modes prescribed for such trials." The Court accordingly held that Ker might be tried by Illinois, regardless of the method by which it acquired control over him.

Sixty-six years later the Supreme Court again faced the question in Frisbie v. Collins, *supra*, in a slightly different context. There a Michigan state prisoner, petitioning for habeas corpus, alleged that he had been brought from Chicago, Illinois, to Michigan for trial only after he had been kidnapped, handcuffed and blackjacked in Chicago by Michigan police officers who had gone there to retrieve him. The prisoner claimed that his conviction in Michigan violated the Due Process Clause of the Fourteenth Amendment as well as the federal Kidnapping Act, 18 U.S.C. § 1201,[3] and was therefore a nullity. Rejecting the due process claim the Supreme Court explained.

> "This Court has never departed from the rule announced in Ker v. Illinois, 119 U.S. 436, 444, [7 S.Ct. 225, 229, 30 L.Ed. 421], that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.' No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after being fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards." 342 U.S. at 522.

Thus, under the so-called "Ker-Frisbie" rule, due process was limited to the guarantee of a constitutionally fair trial, regardless of the method by which jurisdiction was obtained over the defendant. Jurisdiction gained through an indisputably illegal act might still be exercised, even though the effect could be to reward police brutality and lawlessness in some cases.

Since *Frisbie* the Supreme Court, in what one distinguished legal luminary describes as a "constitutional revolution," see Griswold, The Due Process Revolution and Confrontation, 119 U.Pa.L.Rev. 711 (1971), has expanded the interpretation of "due process." No longer is it limited to the guarantee of "fair" procedure at trial. In an effort to deter police misconduct, the term has been extended to bar the government from realizing directly the fruits of its own deliberate and unnecessary lawlessness in bringing the accused to trial. See United States v. Russell, 411 U.S. 423, 430–431, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973); Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); Silverman v. United States, 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961). Concurrent with these decisions the Ker-Frisbie rule has been criticized and its continued validity repeatedly questioned. See, e. g., Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized, 56 Calif.L.Rev. 579, 600 (1968); Scott, Criminal Jurisdiction of a State Over a Defendant Based Upon Presence Secured by Force or Fraud, 37 Minn.L.Rev. 91, 102, 107 (1953); Allen, Due Process and State Criminal Procedures: Another Look, 48 N.W.U.L.Rev. 16, 27–28 (1953); Supreme Court 1951 Term, 66 Harv.L.Rev. 89, 126–27 (1953); United States v. Edmons, 432 F.2d 577, 583 (2d Cir. 1970); Government of Virgin Islands v. Ortiz, 427 F.2d 1043, 1045 n. 2 (3d Cir. 1970).

3. 18 U.S.C. § 1201 provides:
"(a) Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed."

The erosion of *Frisbie* appears to have been anticipated by a decision handed down a little more than two months earlier. In Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), decided at the same Term as *Frisbie*, the Supreme Court broadened its interpretation of due process to set aside for the first time a state court conviction resting on evidence obtained through police brutality. In that case state police officers had frustrated a defendant's efforts to swallow two morphine capsules in his possession by taking the defendant, handcuffed, to a hospital where a doctor was induced to force "an emetic solution through a tube into [the defendant's] stomach against his will." When the solution produced vomiting the capsules were recovered and subsequently introduced at defendant's trial. Reversing the resulting conviction, Justice Frankfurter wrote for a majority of the Court:

> "Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.'
>
> * * * * * *
>
> "Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too categorically. This is conduct that shocks the conscience.
>
> "It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained. This was not true even before the series of recent cases enforcing the constitutional principle that the States may not base convictions upon confessions, however much verified, obtained by coercion. These decisions are not arbitrary exceptions to the comprehensive right of States to fashion their own rules of evidence for criminal trials. They are not sports in our constitutional law but applications of a general principle. They are only instances of the general requirement that States in their prosecutions respect certain decencies of civilized conduct. Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend a 'sense of justice.'" 342 U.S. 169, 172–173.

The underpinnings of *Frisbie* were further weakened by the Supreme Court's landmark decision in Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), where, overruling Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949), it interpreted the Due Process Clause of the Fourteenth Amendment to require that the Exclusionary Rule be applied in state prosecutions, just as it had for years been binding on the federal courts, Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914). Thenceforth evidence obtained by state officers as the result of illegal search or seizure could no longer be admitted in a state criminal trial of the person from whom it was unlawfully seized. As the Supreme Court has repeatedly made clear, the Exclusionary Rule has nothing to do with the fair determination of the guilt or innocence of the accused. It represents a judicially-created device designed to deter disregard for constitutional prohibitions and give substance to constitu-

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tional rights. Mapp v. Ohio, 367 U.S. 643, 646, 81 S.Ct. 1684, 6 L.Ed.2d 1081. In the words of Justice Holmes, to allow the government to benefit illegally from seized evidence, "reduces the Fourth Amendment to a form of words," Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920). The philosophy behind the rule and possible broader application of the basic principle underlying it was best described by Justice Brandeis in an oft-quoted passage from his dissenting opinion in Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928), which we have only recently invoked again, see United States v. Archer, 486 F.2d 670, 674–675 (2d Cir. 1973):

> "The court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination. . . .
>
> "Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face." 277 U.S. at 484–485.

Society is the ultimate loser when, in order to convict the guilty, it uses methods that lead to decreased respect for the law. See United States v. Archer, *supra* at 677.

[1] Thus the Court's decisions in *Rochin* and *Mapp* unmistakably contradict its pronouncement in *Frisbie* that "due process of law is satisfied when one present in court is convicted of crime after being fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards." The requirement of due process in obtaining a conviction is greater. It extends to the pretrial conduct of law enforcement authorities. The force of *Rochin* continues to be recognized. In United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973), for instance, the Court, although holding that the government's alleged entrapment activities did not violate the Constitution or federal law, warned that

> "While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. Rochin v. California, 342 U.S. 165 [72 S.Ct. 205, 96 L.Ed. 183] (1952), the instant case is distinctly not of that breed." 411 U.S. at 431–432.

In United States v. Archer, *supra*, while basing our decision on other grounds, we referred to *Olmstead* and *Rochin* for the proposition that due process principles might be invoked to bar prosecution altogether where it resulted from flagrantly illegal law enforcement practices. In contrast, we have expressed doubt as to the validity of the *Frisbie* doctrine. In United States v. Edmons, 432 F.2d 577 (2d Cir. 1970), for instance, in rejecting the government's attempt to invoke *Frisbie* by analogy as the basis for upholding a conviction obtained through the device of using arrests that were in fact pretexts for investigative activities, Judge Friendly stated:

> "We do not find *Frisbie* . . . and its predecessors . . . to be a truly persuasive analogy. Those cases were decided before the Fourth Amendment as such was held applicable to the states, . . . and thus rested only on general considerations of due process or, as in *Frisbie*, also on a claimed violation of the Federal Kidnapping Act. Whether the Court would now adhere to them must be regarded as questionable." United States v. Edmons, *supra* at 583 [footnotes and citations omitted].

Similar doubt was indicated by the Third Circuit in Government of Virgin Islands v. Ortiz, 427 F.2d 1043, 1045 n.2 (3d Cir. 1970), where it stated "We recognize that the validity of the *Frisbie* doctrine has been seriously questioned because it condones illegal police conduct."

[2, 3] In light of these developments we are satisfied that the "Ker-Frisbie" rule cannot be reconciled with the Supreme Court's expansion of the concept of due process, which now protects the accused against pretrial illegality by denying to the government the fruits of its exploitation of any deliberate and unnecessary lawlessness on its part. Although the issue in most of the cases forming part of this evolutionary process was whether evidence should have been excluded (e. g., *Mapp*, *Miranda*, *Wong Sun*, *Silverman*), it was unnecessary in those cases to invoke any other sanction to insure that an ultimate conviction would not rest on governmental illegality. Where suppression of evidence will not suffice, however, we must be guided by the underlying principle that the government should be denied the right to exploit its own illegal conduct, Wong Sun v. United States, 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), and when an accused is kidnapped and forcibly brought within the jurisdiction, the court's acquisition of power over his person represents the fruits of the government's exploitation of its own misconduct. Having unlawfully seized the defendant in violation of the Fourth Amendment,[4] which guarantees "the right of the people to be secure in their persons . . . against unreasonable . . . seizures," the government should as a matter of fundamental fairness be obligated to return him to his *status quo ante*.

[4] Faced with a conflict between the two concepts of due process, the one being the restricted version found in *Ker-Frisbie* and the other the expanded and enlightened interpretation expressed in more recent decisions of the Supreme Court, we are persuaded that to the extent that the two are in conflict, the *Ker-Frisbie* version must yield. Accordingly we view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights. This conclusion represents but an extension of the well-recognized power of federal courts in the civil context to decline to exercise jurisdiction over a defendant whose presence has been secured by force or fraud. See In re Johnson, 167 U.S. 120, 126, 17 S.Ct. 735, 42 L.Ed. 103 (1896); Fitzgerald Construction Co. v. Fitzgerald, 137 U.S. 98, 11 S.Ct. 36, 34 L.Ed. 608 (1890).

If the charges of government misconduct in kidnapping Toscanino and forcibly bringing him to the United States should be sustained, the foregoing principles would, as a matter of due process,

4. An illegal arrest constitutes a seizure of the person in violation of the Fourth Amendment, see Henry v. United States, 361 U.S. 98, 100–101, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959); Giordenello v. United States, 357 U.S. 480, 485–488, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958); Frankel, Concerning Searches and Seizures, 34 Harv.L.Rev. 361 (1921).

entitle him to some relief. The allegations include corruption and bribery of a foreign official as well as kidnapping, accompanied by violence and brutality to the person. Deliberate misconduct on the part of United States agents, in violation not only of constitutional prohibitions but also of the federal Kidnapping *Act, supra*, and of two international treaties obligating the United States Government to respect the territorial sovereignty of Uruguay, is charged. See U.N. Charter, art. 2; O.A.S. Charter, art. 17.[5] The conduct alleged here satisfies those tests articulated by the Supreme Court in its most recent "entrapment" decision, United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973), where, in holding that due process did not bar prosecution for the manufacture and sale of an illegal drug, even though a government undercover agent had supplied a scarce chemical required for its synthesis, it noted that the government agent had violated no constitutional prohibition or federal law and had committed no crime in infiltrating the defendant's drug enterprise. It furthermore appeared that the type of undercover activity engaged in there by the agent was necessary in order to gather essential evidence. Here, in contrast, not only were several laws allegedly broken and crimes committed at the behest of government agents but the conduct was apparently unnecessary, as the extradition treaty between the United States and Uruguay, see 35 Stat. 2028, does not specifically exclude narcotics violations so that a representative of our government might have been able to conclude with Uruguay a special arrangement for Toscanino's extradition. Cf. Fiocconi v. Attorney General of United States, 339 F.Supp. 1242, 1244 (S.D.N.Y.1972).

[5, 6] In any event, since *Ker* and *Frisbie* involved state court convictions only, the views expressed in those cases would not necessarily apply to the present case, which is an appeal from a judgment entered by a federal district court. Here we possess powers not available to a federal court reviewing a state tribunal's resolution of constitutional issues. In this case we may rely simply upon our supervisory power over the administration of criminal justice in the district courts within our jurisdiction. See McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943); United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972); United States v. Freeman, 357 F.2d 108 (2d Cir. 1967); Williamson v. United States, 311 F.2d 441 (5th Cir. 1962). See Hogan & Snee, The McNabb-Mallory Rule: Its Rise, Rationale and Rescue, 47 Geo.L.J. 29, 32 (1952) (The "real roots of the *McNabb* rule" are found in a refusal to countenance "trials which are the outgrowth or fruit of the Government's illegality," since they "debase the processes of justice."). See also Government of Virgin Islands v. Ortiz, 427 F.2d 1043, 1045 n.2. Clearly this power may legitimately be used to prevent district courts from themselves becoming "accomplices in willful disobedience of law." See *McNabb, supra* at 345. Moreover the supervisory power is not limited to the admission or exclusion of evidence, but may be exercised in any manner necessary to remedy abuses of a district court's process. Cf. Rea v. United States, 350 U.S. 214, 76 S.Ct. 292, 100 L.Ed. 233 (1955). Drawing again from the field of civil procedure, we think a federal court's criminal process is abused or degraded where it is executed against a defendant who has been brought into the territory of the United States by the methods alleged here. Cf. Commercial Mutual Accident Co. v. Davis, 213 U.S. 245, 29 S.Ct. 445, 53 L.Ed. 782 (1909); Fitzgerald Construction Co. v. Fitzgerald, *supra*. We could not tolerate such an abuse without debasing "the processes of justice."[6]

5. The relevant provisions of these Charters are set forth and discussed *infra*.

6. We recognize that the Ninth Circuit, in United States v. Cotten, 471 F.2d 744, 747-748 (9th Cir. 1973), adhered to *Ker* and *Frisbie* in affirming the convictions of defendants who had been forcibly taken by United States officials from Viet Nam to the United States to stand trial. The case is distinguishable on several grounds. It may be judicially noticed that at the time of the transfer South Viet Nam, as an ally, was being maintained and supported by the United States and was occupied by American forces. Control over the appellants was relinquished by the Vietnamese authorities to the United States officials, and no extradition treaty existed between the Republic of Viet Nam and the United States, see pages 3515-16, *supra*. Furthermore, the Ninth Circuit noted, 471 F.2d at 748 n. 11:

"11. While the court recognizes that the vitality of the doctrine we follow may be in doubt, and that federal officers might be held to a higher standard of conduct than their state counterparts, we will not strike it down. Recent legislation and constitutional protections enunciated in the last decade provide viable alternative means of coping with undisciplined law enforcement activities."

The suggestion that such means offer an adequate substitute for the sanction of exclusion or dismissal has repeatedly been rejected by the Supreme Court. See Coolidge v. New Hampshire, 403 U.S. 443, 488, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) (Exclusionary Rule is "only effectively available way" to compel respect for constitutional guarantees). Terry v. Ohio, 392 U.S. 1, 12, 88 S.Ct. 1868, 1875, 20 L.Ed.2d 889 (1968) ("experience has taught us that [Exclusionary Rule] is only effective deterrent . . . .").

"If distinctions are necessary, *Ker* and *Frisbie* are clearly distinguishable on other legally significant grounds which render neither of them controlling here. Neither case, unlike that here, involved the abduction of a defendant in violation of international treaties of the United States. *Frisbie* presented an alleged *interstate* abduction in which the appellant was clearly extraditable and an order returning him to his asylum state, Illinois, would have been an exercise in futility since Illinois would have been obligated to return him to Michigan for trial. U.S.Const. Art. IV, § 2, cl. 2; 18 U.S.C. § 3182. Although the appellant in *Ker* argued that his forcible abduction by the Pinkerton agent violated the extradition treaty between the United States and Peru, the Supreme Court disagreed, holding that the extradition treaty did not apply and that it would have been violated by the demanding state only if, after receiving a fugitive, it tried him for a crime other than that for which he was surrendered. See United States v. Rauscher, 119 U.S. 407, 7 S.Ct. 234, 30 L.Ed. 425 (1888). Here, in contrast, Toscanino alleges that he was forcibly abducted from Uruguay, whose territorial sovereignty this country has agreed in two international treaties to respect. The Charter of the United Nations, the members of which include the United States and Uruguay, see Department of State, Treaties in Force 402-03 (1973), obligates "All Members" to "refrain . . . from the threat or use of force against the territorial integrity of political independence of any state. . . ." See U.N. Charter, art. 2 para. 4. Additionally, the Charter of the Organization of American States, whose members also include the United States and Uruguay, see Department of State, Treaties in Force 359 (1973), provides that the "territory of a state is inviolable; it may not be the object, even temporarily, . . . of . . . measures of force taken by another state, directly or indirectly, on any grounds whatever. . . ." See O.A.S. Charter, art. 17.

That international kidnappings such as the one alleged here violate the U.N. Charter was settled as a result of the Security Council debates following the illegal kidnapping in 1960 of Adolf Eichmann from Argentina by Israeli "volunteer groups." In response to a formal complaint filed by the U.N. representative from Argentina pursuant to article 35 of the U.N. Charter[7] the Security Council, by eight votes to none (with two abstentions and one member—Argentina—not participating in the vote), adopted a resolution condemning the kidnapping and requesting "the Govern-

7. Article 35 of the U.N. Charter permits member nations to bring "any dispute . . . to the attention of the Security Council or of the General Assembly."

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ment of Israel to make appropriate reparation in accordance with the Charter of the United Nations and rules of international law. . . ." U.N.Doc. S/4349 (June 23, 1960), quoted in W. Friedmann, O. Lissitzyn & R. Pugh, International Law: Cases and Materials 497 (1969). The resolution merely recognized a long standing principle of international law that abductions by one state of persons located within the territory of another violate the territorial sovereignty of the second state and are redressable usually by the return of the person kidnapped. See The Vincenti Affair, 1 Hackworth, Digest of International Law 624 (1920); The Cantu Case, 2 Hackworth 310 (1914); The Case of Blatt and Converse, 2 Hackworth 309 (1911).

Since the United States thus agreed not to seize persons residing within the territorial limits of Uruguay, appellant's allegations in this case are governed not by *Ker* but by the Supreme Court's later decision in Cook v. United States, 288 U.S. 102, 53 S.Ct. 305, 77 L.Ed. 641 (1933). In *Cook* officers of the United States Coast Guard boarded and seized a British vessel, the Mazel Tov, in violation of territorial limits fixed by a treaty then in force between the United States and Great Britain. The Supreme Court held that the government's subsequent libel for forfeiture of the vessel in the federal district court was properly dismissed, since under the treaty the forcible seizure was incapable of giving the district court power to adjudicate title to the vessel regardless of the vessel's physical presence within the court's jurisdiction. Distinguishing Ker v. Illinois, the Court said:

> "It is true that where the United States, having possession of property, files a libel to enforce a forfeiture resulting from a violation of its laws, the fact that the possession was acquired by a wrongful act is immaterial. Dodge v. United States, 272 U.S. 530, 532 [47 S.Ct. 191, 71 L.Ed. 392]. Compare Ker v. Illinois, 119 U.S. 436, 444 [7 S.Ct. 225, 30 L.Ed. 421]. The doctrine rests primarily upon the common-law rules that any person may, at his peril, seize property which has become forfeited to, or forfeitable by, the government; and that proceedings by the government to enforce a forfeiture ratify a seizure made by one without authority, since ratification is equivalent to antecedent delegation of authority to seize. . . . The doctrine is not applicable here. The objection to the seizure is not that it was wrongful merely because made by one upon whom the government had not conferred authority to seize at the place where the seizure was made. *The objection is that the government itself lacked power to seize, since by the treaty it had imposed a territorial limitation upon its own authority.* The Treaty fixes the conditions under which a 'vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with' the applicable laws. Thereby, Great Britain agreed that adjudication may follow a rightful seizure. *Our government, lacking power to seize, lacked power, because of the Treaty, to subject the vessel to our laws. To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty.* Compare United States v. Rauscher, 119 U.S. 407, [7 S.Ct. 234, 30 L.Ed. 425]." 288 U.S. at 121–122 (emphasis supplied).

See also United States v. Ferris, 19 F.2d 925 (N.D.Cal.1927); United States v. Schouweiler, 19 F.2d 387 (S.D.Cal.1927).

Thus *Ker* does not apply where a defendant has been brought into the district court's jurisdiction by forcible abduction in violation of a treaty. See Ford v. United States, 273 U.S. 593, 605–606, 47 S.Ct. 531, 71 L.Ed. 793 (1927) (Ker v. Illinois is "inapplicable where a treaty of the United States is directly involved. . . ."). The rule in *Cook* is consistent with the traditional doctrine that "the construction of treaties is judicial in its nature, and courts when called upon to act should be careful to see that international engagements are faithfully kept and observed. . . .," see Sullivan v. Kidd, 254 U.S. 433, 442, 41 S.Ct. 158, 162, 65 L.Ed. 344 (1921), and "that the Executive lives up to our international obligations," Shapiro v. Ferrandina, 478 F.2d 894, 906 n.10 (2d Cir. 1973). It derives directly from the Court's earlier decision in United States v. Rauscher, 119 U.S. 407, 7 S.Ct. 234, 30 L.Ed. 425 (1888), decided the same day as *Ker* and written by the same Justice. In *Rauscher*, the Court held that United States courts were barred from trying a fugitive, surrendered by Great Britain pursuant to a treaty of extradition, for a crime other than that for which he had been extradited, at least until he had been afforded an opportunity to return to the country from which he had been brought. In reaching this result the Court rejected the argument that even where a trial might be in violation of a treaty obligation, the defendant's exclusive remedy was an "appeal to the executive branches of the treaty governments for redress." See 119 U.S. at 430–432. See also Johnson v. Browne, 205 U.S. 309, 27 S.Ct. 539, 51 L.Ed. 816 (1907).

The government's reliance on United States v. Sobell, 244 F.2d 520 (2d Cir.), cert. denied, 355 U.S. 873, 78 S.Ct. 120, 2 L.Ed.2d 77 (1957), is misplaced. In that case, as in *Ker*, the only treaty relied on by Sobell, who claimed he had been abducted into the United States from Mexico by Mexican police acting without authority from their government but at the behest of United States government agents, was the existing extradition treaty between the United States and Mexico, 31 Stat. 1818. Relying solely on the extradition treaty, Sobell argued that *Ker* was distinguishable since there the illegal abduction was accomplished by an individual, the Pinkerton agent, who was acting in a purely private capacity whereas in his (Sobell's) case the illegal abduction was accomplished by persons who at the time of the kidnapping were acting as agents of the United States Government.[8] However, we concluded that, even assuming the truth of these allegations, the extradition treaty with Mexico had not been violated any more than the treaty with Peru in *Ker*, United States v. Sobell, 244 F.2d 520 at 525.

United States v. Cotten, 471 F.2d 744 (9th Cir. 1973), is also clearly distinguishable. Although the appellants there were forcibly returned from the Republic of Viet Nam to face criminal charges in the United States, the Vietnamese authorities, after disposing of pending charges by their government against appellants, relinquished custody to United States officials who transported them to Hawaii. Furthermore as the court noted "The United States does not have an extradition treaty with the Republic of Viet Nam," 471 F.2d at 745. Thus the transportation of the appellants there to the United States did not violate international law or an international treaty.

The Allegation of Unlawful Wiretapping

[7] With respect to Toscanino's request pursuant to 18 U.S.C. § 3504 for a statement from the government affirming or denying the occurrence of an "unlawful act" in the form of eavesdropping or surveillance on the part of agents of the United States Government in Uruguay, we agree with the government that the federal statute governing wiretapping and eavesdropping, 18 U.S.C. § 2510, et seq., has no application outside of the United States. The term "wire communication," as used in the statute, 18 U.S.C. § 2510(1), is intended to refer to communications "through *our Nation's* communications network." See 1968 U.S. Code Cong. & Admin. News, 90th Cong., 2d Sess. p. 2178 (emphasis added). In prescribing the procedures to be followed in obtaining a wiretap authorization, see 18 U.S.C. § 2518, the statute significantly makes no provision

8. Appellant's Brief on Supplementary Motion, United States v. Sobell, 244 F.2d 520 (2d Cir.), cert. denied, 355 U.S. 873, 78 S.Ct. 120, 2 L.Ed.2d 77 (1957).

for obtaining authorizations for a wiretap in a foreign country.

Section 3504, however, is not satisfied merely by showing the inapplicability of our federal wiretap law. Section 3504(b) defines an "unlawful act" as including "any act—in violation of the Constitution." The government concedes that the Fourth Amendment functions independently of the statute. Compare Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967), with Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). The question to be resolved, therefore, is whether it applies under the circumstances of this case.

[8-10] That the Bill of Rights has extraterritorial application to the conduct abroad of federal agents directed against United States citizens is well settled. Reid v. Covert, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957) (Fifth and Sixth Amendments); Balzac v. Puerto Rico, 258 U.S. 298, 312-313, 42 S.Ct. 343, 66 L.Ed. 627 (1922) (due process); Best v. United States, 184 F.2d 131, 138 (1st Cir.), cert. denied, 340 U.S. 939, 71 S.Ct. 480, 95 L.Ed. 677 (1950) (Fourth Amendment.)[9] The government, however, while not denying that American citizens may invoke the Fourth Amendment against unreasonable searches and seizures conducted by our government beyond the continental limits of the United States, contends that such rights are not available to aliens who are the victims of such conduct. We disagree. Like the Fifth Amendment guarantee of due process, the Fourth Amendment refers to and protects "people" rather than "areas," Katz v. United States, supra at 353, or "citizens," compare United States v. Pink, 315 U.S. 203, 228, 62 S.Ct. 552, 86 L.Ed. 796 (1942), and Russian Volunteer Fleet v. United States, 282 U.S. 481, 51 S.Ct. 229, 75 L.Ed. 473 (1931); with Au Yi Lau v. United States Immigration and Naturalization Service, 144 U.S.App.D.C. 147, 445 F.2d 217, cert. denied, 404 U.S. 864, 92 S.Ct. 64, 30 L.Ed.2d 108 (1971). "The Constitution of the United States is in force . . . whenever and wherever the sovereign power of that government is exerted," Balzac v. Puerto Rico, *supra* at 312-313. It is beyond dispute that an alien may invoke the Fourth Amendment's protection against an unreasonable search conducted in the United States. Au Yi Lau v. United States Immigration & Naturalization Serv., *supra* at 223. No sound basis is offered in support of a different rule with respect to aliens who are the victims of unconstitutional action abroad, at least where the government seeks to exploit the fruits of its unlawful conduct in a criminal proceeding against the alien in the United States. It is no answer to argue that the foreign country which is the situs of the search does not afford a procedure for issuance of a warrant. As the court pointed out in Best v. United States, *supra* at 138:

> "Obviously, Congress may not nullify the guarantees of the Fourth Amendment by the simple expedient of not empowering any judicial officer to act on an application for a warrant. If the search is one which would otherwise be unreasonable, and hence in violation of the Fourth Amendment, without the sanction of a search warrant, then in such a case, for lack of a warrant, no search could lawfully be made." 184 F.2d at 138

Even if a more relaxed interpretation were given to the term "unreasonable" as applied to an unauthorized search conducted by our government in Uruguay, appellant alleges that the search here was found to have violated the laws of that country, resulting in the arrest and conviction of the Uruguayan telephone employee hired by the United States Government for unlawful eavesdropping.

[11] Since appellant here alleges that he was the victim of unlawful wiretapping conducted at the direction of United States employees in violation of his constitutional rights, he was entitled to invoke 18 U.S.C. § 3504. The district court was obligated to direct the prosecutor to put his oral denial of the allegation in affidavit form, indicating which federal agencies had been checked and extending the denial not only to conversations of Toscanino but also to conversations of anyone else occurring on premises owned, leased or licensed by Toscanino. See Beverly v. United States, 468 F.2d 732 (5th Cir. 1972); In re Horn, 458 F.2d 468 (3d Cir. 1972); In re Grumbles, 453 F.2d 119 (3d Cir.), cert. denied, 406 U.S. 932, 92 S.Ct. 1806, 32 L.Ed.2d 134 (1971); In re Marx, 451 F.2d 466 (1st Cir. 1971). In the absence of such sworn written representations we are unable to affirm the denial of a hearing on Toscanino's wiretap allegations. Cf. In re Evans, 146 U.S.App. D.C. 310, 452 F.2d 1239 (1971), cert. denied, 408 U.S. 930, 92 S.Ct. 2479, 33 L.Ed.2d 342 (1972) (18 U.S.C. § 3504 is triggered by mere assertion that unlawful wiretapping has been used against a party).

Conclusion

The case is remanded to the district court for further proceedings not inconsistent with this opinion. Our remand should be construed as requiring an evidentiary hearing with respect to Toscanino's allegations of forcible abduction only if, in response to the government's denial, he offers some credible supporting evidence, including specifically evidence that the action was taken by or at the direction of United States officials. Upon his failure to make such an offer the district court may, in its discret decline to hold an evidentiary hear Cf. Russo v. United States, 404 1 1209, 92 S.Ct. 4, 30 L.Ed.2d 13 (Do las, J., sitting as a circuit judge).

ROBERT P. ANDERSON, Cir Judge (concurring in result):

I concur in the result.

My concurrence is so limited beca this case can be disposed of on due p ess grounds alone. Rochin v. Califor 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. (1952). The majority opinion well tablishes that if the defendant is s cessful in proving what he has alle about the highly irregular activities the Federal agents, this court is going to sanction or validate them by firming the conviction of the defend United States v. Archer, 486 F.2d 670 Cir. 1973). The courts of this count in dealing with cases before them, longer completely disregard the behav of our police agents when they are op ating outside of the national boundari

To reach this conclusion, however, t court need not hold that the Bill Rights has extraterritorial applicati for foreign nationals. Defendant co show that he was carried into this ju diction in violation of the Fou Amendment, but the Government nc not comply with the Fourth Amendme or the United States wire tap laws foreign jurisdictions. To hold oth wise would be novel and would make t reasonable demands on our forei agents, whether in law enforcement national security, who by following t law of the country in which they a staying, could at the same time fi themselves in defiance of United Stat constitutional safeguards.

Further, defendant did not enter t country pursuant to any treaty; he therefore, not "clothed" in any trea rights and cannot invoke the extraditi treaty or the charters of the Organiz tion of American States and the Unit Nations as personal defenses. Unit States v. Sobell, 142 F.Supp. 515 (S. N.Y.1956) (Kaufman, Judge), aff'd 2

9. The Constitution, of course, applies only to the conduct abroad of agents acting on behalf of the United States. It does not govern the independent conduct of foreign officials in their own country. Birdsell v. United States, 346 F.2d 775, 782 (5th Cir.) (per Friendly, C. J., sitting by designation), cert. denied, 382 U.S. 963, 86 S. Ct. 449, 15 L.Ed.2d 366 (1965). Whether or not United States officials are substantially involved, or foreigners are acting as their agents or employees, is a question of fact to be resolved in each case. Stonehill v. United States, 405 F.2d 738, 743-745 (9th Cir. 1968).

F.2d 520 (2 Cir.), cert. den. 355 U.S. 873, 78 S.Ct. 120, 2 L.Ed.2d 77 (1957). Violation of the standards laid down by these treaties is again indicative of the denial of due process, but not a defense in and of itself. By and large treaties are to be enforced by governments, rather than by their individual citizens, and neither the United States, Uruguay nor Brazil contemplated that, under these circumstances, a defendant could personally seek to invoke these treaties.

COMMUNITY BANK et al., Appellants,

v.

FEDERAL RESERVE BANK OF SAN FRANCISCO, and Board of Governors of the Federal Reserve System, Appellees.

No. 73-1808.

United States Court of Appeals, Ninth Circuit.

July 22, 1974.

State banks, which were neither members of nor affiliated with the Federal Reserve System, brought suit challenging amendments to Federal Reserve regulations governing the collection of checks and other items by Federal Reserve banks. The United States District Court for the Central District of California, Malcolm M. Lucas, J., denied banks' application for preliminary injunction and entered summary judgment in favor of Federal Reserve bank and Board of Governors and banks appealed. The Court of Appeals, Sneed, Circuit Judge, held that amendments to Regulation J advancing the time in which payor banks must settle for demand items presented for collection by Federal Reserve banks to the close of the banking day of receipt and eliminating drafts drawn on other banks as permissible forms of settlement were not inconsistent with provisions of California Commercial Code governing time in which payor bank must settle when presented with check for collection inasmuch as Code provision elevated Federal Reserve regulations to the status of agreements whether or not specifically assented to by all parties interested in the items handled; that manner of settlement provision did not conflict with Code provision listing six forms or remittance which a collecting bank may take in settlement of an item; and that regulation was within scope of authority conferred on Board by the Federal Reserve Act.

Affirmed.

1. Banks and Banking ⇐140(3), 353

Provision in California Commercial Code that Federal Reserve regulations have the effect of agreements whether or not specifically assented to by all parties interested in the items handled operates to make Federal Reserve regulations binding on nonmember-payor banks; hence amendments to Federal Reserve regulation advancing the time in which payor banks must settle for demand items presented for collection by Federal Reserve banks to the close of the banking day of receipt did not conflict with provisions of California Commercial Code making payor bank accountable if it retained an item beyond midnight of the banking day of receipt without settling for it and allowing payor banks to revoke provisional settlement if such revocation was made before midnight deadline. Federal Reserve Act, § 1 et seq., 12 U.S.C.A. § 221 et seq.; West's Ann.Cal.Com.Code, §§ 4301, 4302.

2. Banks and Banking ⇐161(1)

Section of California Commercial Code listing six forms of remittance which a collecting bank may take in settlement of an item was not designed to require a collecting bank to accept any one or all mentioned forms of remittances in settlement of items. West's Ann.Cal.Com.Code, §§ 4211, 4211(1)(a).

3. Banks and Banking ⇐161(1)

Amendment to Federal Reserve regulation eliminating drafts on other banks as permissible forms of settlement by payor banks does not conflict with provisions of California Commercial Code listing six forms of remittance which a collecting bank may take in settlement of an item inasmuch as the Federal Reserve has the option of refusing to accept any of the six forms of settlement listed in the code. West's Ann.Cal.Com.Code, §§ 4211, 4211(1)(a).

4. Banks and Banking ⇐353

Amendments to Federal Reserve regulation advancing the time in which payor banks must settle for demand to the close of the banking day of receipt and eliminating drafts drawn on other banks as permissible forms of settlement were not beyond scope of authority conferred on Board of Governors by the Federal Reserve Act on theory that the amendments represented an attempt to establish a universal system of check clearance. Federal Reserve Act, § 13, 12 U.S.C.A. § 342; West's Ann.Cal.Com. Code, § 4211.

James B. Irsfeld, Jr. (argued), of Irsfeld, Irsfeld & Younger, Hollywood, Cal., for appellants.

Michael Kimmel (argued), Dept. of Justice, Washington, D. C., for appellees.

OPINION

Before TRASK and SNEED, Circuit Judges, and POWELL,* District Judge.

SNEED, Circuit Judge:

On June 21, 1972, the Board of Governors of the Federal Reserve System unanimously approved changes in Regulation J, 12 C.F.R. § 210, which governs the collection of checks and other items by Federal Reserve Banks. Appellant State Banks, who are neither members of nor affiliated with the Federal Reserve System, object to the amendments to Regulation J insofar as they affect nonmember and non-affiliated payor banks.

Briefly stated, the changes in Regulation J affect both the *time* and *manner* in which payor banks must settle for demand items presented for collection by Reserve Banks. Prior to the amendments, payor banks became accountable if they failed to settle for demand items before midnight of the banking day of receipt, and settlements made earlier could be revoked prior to the midnight deadline. The amendments to Regulation J advance the settlement *time* to the *close* of the banking day of receipt, and only if settlement is made prior to this time may it be revoked before midnight of the banking day of receipt. The amendments also affect the *manner* in which settlement may be made by eliminating drafts drawn on other banks as permissible forms of settlement.[1]

Appellants attack the amendments to Regulation J on two broad grounds. First, they urge that the changes are inconsistent with the time and manner of settlement provisions contained in the California Commercial Code, which they contend should govern the operations of nonmember banks chartered under the laws of the State of California. Second, they argue that, to the extent that they attempt to bind payor banks which are not members of the Federal Reserve System, the amendments to Regulation J exceed the power conferred on the Board under the Federal Reserve Act.

Appellant State Banks' application for a preliminary injunction was denied by the district court on October 10, 1972, and on February 8, 1973, the court en-

* Honorable Charles L. Powell, Senior Judge, Eastern District of Washington, sitting by designation.

1. Prior to the amendments, the time and manner of settlement provisions of Regulation J and the California Commercial Code were virtually identical.

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van holst en steijnen

From: Christopher Black <bar@idirect.com>
To: Jared Israel <jedmisrael@yahoo.com>; van holst en steijnen <n.h.van.holst@freeler.nl>; Vladimir Krsljanin <vlada@sps.org.yu>; David Jacobs <davidafrica2001@yahoo.ca>
Cc: Vincent, Isabel <IVincent@nationalpost.com>
Sent: dinsdag 2 oktober 2001 14:14
Subject: Milosevic

Am now in Amsterdam. Christian Rhodes has refused my request for a visit to see Milosevic. He stated this morning, October 2, that the ICTY is reviewing its policy re visits by non- appointed counsel and other visitors and had hoped to have it by now but it wont be complete by the time I have to leave here (the 5th of October). The only crumb he would give me is that he said he would try to arrange a telephone call from Milosevic to me at the hotel but I wont hold my breath waiting for that.

So, I ask Vlada to let Milosevic know I was here and tried. I suspected they would do this now they have these three stooges appointed as so -called amicus curiae (more like friends of the Prosecutor) becuase they will say his interests are being protected by them so what does he need us for.

They are going to manouevre Milosevic into a corner with these three.

We have to rethink strategy.

Chris

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International Criminal Tribunal for the former Yugoslavia

Tribunal Pénal International pour l'ex Yougoslavie

1 Thursday, 30 August 2001

2 [Open session]

3 [Status Conference]

4 [The accused entered court]

5 --- Upon commencing at 10.08 a.m.

6 JUDGE MAY: Yes. Let the Registrar call the case.

7 THE REGISTRAR: Good morning, Your Honours. Case number

8 IT-99-37-PT, the Prosecutor of the Tribunal against Slobodan Milosevic.

9 JUDGE MAY: The appearances.

10 MS. DEL PONTE: Your Honours, Carla Del Ponte, appearing for the

11 Prosecution, along with Senior Trial Attorney Dirk Ryneveld, as well as

12 Cristina Romano, Milbert Shin, Daryl Mundis, and Daniel Saxon. Thank you,

13 Your Honour.

14 JUDGE MAY: Thank you.

15 The purpose of this hearing is to review the status and progress

16 of this case and, as the Rules require, to ensure that there is

17 expeditious preparation for trial, and also to allow the accused the

18 opportunity to raise issues in relation to the case, including any issue

19 in relation to his mental and physical condition.

20 Before dealing with these matters, the Trial Chamber has an

21 announcement to make concerning the conduct of the trial. The Trial

22 Chamber today is inviting the Registrar of the Tribunal to designate an

23 amicus curiae for these proceedings, and I will summarise now the effect

24 of this order.

25 The position is this: that the accused has not appointed counsel

1 to represent him and has informed the Registrar in writing that he has no

2 intention of engaging a lawyer to do so. The accused is entitled to

represent himself. However, the Trial Chamber has the duty of ensuring that a trial is fair and that the rights of the accused are fully respected. For these reasons, the Trial Chamber invites the Registrar to designate counsel as amicus curiae to assist the Court in the proper determination of this case.

It must be stressed that the role of designated counsel will not be to represent the accused but to assist the Court by the following: first, making any submissions properly open to the accused by way of preliminary or pre-trial motion or during the trial; second, making objections to evidence and cross-examining witnesses, as appropriate; third, drawing attention to any exculpatory or mitigating evidence; and fourth, acting in any other way which designated counsel considers appropriate in order to secure a fair trial.

This order will be issued today and copies will be available after the hearing.

Turning then to the subject matter of today's hearing, we will hear from the Prosecution first and then the accused. I should add this at the outset: that we've received a document entitled a Preliminary Motion, signed by the accused, a Response by the Prosecution, and now a Notice from the accused purporting to disclaim the motion. We will consider these documents in due course and give a decision about them in writing.

Now, turning to the Prosecution. We would wish to hear about the

state of readiness for the trial, the number of Prosecution witnesses and a time estimate, and any matters relating to disclosure.

Madam Prosecutor, we have in mind that we must fix a timetable for this case, including a date for a pre-trial brief and also a general indication as to the date for trial, but we will also hear any submissions which the Prosecution wish to make.

Yes, Madam Prosecutor.

MS. DEL PONTE: Thank you, Your Honour. Before answering your

9 questions, if you allow, I would present a request, a request that it
10 means that I'm asking that the indictment is read to the accused. I would
11 like that the Trial Chamber consider having the amended indictment read to
12 the accused because at the initial appearance the proceedings were
13 conducted properly and in accordance with the Rules of Procedure and
14 Evidence. Nevertheless, at the time the Trial Chamber exercised its
15 discretion to accept the accused's response as a waiver of the reading of
16 the amended indictment, the Trial Chamber may have not been aware of
17 certain facts which we would now like to bring to your attention.
18 At the time of his arrest, Mr. Milosevic refused service of the
19 copy of the original indictment of him. At no time during his transfer to
20 The Hague did Mr. Milosevic accept, read, or have read to him the
21 indictment upon which he was arrested.
22 Furthermore, the amended indictment was confirmed on 29 June, and
23 Mr. Milosevic appeared on 3rd of July without counsel. We understand that
24 prior to his initial appearance before this Trial Chamber, the accused
25 again refused to accept service of the amended indictment, nor had it read

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1 to him by members of the Registry staff.
2 Therefore, it cannot be said that he was aware of the charges
3 against him at the time of the initial appearance, and in light of that
4 information, the Trial Chamber may consider it appropriate to have the
5 charges read to him in English. We suggest that it be done in English
6 because it is clear that he understands English, but does not avail
7 himself of translation services in the Serbian language by wearing the
8 headphones.
9 My request, Your Honour, is that we make sure that the accused,
10 Milosevic, knows the facts that are the charges against him.
11 JUDGE MAY: Madam Prosecutor, let me ask you this: As far as
12 you're concerned, is this indictment in its final form or are you going to
13 apply at some stage to amend it before trial? Because that would affect
14 probably what we decide to do.

15 MS. DEL PONTE: Yes, Your Honour. As you know, I cannot properly
16 answer yes or no, but I can say that we are working on that because of the
17 mass graves, of the graves found near Belgrade, and that is for us another
18 investigation activity that is pertaining to Kosovo. And so it is
19 possible, Your Honour, Mr. President, that we must come out, we must come
20 out with a third amended indictment.
21 JUDGE MAY: The sensible course, it seems to us, is to consider
22 the matter of reading the charges when we have the indictment in a
23 finalised form, and we have your application and we'll have it in mind and
24 we'll consider it.
25 MS. DEL PONTE: Thank you, Your Honour. My only problem is that I

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1 don't want to have Mr. Milosevic in detention without knowing which
2 charges are against him that justifies detention.
3 JUDGE MAY: He has every opportunity of reading the indictment, of
4 which he has a copy. Meanwhile, we'll consider the problem.
5 Yes. Now, is there anything else you want to raise? Yes.
6 MS. DEL PONTE: If you allow, Your Honour, I would -- Senior Trial
7 Attorney about the question you put to us, because he is particularly
8 informed about it. Thank you.
9 JUDGE MAY: Yes. Thank you. Mr. Ryneveld.
10 MR. RYNEVELD: Thank you, Your Honours. I'd like to address you,
11 actually, on two matters, if I may, the first of which is that Your
12 Honours have specifically given a request to us to answer in terms of our
13 anticipation of when the trial might proceed, how many witnesses, and
14 matters of that nature. I must say that at this particular time,
15 especially in light of what Madam Prosecutor has responded in answer to
16 your request in terms of whether or not this is the final indictment, it
17 would be premature for me to attempt to indicate to the Court exactly when
18 matters of this nature could proceed or the number of witnesses. As Madam
19 Prosecutor has indicated, the matter is still proceeding with an
20 investigation. If we were to proceed with this particular indictment and

its amended indictment in its present form, I would anticipate that the matter could not, in any event, proceed until next year. The amount of witnesses have yet to be culled with respect to the vast potential number of witnesses that we have. As you know, when we do our 65 ter analysis and summary, we would be in a much better position to

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1 give the Court an indication as to just how many witnesses they are. This
2 is a vast case, you can appreciate.
3 Something else that Madam Prosecutor has not raised is, of course,
4 in particular, Your Honour has asked about this particular amended
5 indictment. Madam Prosecutor has made no secret that she is considering
6 issuing indictments with respect to Bosnia and Croatia in the near future,
7 and I anticipate that if that were the case, that there would also be an
8 application for joinder.
9 All of those matters make it extremely complex in order for me to
10 give you the type of answer that you are now asking. That is about as
11 well as I can do at this particular point in time. There are just too
12 many variables.
13 JUDGE MAY: Mr. Kyneveld, the Chamber has considered the position,
14 and in the view of the Chamber, this matter should be ready for trial.
15 The indictment was issued over two years ago. This accused has now been
16 in custody for two months, and the matter must be readied for trial. Of
17 course, it's a matter for you what other indictments you wish to bring
18 forward. That can be done. If they're confirmed, of course, and you wish
19 to make an application to join them, we will consider that in due course.
20 MR. RYNEVELD: Yes.
21 JUDGE MAY: But "in due course" is not an infinite amount of
22 time. When do you anticipate that you will have the amendments ready for
23 this indictment, in any event?
24 MR. RYNEVELD: My guess, Your Honour, although I can't -- as you
25 can appreciate -- I see Madam Prosecutor is rising to her feet. Perhaps I

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1 will allow her to answer that issue.
2 JUDGE MAY: Yes.
3 MS. DEL PONTE: Thank you. Thank you, Mr. President. Our
4 preparation activity to come out with an amended indictment of Kosovo and
5 with other two indictments about Croatia and Bosnia, we have a programme
6 of investigation activity, and we think, particularly with both new

7 indictments, the beginning of October. And we are working, but it's not
8 easy, Your Honour, to make such a decision. In the same time, if, if, we
9 are ready with our investigations and we came out with the amended
10 indictment Kosovo, so-called Kosovo, I think we will need some more weeks
11 for this amended indictment Kosovo.
12 So first we will come out with two new indictments, Croatia and
13 Bosnia, and end of October/beginning of November, we will try to do our
14 best for the amended indictment of Kosovo. So let's say two months, two,
15 two and a half months more.
16 JUDGE MAY: The programme which we have in mind for this trial,
17 and I emphasise "this trial" -- we will, of course, consider any
18 applications that are made meanwhile, but it's important that this
19 indictment, having been issued, as I say, being two years old now, is
20 tried. The programme we have in mind is that a date for trial should be
21 fixed within the first two months of next year. Working backwards from
22 that date, a Pre-Trial Conference on the 9th of January. That means a
23 date for the Prosecution pre-trial brief on this indictment would be
24 something towards three months' time, the 26th of November.
25 Now, that is the timetable that we have in mind fixing. There

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1 must come a time when the matter is ready for trial and comes to trial,
2 with respect, and that time is coming. So that is the timetable which we
3 have in mind to impose, without hearing -- it may be appropriate that we
4 could deal with the other matters you have in mind at the end of October,
5 on the 29th of October. That may be suitable to deal with any other
6 matters which you want to raise and any matters which the amicus wants to
7 raise by way of any pre-trial motions.
8 MS. DEL PONTE: Yes, Your Honour. I take notice of that. I think
9 we can manage that. I must confirm that we are trial ready for this
10 indictment, but obviously it is not our -- our work is not finished and so
11 that is what caused our problems. But for this indictment, we are trial
12 ready.

13 JUDGE MAY: Well, that will be the timetable, and you can work
14 towards it.
15 MS. DEL PONTE: Yes, Your Honour. Thank you.
16 [Trial Chamber confers]
17 JUDGE MAY: Yes.
18 MR. RYNEVELD: If I may, I indicated, Your Honour --
19 THE INTERPRETER: Microphone for the counsel.
20 MR. RYNEVELD: If I may, I indicated that there were two issues.
21 The -- oh, yes. I've just been -- perhaps before I deal with the second
22 issue, Your Honour might just clarify. When you said October 29th for the
23 joinder application, I'm not quite sure exactly what Your Honour had in
24 mind.
25 JUDGE MAY: Simply that of the next status conference and, if

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1 necessary, the hearing of any motions on that day.
2 MR. RYNEVELD: Yes. No, I appreciate -- that is your proposal for
3 the next Status Conference date. Yes. All right. That explains that.
4 The second issue, Your Honours, deals, of course, with the
5 Prosecution's concern that the accused is -- continues to be
6 unrepresented, and Your Honour has very clearly indicated what your --
7 what the Court's proposal is, or what the Court's decision is with respect
8 to dealing with that matter. We had intended to ask the Court to consider
9 the appointment of Defence counsel. The amicus, of course, under Rule 74,
10 and Your Honour has quite correctly pointed out that this is -- the amicus
11 is intended to assist the Court. And the point that I believe I must
12 raise is that, of course, the role of Defence counsel is to assist the
13 accused.
14 Now, the four points by which the amicus would be assisting the
15 Court quite clearly are intended to assist the Defence, to ensure that the
16 interests of justice are being met. I accept that, but I wonder whether
17 the Court, in addition to appointing an amicus curiae, would also consider
18 whether or not it would be appropriate to assign a Defence counsel for the

19 accused in these proceedings.
20 The function or the role for each is distinct, and Your Honours
21 have quite carefully pointed out that the role of an amicus is to assist
22 the Court. It is our view, however, that the Court may also wish to
23 consider the appointment of a Defence counsel.
24 For example, one of the issues that Your Honour has already
25 raised, the confusion with respect to his original document that he filed,

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1 which was the preliminary protective motion wherein he purported to submit
2 paragraph 8 only, we then filed a response. Then on the 27th of August,
3 he filed a document entitled The Registry which may be interpreted as a
4 withdrawal of that earlier motion. These matters, if counsel were
5 assigned to him, these matters would not be as confusing.
6 The second thing is - and I believe this is something that the
7 Court would ask us to address in any event - the Prosecution has now
8 complied with its obligations under Rule 66(A)(i) in that we have
9 disclosed to the accused, in a language which he understands, all of the
10 confirming materials for the -- that supported the amended indictment and
11 all statements, et cetera, under Rule 66(A)(i).
12 My understanding is that the time for which he has to file any
13 motion under Rule 72 is 30 days. From the 10th of August, time is
14 running, and again that's another situation where we submit it would --
15 the interests of justice would benefit from the assignment of Defence
16 counsel.
17 I appreciate that the issue of the preparation of preliminary
18 motions is one of the items enumerated in the Court's proposal as to the
19 role of amicus curiae, and perhaps Your Honours' assignment of an amicus
20 curiae will deal with many of the issues that the Prosecution had
21 anticipated. However, it would still be our recommendation and our
22 request that you consider appointing not only an amicus but a Defence
23 counsel. That is our request.
24 JUDGE ROBINSON: Mr. Ryneveld, I have heard your submission.

25 However, I do not consider it appropriate for the Chamber to impose

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1 counsel upon the accused. We have to act in accordance with the Statute

2 and our Rules which, in any event, reflect the position under customary

3 international law, which is that the accused has a right to counsel, but

4 he also has a right not to have counsel. He has a right to defend

himself, and it is quite clear that he has chosen to defend himself. He has made that abundantly clear.

The strategy that the Chamber has employed of appointing an amicus curiae will take care of the problems that you have outlined, but I stress that it would be wrong for the Chamber to impose counsel on the accused, because that would be in breach of the position under customary international law.

MR. RYNEVELD: Thank you, Your Honours. I appreciate that Your Honours have taken our request into consideration.

JUDGE MAY: Let me add this, Mr. Ryneveld: Yes, that is the view of the Trial Chamber, that it would not be practical to impose counsel on an accused who wishes to represent himself, but the point should be made and so that the accused can hear it, that the amicus is not there to represent him but to assist the Court, the point that you were making. And what the amicus cannot do is put forward a positive Defence case. That would be the role of Defence counsel or the accused. Now, the accused may wish to reflect on that fact when he's considering his position.

Yes. Your next point, Mr. Ryneveld.

MR. RYNEVELD: I just wonder, Your Honours. I've also mentioned the fact that the accused has indicated in writing, and I wonder whether

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maybe we could get a copy of his request to represent himself. We didn't have that.

JUDGE MAY: Yes. That can be done.

MR. RYNEVELD: I believe those are the only points that we wish to raise at this particular point. Thank you.

JUDGE MAY: Yes. Thank you.

[Trial Chamber confers]

JUDGE MAY: Turning then to the accused. Mr. Milosevic, are there any issues you wish to raise in connection with your case or with your physical and mental condition?

11 You know the rules. No speeches at this stage. You'll have the
12 opportunity to defend yourself in due course. But if there are issues you
13 want to raise about the case or about your conditions, then this is your
14 chance to do so.
15 THE ACCUSED: Well, I would like to know, first of all, can I
16 speak or you are going to turn off my microphone like first time?
17 JUDGE MAY: Mr. Milosevic, if you follow the rules, you will be
18 able to speak. If you deal with relevant matters, of course you will be
19 able to speak.
20 THE ACCUSED: Well, that is my next question. I would like to
21 make presentation on the illegality of this Tribunal.
22 JUDGE MAY: You've already put a motion in on that topic. Are you
23 asking to be able to address it -- the Chamber orally on that topic?
24 THE ACCUSED: If I cannot make the presentation orally that can
25 take 40 minutes, I will give that in writing, and my --

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1 JUDGE MAY: Yes. Well, why don't you -- sorry.
2 THE ACCUSED: My associates will give it to the press if you
3 don't allow me to make it public here.
4 JUDGE MAY: If you make it in writing, it can be made public in
5 due course. If you have it in writing, it may be more convenient to deal
6 with it in that way.
7 THE ACCUSED: Well, that is your decision.
8 JUDGE MAY: Very well.
9 THE ACCUSED: So we have to communicate as civilised persons, not
10 with switching off the microphone or to use the force for that so we can
11 understand each other, what is possible, what is not. So I will leave it
12 to you in writing.
13 JUDGE MAY: Very well.
14 THE ACCUSED: And if I can comment what I just heard. That was
15 very interesting what I heard now, and that is proving what I said 3rd of
16 July in this room, that that is false indictment. I was indicted 26th of

17 May, 60th day of NATO aggression against Yugoslavia, when I was defending
18 my country; and there are two and a half years from that date, and we just
19 heard that they have no evidence, that they cannot complete indictment, in
20 two and a half years. It is very long time for false indictments to be
21 completed, and what we heard, that was proving that. And of course,
22 having in mind that I'm not recognising this Tribunal, having a clear
23 opinion, which is proved by legal facts, that this Tribunal is illegal, I
24 don't see why I have to defend myself in front of false Tribunal from
25 false indictments. That's another -- that's another explanation.

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1 If you allow to me, I would ask some questions to you concerning
2 my position in illegal imprisonment.
3 JUDGE MAY: You can't ask us any questions, but if there are
4 issues you want to raise about that, you can do so.
5 THE ACCUSED: Well, I'm, by the order of this illegal institution,
6 in total isolation, and my question is: Why am I isolated from my
7 family? Why my family cannot visit me the same way as the others have
8 that possibility? Why the visits of my family are monitored? Why you
9 need monitoring of my talks with my grandson, who is two and a half years
10 old? So why you are making all those acts of massive violation of my
11 rights? Why I am isolated from the persons who would like to visit me and
12 who I need to talk and to discuss different legal aspects of my position
13 in this illegal imprisonment?
14 JUDGE MAY: Just pause there. The Rules governing the detention
15 are a matter for the Registrar. If they are being applied differently to
16 you to anybody else, we will inquire.
17 THE ACCUSED: It is --
18 JUDGE MAY: Just a moment. The difficulty about the lawyers is
19 this: that you have not yet selected or nominated a lawyer, and the Rules
20 allow legal visits from a nominated lawyer. Now, is this your position:
21 that you wish to represent yourself, you do not wish to appoint a lawyer,
22 but you do wish to have access to legal advice? Does that summarise your

23 position?

24 THE ACCUSED: Well, it is clear that it is my right to contact

25 different experts for different aspects of my position in illegal

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1 imprisonment, and in addition to that, I have the right to contact lawyers

2 who are dealing with my private affairs in Yugoslavia. I have the right

3 to contact lawyers who are engaged within some international organisations

4 who are supporting me. I have right to communicate with that people, and

5 I cannot understand how that will be established on a discriminatory

6 basis. As I understand, all system of UN is based on the principle of

7 non-discrimination, and I am discriminated all the time from the first day

8 I got in.

9 JUDGE MAY: The problem, Mr. Milosevic, is that you have not

10 nominated a lawyer. If you had nominated a lawyer, the matter would be

11 clear. The staff here have to follow the rules, and the person who is

12 allowed the legal visits is your nominated lawyer. But you say there are

13 essentially two matters on which you want advice. You want advice, first

14 of all, on your position here, on these proceedings; you also want advice

15 about your affairs in Yugoslavia. Is that right?

16 THE ACCUSED: Of course it is right, and many other things I have

17 in mind what I have to talk about with the persons who would like to visit

18 me and to contact me.

19 JUDGE MAY: The Trial Chamber will look into these matters. We'll

20 consider it.

21 THE ACCUSED: The third question is why I am isolated from the

22 press, especially in the circumstances in which every single day there is

23 something printed or broadcast against me as a pure lie? So you are

24 keeping me in isolation not to communicate to the press even by telephone,

25 which is only -- which is available to me. There are some representatives

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of the press. Maybe there are somebody within them who would like to know the truth. I believe that nobody has to be afraid of the truth, and if there is on one side all that machinery you represent, all that secret services, military machinery, media machinery, and everything else, and on my side is only the truth, if you are isolating me from the communications with the press, then it is clear that it is completely discriminatory, and you cannot even mention the idea of even-handedness in any kind of that procedure you have in mind.

JUDGE MAY: Mr. Milosevic --

THE ACCUSED: And please, I want to remind you, I'm not recognising this Tribunal, considering it completely illegitimate and illegal, so all those questions about counsels, about representations, are out of any question. I saw in newspaper that --

JUDGE MAY: Very well. Mr. Milosevic, there must be an end to this. Just one moment. Let me deal with the matters you raised. The Rules of the Detention Unit provide that there should not be communication with the press. Those are the Rules and they must be followed. They don't discriminate against you. They are applied to all the accused who are in detention.

As for your point about not recognising the Tribunal, you have made it and we have heard it and there is no need to repeat it.

Now, is there anything else you want to add?

THE ACCUSED: Well, I understood that they were dealing with that problem of illegality of the Tribunal as a problem of jurisdiction. It is clear to any lawyer in the world that question of jurisdiction can be open

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when juridical institutions are concerned, and you are not juridical institution; you are political tool.

JUDGE MAY: You've made all these points. Mr. Milosevic, we're not going to listen to -- we are not going to listen to these political arguments. You have your motion on jurisdiction which you can put in and which we will consider.

THE ACCUSED: But that is not a question of jurisdiction, just because of that --

JUDGE MAY: We will consider it.

THE ACCUSED: You are political tool of those who --

JUDGE MAY: Very well. This hearing will be adjourned now until Monday, the 29th of October.

--- Whereupon the Status Conference adjourned at 10.47 a.m. to be reconvened on Monday, the 29th day

15 of October 2001

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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

THE PROSECUTOR OF THE TRIBUNAL

AGAINST

SLOBODAN MILOSEVIC
MILAN MILUTINOVIC
NIKOLA SAINOVIC
DRAGOLJUB OJDANIC
VLAJKO STOJILJKOVIC

INDICTMENT

The Prosecutor of the International Criminal Tribunal for the former Yugoslavia, pursuant to her authority under Article 18 of the Statute of the Tribunal, charges:

SLOBODAN MILOSEVIC
MILAN MILUTINOVIC
NIKOLA SAINOVIC
DRAGOLJUB OJDANIC
VLAJKO STOJILJKOVIC

with **CRIMES AGAINST HUMANITY** and **VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR** as set forth below:

BACKGROUND

1. The Autonomous Province of Kosovo and Metohija is located in the southern part of the Republic of Serbia, a constituent republic of the Federal Republic of Yugoslavia (hereinafter FRY). The territory now comprising the FRY was part of the former Socialist Federal Republic of Yugoslavia (hereinafter SFRY). The Autonomous Province of Kosovo and Metohija is bordered on the north and north-west by the Republic of Montenegro, another constituent republic of the FRY. On the south-west, the Autonomous Province of Kosovo and Metohija is bordered by the Republic of Albania, and to the south, by the Former Yugoslav Republic of Macedonia. The capital of the Autonomous Province of Kosovo and Metohija is Pristina.

2. In 1990 the Socialist Republic of Serbia promulgated a new Constitution which, among other things, changed the names of the republic and the autonomous provinces. The name of the Socialist Republic of Serbia was changed to the Republic of Serbia (both hereinafter Serbia); the name of the Socialist Autonomous Province of Kosovo was changed to the Autonomous Province of Kosovo and Metohija (both hereinafter Kosovo); and the name of the Socialist Autonomous Province of Vojvodina was changed to the Autonomous Province of Vojvodina (hereinafter Vojvodina). During this same period, the Socialist Republic of Montenegro changed its name to the Republic of Montenegro (hereinafter Montenegro).

3. In 1974, a new SFRY Constitution had provided for a devolution of power from the central government to the six constituent republics of the country. Within Serbia, Kosovo and Vojvodina were given considerable autonomy including control of their educational systems, judiciary, and police. They were also given their own provincial assemblies, and were represented in the Assembly, the Constitutional Court, and the Presidency of the SFRY.

4. In 1981, the last census with near universal participation, the total population of Kosovo was approximately 1,585,000 of which 1,227,000 (77%) were Albanians, and 210,000 (13%) were Serbs. Only estimates for the population of Kosovo in 1991 are available because Kosovo Albanians boycotted the census administered that year. General estimates are that the current population of Kosovo is between 1,800,000 and 2,100,000 of which approximately 85-90% are Kosovo Albanians and 5-10% are Serbs.

5. During the 1980s, Serbs voiced concern about discrimination against them by the Kosovo Albanian-led provincial government while Kosovo Albanians voiced concern about economic underdevelopment and called for greater political liberalisation and republican status for Kosovo. From 1981 onwards, Kosovo Albanians staged demonstrations which were suppressed by SFRY

military and police forces of Serbia.

6. In April 1987, **Slobodan MILOSEVIC**, who had been elected Chairman of the Presidium of the Central Committee of the League of Communists of Serbia in 1986, travelled to Kosovo. In meetings with local Serb leaders and in a speech before a crowd of Serbs, **Slobodan MILOSEVIC** endorsed a Serbian nationalist agenda. In so doing, he broke with the party and government policy which had restricted nationalist expression in the SFRY since the time of its founding by Josip Broz Tito after the Second World War. Thereafter, **Slobodan MILOSEVIC** exploited a growing wave of Serbian nationalism in order to strengthen centralised rule in the SFRY.

7. In September 1987 **Slobodan MILOSEVIC** and his supporters gained control of the Central Committee of the League of Communists of Serbia. In 1988, **Slobodan MILOSEVIC** was re-elected as Chairman of the Presidium of the Central Committee of the League of Communists of Serbia. From that influential position, **Slobodan MILOSEVIC** was able to further develop his political power.

8. From July 1988 to March 1989, a series of demonstrations and rallies supportive of **Slobodan MILOSEVIC**'s policies -- the so-called "Anti-Bureaucratic Revolution" -- took place in Vojvodina and Montenegro. These protests led to the ouster of the respective provincial and republican governments; the new governments were then supportive of, and indebted to, **Slobodan MILOSEVIC**.

9. Simultaneously, within Serbia, calls for bringing Kosovo under stronger Serbian rule intensified and numerous demonstrations addressing this issue were held. On 17 November 1988, high-ranking Kosovo Albanian political figures were dismissed from their positions within the provincial leadership and were replaced by appointees loyal to **Slobodan MILOSEVIC**. In early 1989, the Serbian Assembly proposed amendments to the Constitution of Serbia which would strip Kosovo of most of its autonomous powers, including control of the police, educational and economic policy, and choice of official language, as well as its veto powers over further changes to the Constitution of Serbia. Kosovo Albanians demonstrated in large numbers against the proposed changes. Beginning in February 1989, a strike by Kosovo Albanian miners further increased tensions.

10. Due to the political unrest, on 3 March 1989, the SFRY Presidency declared that the situation in the province had deteriorated and had become a threat to the constitution, integrity, and sovereignty of the country. The government then imposed "special measures" which assigned responsibility for public security to the federal government instead of the government of Serbia.

11. On 23 March 1989, the Assembly of Kosovo met in Pristina and, with the majority of Kosovo Albanian delegates abstaining, voted to accept the proposed amendments to the constitution. Although lacking the required two-thirds majority in the Assembly, the President of the Assembly nonetheless declared that the amendments had passed. On 28 March 1989, the Assembly of Serbia voted to approve the constitutional changes effectively revoking the autonomy granted in the 1974 constitution.

12. At the same time these changes were occurring in Kosovo, **Slobodan MILOSEVIC** further increased his political power when he became the President of Serbia. **Slobodan MILOSEVIC** was elected President of the Presidency of Serbia on 8 May 1989 and his post was formally confirmed on 6 December 1989.

13. In early 1990, Kosovo Albanians held mass demonstrations calling for an end to the "special measures." In April 1990, the SFRY Presidency lifted the "special measures" and removed most of the federal police forces as Serbia took over responsibility for police enforcement in Kosovo.

14. In July 1990, the Assembly of Serbia passed a decision to suspend the Assembly of Kosovo shortly after 114 of the 123 Kosovo Albanian delegates from that Assembly had passed an unofficial resolution declaring Kosovo an equal and independent entity within the SFRY. In September 1990, many of these same Kosovo Albanian delegates proclaimed a constitution for a "Republic of Kosovo." One year later, in September 1991, Kosovo Albanians held an unofficial referendum in which they voted overwhelmingly for independence. On 24 May 1992, Kosovo Albanians held unofficial elections for an assembly and president for the "Republic of Kosovo."

15. On 16 July 1990, the League of Communists of Serbia and the Socialist Alliance of Working People of Serbia joined to form the Socialist Party of Serbia (SPS), and **Slobodan MILOSEVIC** was elected its President. As the successor to the League of Communists, the SPS became the dominant political party in Serbia and **Slobodan MILOSEVIC**, as President of the SPS, was able to wield considerable power and influence over many branches of the government as well as the private sector. **Milan MILUTINOVIC** and **Nikola SAINOVIC** have both held prominent positions within the SPS. **Nikola SAINOVIC** was a member of the Main Committee and the Executive Council as well as a vice-chairman; and **Milan MILUTINOVIC** successfully ran for President of Serbia in 1997 as the SPS candidate.

16. After the adoption of the new Constitution of Serbia on 28 September 1990, **Slobodan MILOSEVIC** was elected President of Serbia in multi-party elections held on 9 and 26 December 1990; he was re-elected on 20 December 1992. In December 1991, **Nikola SAINOVIC** was appointed a Deputy Prime Minister of Serbia.

17. After Kosovo's autonomy was effectively revoked in 1989, the political situation in Kosovo became more and more divisive. Throughout late 1990 and 1991 thousands of Kosovo Albanian doctors, teachers, professors, workers, police and civil servants were dismissed from their positions. The local court in Kosovo was abolished and many judges removed. Police violence against Kosovo Albanians increased.

18. During this period, the unofficial Kosovo Albanian leadership pursued a policy of non-violent civil resistance and began establishing a system of unofficial, parallel institutions in the health care and education sectors.

19. In late June 1991 the SFRY began to disintegrate in a succession of wars fought in the Republic of Slovenia (hereinafter Slovenia), the Republic of Croatia (hereinafter Croatia), and the Republic of Bosnia and Herzegovina (hereinafter Bosnia and Herzegovina). On 25 June 1991, Slovenia declared independence from the SFRY, which led to the outbreak of war; a peace agreement was reached on 8 July 1991. Croatia declared its independence on 25 June 1991, leading to fighting between Croatian military forces on the one side and the Yugoslav People's Army (JNA), paramilitary units and the "Army of the Republic of Srpska Krajina" on the other.

20. On 6 March 1992, Bosnia and Herzegovina declared its independence, resulting in wide scale war after 6 April 1992. On 27 April 1992, the SFRY was reconstituted as the FRY. At this time, the JNA was re-formed as the Armed Forces of the FRY (hereinafter VJ). In the war in Bosnia and Herzegovina, the JNA, and later the VJ, fought along with the "Army of Republika Srpska" against military forces of the Government of Bosnia and Herzegovina and the "Croat Defence Council." Active hostilities ceased with the signing of the Dayton peace agreement in December 1995.

21. Although **Slobodan MILOSEVIC** was the President of Serbia during the wars in Slovenia, Croatia and Bosnia and Herzegovina, he was nonetheless the dominant Serbian political figure exercising *de facto* control of the federal government as well as the republican government and was the person with whom the international community negotiated a variety of peace plans and agreements related to these wars.

22. Between 1991 and 1997 **Milan MILUTINOVIC** and **Nikola SAINOVIC** both held a number of high ranking positions within the federal and republican governments and continued to work closely with **Slobodan MILOSEVIC**. During this period, **Milan MILUTINOVIC** worked in the Foreign Ministry of the FRY, and at one time was Ambassador to Greece; in 1995, he was appointed Minister of Foreign Affairs of the FRY, a position he held until 1997. **Nikola SAINOVIC** was Prime Minister of Serbia in 1993 and Deputy Prime Minister of the FRY in 1994.

23. While the wars were being conducted in Slovenia, Croatia and Bosnia and Herzegovina, the situation in Kosovo, while tense, did not erupt into the violence and intense fighting seen in the other countries. In the mid-1990s, however, a faction of the Kosovo Albanians organised a group known as *Ushtria Çlirimtare e Kosovës* (UÇK) or, known in English as the Kosovo Liberation Army (KLA). This group advocated a campaign of armed insurgency and violent resistance to the Serbian authorities. In mid-1996, the KLA began launching attacks primarily targeting FRY and Serbian police forces. Thereafter, and throughout 1997, FRY and Serbian police forces responded with forceful operations against suspected KLA bases and supporters in Kosovo.

24. After concluding his term as President of Serbia, **Slobodan MILOSEVIC** was elected President of the FRY 15 July 1997, and assumed office on 23 July 1997. Thereafter, elections for the office of the President of Serbia were held; **Milan MILUTINOVIC** ran as the SPS candidate and was elected President of Serbia on 21 December 1997. In 1996, 1997 and 1998, **Nikola SAINOVIC** was re-appointed Deputy Prime Minister of the FRY. In part through his close alliance with **Milan MILUTINOVIC, Slobodan MILOSEVIC** was able to retain his influence over the Government of Serbia.

25. Beginning in late February 1998, the conflict intensified between the KLA on the one hand and the VJ, the police forces of the FRY, police forces of Serbia, and paramilitary units (all hereinafter forces of the FRY and Serbia), on the other hand. A number of Kosovo Albanians and Kosovo Serbs were killed and wounded during this time. Forces of the FRY and Serbia engaged in a campaign of shelling predominantly Kosovo Albanian towns and villages, widespread destruction of property, and expulsions of the civilian population from areas in which the KLA was active. Many residents fled the territory as a result of the fighting and destruction or were forced to move to other areas within Kosovo. The United Nations estimates that by mid-October 1998, over 298,000 persons, roughly fifteen percent of the population, had been internally displaced within Kosovo or had left the province.

26. In response to the intensifying conflict, the United Nations Security Council (UNSC) passed Resolution 1160 in March 1998 "condemning the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo," and imposed an arms embargo on the FRY. Six months later the UNSC passed Resolution 1199 (1998) which stated that "the deterioration of the situation in Kosovo, Federal Republic of Yugoslavia, constitutes a threat to peace and security in the region." The Security Council demanded that all parties cease hostilities and that "the security forces used for civilian repression" be withdrawn.

27. In an attempt to diffuse tensions in Kosovo, negotiations between **Slobodan MILOSEVIC,** and representatives of the North Atlantic Treaty Organisation (NATO), and the Organisation for Security and Co-operation in Europe (OSCE) were conducted in October 1998. An "Agreement on the OSCE Kosovo Verification Mission" was signed on 16 October 1998. This agreement and the "Clark-Naumann agreement," which was signed by **Nikola SAINOVIC,** provided for the partial withdrawal of forces of the FRY and Serbia from Kosovo, a limitation on the introduction of additional forces and equipment into the area, and the deployment of unarmed OSCE verifiers.

28. Although scores of OSCE verifiers were deployed throughout Kosovo, hostilities continued. During this period, a number of killings of Kosovo Albanians were documented by the international verifiers and human rights organisations. In one such incident, on 15 January 1999, 45 unarmed Kosovo Albanians were murdered in the village of Racak in the municipality of Stimlje/Shtime.

29. In a further response to the continuing conflict in Kosovo, an international peace conference was organised in Rambouillet, France beginning on 7 February 1999. **Nikola SAINOVIC,** the Deputy Prime Minister of the FRY, was a member of the Serbian delegation at the peace talks and **Milan MILUTINOVIC,** President of Serbia, was also present during the negotiations. The Kosovo Albanians were represented by the KLA and a delegation of Kosovo Albanian political and civic leaders. Despite intensive negotiations over several weeks, the peace talks collapsed in mid-March 1999.

30. During the peace negotiations in France, the violence in Kosovo continued. In late February and early March, forces of the FRY and Serbia launched a series of offensives against dozens of predominantly Kosovo Albanian villages and towns. The FRY military forces were comprised of elements of the 3rd Army, specifically the 52nd Corps, also known as the Pristina Corps, and several brigades and regiments under the command of the Pristina Corps. The Chief of the General Staff of the VJ, with command responsibilities over the 3rd Army and ultimately over the Pristina Corps, is **Colonel General Dragoljub OJDANIC**. The Supreme Commander of the VJ is **Slobodan MILOSEVIC**.

31. The police forces taking part in the actions in Kosovo are members of the Ministry of Internal Affairs of Serbia in addition to some units from the Ministry of Internal Affairs of the FRY. All police forces employed by or working under the authority of the Ministry of Internal Affairs of Serbia are commanded by **Vlajko STOJILJKOVIC**, Minister of Internal Affairs of Serbia. Under the FRY Act on the Armed Forces, those police forces engaged in military operations during a state of war or imminent threat of war are subordinated to the command of the VJ whose commanders are **Colonel General Dragoljub OJDANIC** and **Slobodan MILOSEVIC.**

32. Prior to December 1998, **Slobodan MILOSEVIC** designated **Nikola SAINOVIC** as his representative for the Kosovo situation. A number of diplomats and other international officials who needed to speak with a government official regarding events in Kosovo were directed to **Nikola SAINOVIC**. He took an active role in the negotiations establishing the OSCE verification mission for Kosovo and he participated in numerous other meetings regarding the Kosovo crisis. From January 1999 to the date of this indictment, **Nikola SAINCOVIC** has acted as the liaison between **Slobodan MILOSEVIC** and various Kosovo Albanian leaders.

33. **Nikola SAINOVIC** was most recently re-appointed Deputy Prime Minister of the FRY on 20 May 1998. As such, he is a member of the Government of the FRY, which, among other duties and responsibilities, formulates domestic and foreign policy, enforces federal law, directs and co-ordinates the work of federal ministries, and organises defence preparations.

34. During their offensives, forces of the FRY and Serbia acting in concert have engaged in a well-planned and co-ordinated campaign of destruction of property owned by Kosovo Albanian civilians. Towns and villages have been shelled, homes, farms, and businesses burned, and personal property destroyed. As a result of these orchestrated actions, towns, villages, and entire regions have been made uninhabitable for Kosovo Albanians. Additionally, forces of the FRY and Serbia have harassed, humiliated, and degraded Kosovo Albanian civilians through physical and verbal abuse. The Kosovo Albanians have also been persistently subjected to insults, racial slurs, degrading acts based on ethnicity and religion, beatings, and other forms of physical mistreatment.

35. The unlawful deportation and forcible transfer of thousands of Kosovo Albanians from their homes in Kosovo involved well-planned and co-ordinated efforts by the leaders of the FRY and Serbia, and forces of the FRY and Serbia, all acting in concert. Actions similar in nature took place during the wars in Croatia and Bosnia and Herzegovina between 1991 and 1995. During those wars, Serbian military, paramilitary and police forces forcibly expelled and deported non-Serbs in Croatia and Bosnia and Herzegovina from areas under Serbian control utilising the same method of operations as have been used in Kosovo in 1999: heavy shelling and armed attacks on villages; widespread killings; destruction of non-Serbian residential areas and cultural and religious sites; and forced transfer and deportation of non-Serbian populations.

36. On 24 March 1999, NATO began launching air strikes against targets in the FRY. The FRY issued decrees of an imminent threat of war on 23 March 1999 and a state of war on 24 March 1999. Since the air strikes commenced, forces of the FRY and Serbia have intensified their systematic campaign and have forcibly expelled hundreds of thousands of Kosovo Albanians.

37. In addition to the forced expulsions of Kosovo Albanians, forces of the FRY and Serbia have also engaged in a number of killings of Kosovo Albanians since 24 March 1999. Such killings occurred at numerous locations, including but not limited to, Bela Crkva, Mali Krusa/Krushe e Vogel -- Velika Krusa/Krushe e Mahde, Dakovica/Gjakovë , Crkovez/Padalishte, and Izbica.

38. The planning, preparation and execution of the campaign undertaken by forces of the FRY and Serbia in Kosovo, was planned, instigated, ordered, committed or otherwise aided and abetted by **Slobodan MILOSEVIC,** the President of the FRY; **Milan MILUTINOVIC,** the President of Serbia; **Nikola SAINOVIC,** the Deputy Prime Minister of the FRY; **Colonel General Dragoljub OJDANIC,** the Chief of the General Staff of the VJ; and **Vlajko STOJILJKOVIC,** the Minister of Internal Affairs of Serbia.

39. By 20 May 1999, over 740,000 Kosovo Albanians, approximately one-third of the entire Kosovo Albanian population, were expelled from Kosovo. Thousands more are believed to be internally displaced. An unknown number of Kosovo Albanians have been killed in the operations by forces of the FRY and Serbia.

THE ACCUSED

40. **Slobodan MILOSEVIC** was born on 20 August 1941 in the town of Pozarevac in present-day Serbia. In 1964 he received a law degree from the University of Belgrade and began a career in management and banking. **Slobodan MILOSEVIC** held the posts of deputy director and later general director at *Tehnogas*, a major gas company until 1978. Thereafter, he became president of *Beogradska banka (Beobanka)*, one of the largest banks in the SFRY and held that post until 1983.

41. In 1983 **Slobodan MILOSEVIC** began his political career. He became Chairman of the City Committee of the League of Communists of Belgrade in 1984. In 1986 he was elected Chairman of the Presidium of the Central Committee of the League of Communists of Serbia and was re-elected in 1988. On 16 July 1990, the League of Communists of Serbia and the Socialist Alliance of Working People of Serbia were united; the new party was named the Socialist Party of Serbia (SPS), and **Slobodan MILOSEVIC** was elected its President. He holds the post of President of the SPS as of the date of this indictment.

42. **Slobodan MILOSEVIC** was elected President of the Presidency of Serbia on 8 May 1989 and re-elected on 5 December that same year. After the adoption of the new Constitution of Serbia on 28 September 1990, **Slobodan MILOSEVIC** was elected to the newly established office of President of Serbia in multi-party elections held on 9 and 26 December 1990; he was re-elected on 20 December 1992.

43. After serving two terms as President of Serbia, **Slobodan MILOSEVIC** was elected President of the FRY on 15 July 1997 and he began his official duties on 23 July 1997. At all times relevant to this indictment, **Slobodan MILOSEVIC** has held the post of President of the FRY.

44. **Milan MILUTINOVIC** was born on 19 December 1942 in Belgrade in present-day Serbia. **Milan MILUTINOVIC** received a degree in law from Belgrade University.

45. Throughout his political career, **Milan MILUTINOVIC** has held numerous high level governmental posts within Serbia and the FRY. **Milan MILUTINOVIC** was a deputy in the Socio-Political Chamber and a member of the foreign policy committee in the Federal Assembly; he was Serbia's Secretary for Education and Sciences, a member of the Executive Council of the Serbian Assembly, and a director of the Serbian National Library. **Milan MILUTINOVIC** also served as an ambassador in the Federal Ministry of Foreign Affairs and as the FRY Ambassador to Greece. He was appointed the Minister of Foreign Affairs of the FRY on 15 August 1995. **Milan MILUTINOVIC** is a member of the SPS.

46. On 21 December 1997, **Milan MILUTINOVIC** was elected President of Serbia. At all times relevant to this indictment, **Milan MILUTINOVIC** has held the post of President of Serbia.

47. **Nikola SAINOVIC** was born on 7 December 1948 in Bor, Serbia. He graduated from the University of Ljubljana in 1977 and holds a Master of Science degree in Chemical Engineering. He began his political career in the municipality of Bor where he held the position of President of the Municipal Assembly of Bor from 1978 to 1982.

48. Throughout his political career, **Nikola SAINOVIC** has been an active member of both the League of Communists and the Socialist Party of Serbia (SPS). He held the position of Chairman of the Municipal Committee of the League of Communists in Bor. On 28 November 1995, **Nikola SAINOVIC** was elected a member of the SPS's Main Committee and a member of its Executive Council. He was also named president of the Committee to prepare the SPS Third Regular Congress (held in Belgrade on 2-3 March 1996). On 2 March 1996 **Nikola SAINOVIC** was elected one of several vice chairmen of the SPS. He held this position until 24 April 1997.

49. **Nikola SAINOVIC** has held several positions within the governments of Serbia and the FRY. In 1989, he served as a member of the Executive Council of Serbia's Assembly and Secretary for Industry, Energetics and Engineering of Serbia in 1989. He was appointed Minister of Mining and Energy of Serbia on 11 February 1991, and again on 23 December 1991. On 23 December 1991, he was also named Deputy Prime Minister of Serbia. **Nikola SAINOVIC** was appointed Minister of the Economy of the FRY on 14 July 1992, and again on 11 September 1992. He resigned from this post on 29 November 1992. On 10 February 1993, **Nikola SAINOVIC** was elected Prime Minister of Serbia.

50. On 22 February 1994, **Nikola SAINOVIC** was appointed Deputy Prime Minister of the FRY. He was re-appointed to this position in three subsequent governments: on 12 June 1996, 20 March 1997 and 20 May 1998. **Slobodan MILOSEVIC** co-designated **Nikola SAINOVIC** as his representative for the Kosovo situation. **Nikola SAINOVIC** chaired the commission for co-operation with the OSCE Verification Mission in Kosovo, and was an official member of the Serbian delegation at the Rambouillet peace talks in February 1999. At all times relevant to this indictment, **Nikola SAINOVIC** has held the post of Deputy Prime Minister of the FRY.

51. **Colonel General Dragoljub OJDANIC** was born on 1 June 1941 in the village of Ravni, near Uzice in what is now Serbia. In 1958, he completed the Infantry School for Non-Commissioned Officers and in 1964, he completed the Military Academy of the Ground Forces. In 1985, **Dragoljub OJDANIC** graduated from the Command Staff Academy and School of National Defence with a Masters Degree in Military Sciences. At one time he served as the Secretary for the League of Communists for the Yugoslav National Army (JNA) 52nd Corps, the precursor of the 52nd Corps of the VJ now operating in Kosovo.

52. In 1992, **Colonel General Dragoljub OJDANIC** was the Deputy Commander of the 37th Corps of the JNA, later the VJ, based in Uzice, Serbia. He was promoted to Major General on 20 April 1992 and became Commander of the Uzice Corps. Under his command, the Uzice Corps was involved in military actions in eastern Bosnia during the war in Bosnia and Herzegovina. In 1993 and 1994 **Dragoljub OJDANIC** served as Chief of the General Staff of the First Army of the FRY. He was Commander of the First Army between 1994 and 1996. In 1996, he became Deputy Chief of the General Staff of the VJ. On 26 November 1998, **Slobodan MILOSEVIC** appointed **Dragoljub OJDANIC** Chief of General Staff of the VJ, replacing General Momcilo Perisic. At all times relevant to this indictment, **Colonel General Dragoljub OJDANIC** has held the post of Chief of the General Staff of the VJ.

53. **Vlajko STOJILJKOVIC** was born in Mala Krsna, in Serbia. He graduated from the University of Belgrade with a law degree, and then was employed at the municipal court. Thereafter, he became head of the Inter-Municipal Secretariat of Internal Affairs in Pozarevac. **Vlajko STOJILJKOVIC** has served as director of the PIK firm in Pozarevac, vice-president and president of the Economic Council of Yugoslavia, and president of the Economic Council of Serbia.

54. By April 1997, **Vlajko STOJILJKOVIC** became Deputy Prime Minister of the Serbian Government and Minister of Internal Affairs of Serbia. On 24 March 1998, the Serbian Assembly elected a new Government, and **Vlajko STOJILJKOVIC** was named Minister of Internal Affairs of Serbia. He is also a member of the main board of the SPS. At all times relevant to this indictment, **Vlajko STOJILJKOVIC**, has held the post of Minister of Internal Affairs.

SUPERIOR AUTHORITY

55. **Slobodan MILOSEVIC** was elected President of the FRY on 15 July 1997, assumed office on 23 July 1997, and remains President as of the date of this indictment.

56. As President of the FRY, **Slobodan MILOSEVIC** functions as President of the Supreme Defence Council of the FRY. The Supreme Defence Council consists of the President of the FRY and the Presidents of the member republics, Serbia and Montenegro. The Supreme Defence Council decides on the National Defence Plan and issues decisions concerning the VJ. As President of the FRY, **Slobodan MILOSEVIC** has the power to "order implementation of the National Defence Plan" and commands the VJ in war and peace in compliance with decisions made by the Supreme Defence Council. **Slobodan MILOSEVIC**, as Supreme Commander of the VJ, performs these duties through "commands, orders and decisions."

57. Under the FRY Act on the Armed Forces of Yugoslavia, as Supreme Commander of the VJ, **Slobodan MILOSEVIC** also exercises command authority over republican and federal police units subordinated to the VJ during a state of imminent threat of war or a state of war. A declaration of imminent threat of war was proclaimed on 23 March 1999, and a state of war on 24 March 1999.

58. In addition to his *de jure* powers, **Slobodan MILOSEVIC** exercises extensive *de facto* control over numerous institutions essential to, or involved in, the conduct of the offences alleged herein. **Slobodan MILOSEVIC** exercises extensive *de facto* control over federal institutions nominally under the competence of the Assembly or the Government of the FRY. **Slobodan MILOSEVIC** also exercises *de facto* control over functions and institutions nominally under the competence of Serbia and its autonomous provinces, including the Serbian police force. **Slobodan MILOSEVIC** further exercises *de facto* control over numerous aspects of the FRY's political and economic life, particularly the media. Between 1986 and the early 1990s, **Slobodan MILOSEVIC** progressively acquired *de facto* control over these federal, republican, provincial and other institutions. He continues to exercise this *de facto* control to this day.

59. **Slobodan MILOSEVIC's** *de facto* control over Serbian, SFRY, FRY and other state organs has stemmed, in part, from his leadership of the two principal political parties that have ruled in Serbia since 1986, and in the FRY since 1992. From 1986 until 1990, he was Chairman of the Presidium of the Central Committee of the League of Communists in Serbia, then the ruling party in Serbia. In 1990, he was elected President of the Socialist Party of Serbia, the successor party to the League of Communists of Serbia and the Socialist Alliance of the Working People of Serbia. The SPS has been the principal ruling party in Serbia and the FRY ever since. Throughout the period of his Presidency of Serbia, from 1990 to 1997, and as the President of the FRY, from 1997 to the present, **Slobodan MILOSEVIC** has also been the leader of the SPS.

60. Beginning no later than October 1988, **Slobodan MILOSEVIC** has exercised *de facto* control over the ruling and governing institutions of Serbia, including its police force. Beginning no later than October 1988, he has exercised *de facto* control over Serbia's two autonomous provinces -- Kosovo and Vojvodina -- and their representation in federal organs of the SFRY and the FRY. From no later than October 1988 until mid-1998, **Slobodan MILOSEVIC** also exercised *de facto* control over the ruling and governing institutions of the Montenegro, including its representation in all federal organs of the SFRY and the FRY.

61. In significant international negotiations, meetings and conferences since 1989, **Slobodan MILOSEVIC** has been the primary interlocutor with whom the international community has negotiated. He has negotiated international agreements that have subsequently been implemented within Serbia, the SFRY, the FRY, and elsewhere on the territory of the former SFRY. Among the conferences and international negotiations at which **Slobodan MILOSEVIC** has been the primary representative of the SFRY and FRY are: The Hague Conference in 1991; the Paris negotiations of March 1993; the International Conference on the Former Yugoslavia in January 1993; the Vance-Owen peace plan negotiations between January and May 1993; the Geneva peace talks in the summer of 1993; the Contact Group meeting in June 1994; the negotiations for a cease fire in Bosnia and Herzegovina, 9-14 September 1995; the negotiations to end the NATO bombing in Bosnia and Herzegovina, 14-20 September 1995; and the Dayton peace negotiations in November 1995.

62. As the President of the FRY, the Supreme Commander of the VJ, and the President of the Supreme Defence Council, and pursuant to his *de facto* authority, **Slobodan MILOSEVIC** is responsible for the actions of his subordinates within the VJ and any police forces, both federal and republican, who have committed the crimes alleged in this indictment since January 1999 in the province of Kosovo.

63. **Milan MILUTINOVIC** was elected President of Serbia on 21 December 1997, and remains President as of the date of this indictment. As President of Serbia, **Milan MILUTINOVIC** is the head of State. He represents Serbia and conducts its relations

with foreign states and international organisations. He organises preparations for the defence of Serbia.

64. As President of Serbia, **Milan MILUTINOVIC** is a member of the Supreme Defence Council of the FRY and participates in decisions regarding the use of the VJ.

65. As President of Serbia, **Milan MILUTINOVIC**, in conjunction with the Assembly, has the authority to request reports both from the Government of Serbia, concerning matters under its jurisdiction, and from the Ministry of the Internal Affairs, concerning its activities and the security situation in Serbia. As President of Serbia, **Milan MILUTINOVIC** has the authority to dissolve the Assembly, and with it the Government, "subject to the proposal of the Government on justified grounds," although this power obtains only in peacetime.

66. During a declared state of war or state of imminent threat of war, **Milan MILUTINOVIC**, as President of Serbia, may enact measures normally under the competence of the Assembly, including the passage of laws; these measures may include the reorganisation of the Government and its ministries, as well as the restriction of certain rights and freedoms.

67. In addition to his *de jure* powers, **Milan MILUTINOVIC** exercises extensive *de facto* influence or control over numerous institutions essential to, or involved in, the conduct of the crimes alleged herein. **Milan MILUTINOVIC** exercises *de facto* influence or control over functions and institutions nominally under the competence of the Government and Assembly of Serbia and its autonomous provinces, including but not limited to the Serbian police force.

68. In significant international negotiations, meetings and conferences since 1995, **Milan MILUTINOVIC** has been a principal interlocutor with whom the international community has negotiated. Among the conferences and international negotiations at which **Milan MILUTINOVIC** has been a primary representative of the FRY are: preliminary negotiations for a cease fire in Bosnia and Herzegovina, 15-21 August 1995; the Geneva meetings regarding the Bosnian cease fire, 7 September 1995; further negotiations for a cease fire in Bosnia and Herzegovina, 9-14 September 1995; the negotiations to end the NATO bombing in Bosnia and Herzegovina, 14-20 September 1995; the meeting of Balkan foreign ministers in New York, 26 September 1995; and the Dayton peace negotiations in November 1995. **Milan MILUTINOVIC** was also present at the negotiations at Rambouillet in February 1999.

69. As the President of Serbia, and a member of the Supreme Defence Council, and pursuant to his *de facto* authority, **Milan MILUTINOVIC** is responsible for the actions of any of his subordinates within the VJ and within any police forces who have committed the crimes alleged in this indictment since January 1999 within the province of Kosovo.

70. **Colonel General Dragoljub OJDANIC** was appointed Chief of the General Staff of the VJ on 26 November 1998. He remains in that position as of the date of this indictment. As Chief of the General Staff of the VJ, **Colonel General Dragoljub OJDANIC** commands, orders, instructs, regulates and otherwise directs the VJ, pursuant to acts issued by the President of the FRY and as required to command the VJ.

71. As Chief of the General Staff of the VJ, **Colonel General Dragoljub OJDANIC** determines the organisation, plan of development and formation of commands, units and institutions of the VJ, in conformity with the nature and needs of the VJ and pursuant to acts rendered by the President of the FRY.

72. In his position of authority, **Colonel General Dragoljub OJDANIC** also determines the plan for recruiting and filling vacancies within the VJ and the distribution of recruits therein; issues regulations concerning training of the VJ; determines the educational plan and advanced training of professional and reserve military officers; and performs other tasks stipulated by law.

73. As Chief of the General Staff of the VJ, **Colonel General Dragoljub OJDANIC** -- or other officers empowered by him -- assigns commissioned officers, non-commissioned officers and soldiers, and promotes non-commissioned officers, reserve officers, and officers up to the rank of colonel. In addition, **Colonel General Dragoljub OJDANIC** nominates the president, judges, prosecutors, and their respective deputies and secretaries, to serve on military disciplinary courts.

74. **Colonel General Dragoljub OJDANIC** carries out preparations for the conscription of citizens and mobilisation of the VJ; co-operates with the Ministries of Internal Affairs of the FRY and Serbia and the Ministry of Defence of the FRY in mobilising organs and units of Ministries of Internal Affairs; monitors and, proposes measures to correct problems encountered during, and informs the Government of the FRY and the Supreme Defence Council about the implementation of the aforementioned mobilisation.

75. As the Chief of the General Staff of the VJ , **Colonel General Dragoljub OJDANIC** is responsible for the actions of his subordinates within the VJ and for the actions of any federal and republican police forces, which are subordinated to the VJ, who have committed crimes since January 1999 within the province of Kosovo.

76. **Vlajko STOJILJKOVIC** was named Minister of Internal Affairs of Serbia on 24 March 1998. As head of a Serbian government ministry, **Vlajko STOJILJKOVIC** is responsible for the enforcement of laws, regulations and general acts promulgated by Serbia's Assembly, Government or President.

77. As Minister of Internal Affairs of Serbia, **Vlajko STOJILJKOVIC** directs the work of the Ministry of Internal Affairs and its personnel. He determines the structure, mandate and scope of operations of organisational units within the Ministry of Internal Affairs. He is empowered to call up members of the Ministry of Internal Affairs reserve corps to perform duties during peace time, and to prevent activities threatening Serbia's security. The orders which he and Ministry of Internal Affairs superior officers issue to Ministry of Internal Affairs personnel are binding unless they constitute a criminal act.

78. As Minister of Internal Affairs of Serbia, **Vlajko STOJILJKOVIC** has powers of review over decisions and acts of agents for the Ministry. He considers appeals against decisions made in the first instance by the head of an organisational unit of the Ministry of Internal Affairs. Moreover, he is empowered to decide appeals made by individuals who have been detained by the police.

79. On 8 April 1999, as Minister of Internal Affairs of Serbia, **Vlajko STOJILJKOVIC**'s powers during the state of war were expanded to include transferring Ministry employees to different duties within the Ministry for as long as required.

80. As Minister of Internal Affairs of Serbia, **Vlajko STOJILJKOVIC** is responsible for ensuring the maintenance of law and order in Serbia. As Minister of Internal Affairs, he is responsible for the actions of his subordinates within the police forces of the Ministry of Internal Affairs of Serbia who have committed crimes since January 1999 in the province of Kosovo.

GENERAL ALLEGATIONS

81. At all times relevant to this indictment, a state of armed conflict existed in Kosovo in the FRY.

82. All acts and omissions charged as crimes against humanity were part of a widespread or systematic attack directed against the Kosovo Albanian civilian population of Kosovo in the FRY.

83. Each of the accused is individually responsible for the crimes alleged against him in this indictment, pursuant to Article 7(1) of the Tribunal Statute. Individual criminal responsibility includes committing, planning, instigating, ordering or aiding and abetting in the planning, preparation or execution of any crimes referred to in Articles 2 to 5 of the Tribunal Statute.

84. In as much as he has authority or control over the VJ and police units, other units or individuals subordinated to the command of the VJ in Kosovo, **Slobodan MILOSEVIC**, as President of the FRY, Supreme Commander of the VJ and President of the Supreme Defence Council, is also, or alternatively, criminally responsible for the acts of his subordinates, including members of the VJ and aforementioned employees of the Ministries of Internal Affairs of the FRY and Serbia, pursuant to Article 7(3) of the Tribunal Statute.

85. In as much as he has authority or control over police units of the Ministry of Internal Affairs, the VJ, or police units, other units or individuals subordinated to the command of the VJ in Kosovo, **Milan MILUTINOVIC**, as President of Serbia and a member of the Supreme Defence Council, is also, or alternatively, criminally responsible for the acts of his subordinates, including aforementioned employees of the Ministry of Internal Affairs of Serbia, pursuant to Article 7(3) of the Tribunal Statute.

86. In as much as he has authority or control over the VJ and police units, other units or individuals subordinated to the command of the VJ in Kosovo, **Colonel General Dragoljub OJDANIC**, as Chief of the General Staff of the VJ, is also, or alternatively, criminally responsible for the acts of his subordinates, including members of the VJ and aforementioned employees of the Ministries of Internal Affairs of Serbia and the FRY, pursuant to Article 7(3) of the Tribunal Statute.

87. In as much as he has authority or control over employees of the Ministry of Internal Affairs, including any other regular or mobilised police units, **Vlajko STOJILJKOVIC**, as Minister of Internal Affairs of Serbia, is also, or alternatively, criminally responsible for the acts of his subordinates, including employees of the Ministry of Internal Affairs of Serbia, pursuant to Article 7 (3) of the Tribunal Statute.

88. A superior is responsible for the acts of his subordinate(s) if he knew or had reason to know that his subordinate(s) was/were about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

89. The general allegations contained in paragraphs 81 through 88 are re-alleged and incorporated into each of the charges set forth below.

CHARGES

COUNTS 1 - 4
CRIMES AGAINST HUMANITY
VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR

90. Beginning in January 1999 and continuing to the date of this indictment, **Slobodan MILOSEVIC, Milan MILUTINOVIC, Nikola SAINOVIC, Dragoljub OJDANIC,** and **Vlajko STOJILJKOVIC** planned, instigated, ordered, committed or otherwise aided and abetted in a campaign of terror and violence directed at Kosovo Albanian civilians living in Kosovo in the FRY.

91. The campaign of terror and violence directed at the Kosovo Albanian population was executed by forces of the FRY and

Serbia acting at the direction, with the encouragement, or with the support of **Slobodan MILOSEVIC, Milan MILUTINOVIC, Nikola SAINOVIC, Dragoljub OJDANIC,** and **Vlajko STOJILJKOVIC.** The operations targeting the Kosovo Albanians were undertaken with the objective of removing a substantial portion of the Kosovo Albanian population from Kosovo in an effort to ensure continued Serbian control over the province. To achieve this objective, the forces of the FRY and Serbia, acting in concert, have engaged in well-planned and co-ordinated operations as described in paragraphs 92 through 98 below.

92. The forces of the FRY and Serbia, have in a systematic manner, forcibly expelled and internally displaced hundreds of thousands of Kosovo Albanians from their homes across the entire province of Kosovo. To facilitate these expulsions and displacements, the forces of the FRY and Serbia have intentionally created an atmosphere of fear and oppression through the use of force, threats of force, and acts of violence.

93. Throughout Kosovo, the forces of the FRY and Serbia have looted and pillaged the personal and commercial property belonging to Kosovo Albanians forced from their homes. Policemen, soldiers, and military officers have used wholesale searches, threats of force, and acts of violence to rob Kosovo Albanians of money and valuables, and in a systematic manner, authorities at FRY border posts have stolen personal vehicles and other property from Kosovo Albanians being deported from the province.

94. Throughout Kosovo, the forces of the FRY and Serbia have engaged in a systematic campaign of destruction of property owned by Kosovo Albanian civilians. This has been accomplished through the widespread shelling of towns and villages; the burning of homes, farms, and businesses; and the destruction of personal property. As a result of these orchestrated actions, villages, towns, and entire regions have been made uninhabitable for Kosovo Albanians.

95. Throughout Kosovo, the forces of the FRY and Serbia have harassed, humiliated, and degraded Kosovo Albanian civilians through physical and verbal abuse. Policemen, soldiers, and military officers have persistently subjected Kosovo Albanians to insults, racial slurs, degrading acts, beatings, and other forms of physical mistreatment based on their racial, religious, and political identification.

96. Throughout Kosovo, the forces of the FRY and Serbia have systematically seized and destroyed the personal identity documents and licenses of vehicles belonging to Kosovo Albanian civilians. As Kosovo Albanians have been forced from their homes and directed towards Kosovo's borders, they have been subjected to demands to surrender identity documents at selected points *en route* to border crossings and at border crossings into Albania and Macedonia. These actions have been undertaken in order to erase any record of the deported Kosovo Albanians' presence in Kosovo and to deny them the right to return to their homes.

97. Beginning on or about 1 January 1999 and continuing until the date of this indictment, the forces of the FRY and Serbia, acting at the direction, with the encouragement, or with the support of **Slobodan MILOSEVIC, Milan MILUTINOVIC, Nikola SAINOVIC, Dragoljub OJDANIC,** and **Vlajko STOJILJKOVIC** have perpetrated the actions set forth in paragraphs 92 through 96, which have resulted in the forced deportation of approximately 740,000 Kosovo Albanian civilians. These actions have been undertaken in all areas of Kosovo, and these means and methods were used throughout the province, including the following municipalities:

a. Dakovica/Gjakovë : On or about 2 April 1999, forces of the FRY and Serbia began forcing residents of the town of Dakovica/Gjakovë to leave. Forces of the FRY and Serbia spread out through the town and went house to house ordering Kosovo Albanians from their homes. In some instances, people were killed, and most persons were threatened with death. Many of the houses and shops belonging to Kosovo Albanians were set on fire, while those belonging to Serbs were protected. During the period from 2 to 4 April 1999, thousands of Kosovo Albanians living in Dakovica/Gjakovë and neighbouring villages joined a large convoy, either on foot or driving in cars, trucks and tractors, and moved to the border with Albania. Forces of the FRY and Serbia directed those fleeing along pre-arranged routes, and at police checkpoints along the way most Kosovo Albanians had their identification papers and license plates seized. In some instances, Yugoslav army trucks were used to transport persons to the border with Albania.

b. Gnjilane/Gjilan: Forces of the FRY and Serbia entered the town of Prilepnica/Pë rlepnicë on or about 6 April 1999, and ordered residents to leave saying that the town would be mined the next day. The townspeople left and tried to go to another village but were turned back by police. On 13 April 1999, residents of Prilepnica/Pë rlepnicë were again informed that the town had to be evacuated by the following day. The next morning, the Kosovo Albanian residents left in a convoy of approximately 500 vehicles and headed to the Macedonian border. Shortly after the residents left, the houses in Prilepnica/Pë rlepnicë were set on fire. Kosovo Albanians in other villages in Gnjilane/Gjilan municipality were also forced from their homes, and were made to join another convoy to the Macedonian border. Along the way, some men were taken from the convoy and killed along the road. When the Kosovo Albanians reached the border, their identification papers were confiscated.

c. Kosovska Mitrovica/Mitrovicë : In late March 1999, forces of the FRY and Serbia began moving systematically through the town of Kosovska Mitrovica/Mitrovicë . They entered the homes of Kosovo Albanians and ordered the residents to leave their houses at once and to go to the bus station. Some houses were set on fire forcing the residents to flee to other parts of the town. Over a two week period the forces of the FRY and Serbia continued to expel the Kosovo Albanian residents of the town. During this period, properties belonging to Kosovo Albanians were destroyed and Kosovo Albanians were robbed of money, vehicles, and other valuables. A similar pattern was repeated in other villages in the Kosovska Mitrovica/Mitrovicë municipality, where Kosovo Albanians were forced from their homes, followed by the destruction of their villages by forces of the FRY and Serbia. The Kosovo Albanian residents of the municipality were forced to join convoys going to the Albanian border. *En route* to the border, Serb soldiers, policemen, and military officers robbed them of valuables and seized their identity documents.

d. Orahovac/Rahovec: On the morning of 25 March 1999, forces of the FRY and Serbia surrounded the village of Celine with tanks and armoured vehicles. After shelling the village, troops entered the village and systematically looted and pillaged everything of value from the houses. Most of the Kosovo Albanian villagers had fled to a nearby forest before the army and police arrived. On 28 March, a number of Serb police forced the thousands of people hiding in the forest to come out. After marching the civilians to a nearby village, the men were separated from the women and were beaten, robbed, and had all of their identity documents taken from them. The men were then marched to Prizren and eventually forced to go to the Albanian border.

On 25 March 1999, a large group of Kosovo Albanians went to a mountain near the village of Nagafc, also in Orahovac/Rahovec municipality, seeking safety from attacks on nearby villages. Forces of the FRY and Serbia surrounded them and on the following day, ordered the 8,000 people who had sought shelter on the mountain to leave. The Kosovo Albanians were forced to go to a nearby school and then they were forcibly dispersed into nearby villages. After three or four days, the forces of the FRY and Serbia entered the villages, went house to house and ordered people out. Eventually, they were forced back into houses and told not to leave. Those who could not fit inside the houses were forced to stay in cars and tractors parked nearby. On 2 April 1999, the forces of the FRY and Serbia started shelling the villages, killing a number of people who had been sleeping in tractors and cars. Those who survived headed for the Albanian border. As they passed through other Kosovo Albanian villages, which had been destroyed, they were taunted by Serb soldiers. When the villagers arrived at the border, all their identification papers were taken from them.

e. Pec/Pejë : On 27 and 28 March 1999, in the city of Pec/Pejë , forces of the FRY and Serbia went from house to house forcing Kosovo Albanians to leave. Some houses were set on fire and a number of people were shot. Soldiers and police were stationed along every street directing the Kosovo Albanians toward the town centre. Once the people reached the centre of town, those without cars or vehicles were forced to get on buses or trucks and were driven to the town of Prizren. Outside Prizren, the Kosovo Albanians were forced to get off the buses and walk approximately 40 kilometres to the Albanian border where they were ordered to turn their identification papers over to Serb policemen.

f. Pristina/Prishtinë : On or about 1 April 1999, Serbian police went to the homes of Kosovo Albanians in the city of Pristina/Prishtinë and forced the residents to leave in a matter of minutes. During the course of these forced expulsions, a number of people were killed. Many of those forced from their homes went directly to the train station, while others sought shelter in nearby neighbourhoods. Hundreds of ethnic Albanians, guided by Serb police at all the intersections, gathered at the train station and then were loaded onto overcrowded trains or buses after a long wait where no food or water was provided. Those on the trains went as far as General Jankovic, a village near the Macedonian border. During the train ride many people had their identification papers taken from them. After getting off the trains, the Kosovo Albanians were told by the Serb police to walk along the tracks into Macedonia since the surrounding land had been mined. Those who tried to hide in Pristina/Prishtinë were expelled a few days later in a similar fashion.

During the same period, forces of the FRY and Serbia entered the villages of Pristina/Prishtinë municipality where they beat and killed many Kosovo Albanians, robbed them of their money, looted their property and burned their homes. Many of the villagers were taken by truck to Glogovac in the municipality of Lipljan/Lipjan. From there, they were transported to General Jankovic by train and walked to the Macedonian border. Others, after making their way to the town of Urosevac/Ferizaj, were ordered by the Serb police to take a train to General Jankovic, from where they walked across the border into Macedonia.

g. Prizren: On 25 March 1999 the village of Pirana was surrounded by forces of the FRY and Serbia, tanks and various military vehicles. The village was shelled and a number of the residents were killed. Thereafter, police entered the village and burned the house of Kosovo Albanians. After the attack, the remaining villagers left Pirana and went to surrounding villages. Some of the Kosovo Albanians fleeing toward Srbica were killed or wounded by snipers. Serb forces then launched an offensive in the area of Srbica and shelled the villages of Reti e Utlet, Reti and Randobrava. Kosovo Albanian villagers were forced from their homes and sent to the Albanian border. From 28 March 1999, in the city of Prizren itself, Serb policemen went from house to house, ordering Kosovo Albanian residents to leave. They were forced to join convoys of vehicles and persons travelling on foot to the Albanian border. At the border all personal documents were taken away by Serb policemen.

h. Srbica/Skenderaj: On or about 25 March 1999, the villages of Vojnik, Lecina, Kladernica, Turiqevc Broje and Izbica were destroyed by shelling and burning. A group of approximately 4,500 Kosovo Albanians from these villages gathered outside the village of Izbica where members of the forces of the FRY and Serbia demanded money from the group and separated the men from the women and children. A large number of the men were then killed. The surviving women and children were moved as a group towards Vojnik and then on to the Albanian border.

i. Suva Reka/Suharekë : On the morning of 25 March 1999, forces of the FRY and Serbia surrounded the town of Suva Reka/Suharekë . During the following days, police officers went from house to house, threatening Kosovo Albanian residents, and removing many of the people from their homes at gunpoint. The women, children and elderly were sent away by the police and then a number of the men were killed by the Forces of the FRY and Serbia. The Kosovo Albanians were forced to flee making their way in trucks, tractors and trailers towards the border with Albania. While crossing the border, they had all their documents and money taken.

On 31 March 1999, approximately 80,000 Kosovo Albanians displaced from villages in the Suva Reka/Suharekë municipality gathered near Bellanice. The following day, forces of the FRY and Serbia shelled Bellanice, forcing the displaced persons to flee toward the Albanian border. Prior to crossing the border, they had all their identification documents taken away.

j. Urosevac/Ferizaj: During the period between 4 and 14 April 1999, forces of the FRY and Serbia shelled the villages of Softaj, Rahovica, Zltara, Pojatista, Komoglava and Sojevo, killing a number of residents. After the shelling, police and military vehicles entered the villages and ordered the residents to leave. After the villagers left their houses, the soldiers and policemen burned the houses. The villagers that were displaced joined in a convoy to the Macedonian border. At the border, all of their documents were taken.

98. Beginning on or about 1 January 1999 and continuing until the date of this indictment, forces of the FRY and Serbia, acting at the direction, with the encouragement, or with the support of **Slobodan MILOSEVIC, Milan MILUTINOVIC, Nikola SAINOVIC, Dragoljub OJDANIC,** and **Vlajko STOJILJKOVIC**, have murdered hundreds of Kosovo Albanian civilians. These killings have occurred in a widespread or systematic manner throughout the province of Kosovo and have resulted in the deaths of numerous men, women, and children. Included among the incidents of mass killings are the following:

a. On or about 15 January 1999, in the early morning hours, the village of Racak (Stimlje/Shtime municipality) was attacked by forces of the FRY and Serbia. After shelling by the VJ units, the Serb police entered the village later in the morning and began conducting house-to-house searches. Villagers, who attempted to flee from the Serb police, were shot throughout the village. A group of approximately 25 men attempted to hide in a building, but were discovered by the Serb police. They were beaten and then were removed to a nearby hill, where the policemen shot and killed them. Altogether, the forces of the FRY and Serbia killed approximately 45 Kosovo Albanians in and around Racak. (Those persons killed who are known by name are set forth in Schedule A, which is attached as an appendix to this indictment.)

b. On or about 25 March 1999, forces of the FRY and Serbia attacked the village of Bela Crkva (Orahovac/Rahovec municipality). Many of the residents of Bela Crkva fled into a streambed outside the village and sought shelter under a railroad bridge. As additional villagers approached the bridge, a Serbian police patrol opened fire on them killing 12 persons, including 10 women and children. The police then ordered the remaining villagers out of the streambed, at which time the men were separated from the women and small children. The police ordered the men to strip and then systematically robbed them of all valuables. The women and children were then ordered to leave. The village doctor attempted to speak with the police commander, but he was shot and killed, as was his nephew. The other men were then ordered back into the streambed. After they complied, the police opened fire on the men, killing approximately 65 Kosovo Albanians. (Those persons killed who are known by name are set forth in Schedule B which is attached as an appendix to the indictment.)

c. On or about 25 March 1999, the villages of Velika Krusa and Mali Krusa/Krushe e Mahde and Krushe e Vogel (Orahovac/Rahovec municipality) were attacked by forces of the FRY and Serbia. Village residents took refuge in a forested area outside Velika Krusa/Krushe e Mahde, where they were able to observe the police systematically looting and then burning the villagers' houses. On or about the morning of 26 March 1999, Serb police located the villagers in the forest. The police ordered the women and small children to leave the area and to go to Albania. The police then searched the men and boys and took their identity documents, after which they were made to walk to an uninhabited house between the forest and Mali Krusa/Krushe e Vogel. Once the men and boys were assembled inside the house, the Serb police opened fire on the group. After several minutes of gunfire, the police piled hay on the men and boys and set fire to it in order to burn the bodies. As a result of the shootings and the fire, approximately 105 Kosovo Albanian men and boys were killed by the Serb police. (Those persons killed who are known by name are set forth in Schedule C which is attached as an appendix to this indictment.)

d. On or about the evening of 26 March 1999, in the town of Dakovica/Gjakovë , Serb gunmen came to a house on Ymer Grezda Street. The women and children inside the house were separated from the men, and were ordered to go upstairs. The Serb gunmen then shot and killed the 6 Kosovo Albanian men who were in the house. (The names of those killed are set forth in Schedule D which is attached as an appendix to this indictment.)

e. On or about 27 March 1999, in the morning hours, forces of the FRY and Serbia attacked the village of Crkolez/Padalishte (Istok/Istog municipality). As the forces entered the village, they fired on houses and on villagers who attempted to flee. Eight members of the Beke IMERAJ family were forced from their home and were killed in front of their house. Other residents of Crkolez/Padalishte were killed at their homes and in a streambed near the village. Altogether, forces of the FRY and Serbia killed approximately 20 Kosovo Albanians from Crkolez/Padalishte. (Those persons killed who are known by name are set forth in Schedule E which is attached as an appendix to this indictment.)

f. On or about 27 March 1999, FRY and Republic of Serbia forces attacked the village of Izbica (Srbica/Skenderaj municipality). Several thousand village residents took refuge in a meadow outside the village. On or about 28 March 1999, forces of the FRY and Serbia surrounded the villagers and then approached them, demanding money. After valuables were stolen by the soldiers and policemen, the men were separated from the women and small children. The men were then further divided into two groups, one of which was sent to a nearby hill, and the other of which was sent to a nearby streambed. Both groups of men were then fired upon by the forces of the FRY and Serbia, and approximately 130 Kosovo Albanian men were killed. (Those persons killed who are known by name are set forth in Schedule F which is attached as an appendix to this indictment.)

g. On or about the early morning hours of 2 April 1999, Serb police launched an operation against the Qerim district of Dakovica/Gjakovë . Over a period of several hours, Serb police forcibly entered houses of Kosovo Albanians in the Qerim district, killing the occupants, and then setting fire to the buildings. In the basement of a house on Millosh Gilic Street, the Serb police shot the 20 occupants and then set the house on fire. As a result of the shootings and the fires set by the Serb police, 20 Kosovo Albanians were killed, of whom 19 were women and children. (The names of those killed are set forth in Schedule G which is attached as an appendix to this indictment.)

99. Beginning on or about 1 January 1999 and continuing until the date of this indictment, the forces of the FRY and Serbia, acting at the direction, with the encouragement, or with the support of **Slobodan MILOSEVIC, Milan MILUTINOVIC, Nikola SAINOVIC, Dragoljub OJDANIC,** and **Vlajko STOJILJKOVIC**, have utilised the means and methods set forth in paragraphs 92 through 98 to execute a campaign of persecution against the Kosovo Albanian civilian population based on political, racial, or religious grounds.

100. By these actions **Slobodan MILOSEVIC, Milan MILUTINOVIC, Nikola SAINOVIC, Dragoljub OJDANIC,** and **Vlajko STOJILJKOVIC** planned, instigated, ordered, committed or otherwise aided and abetted the planning, preparation or execution of:

COUNT 1
(Deportation)

Count 1: Deportation, a **CRIME AGAINST HUMANITY**, punishable under Article 5(d) of the Statute of the Tribunal.

COUNT 2
(Murder)

Count 2: Murder, a **CRIME AGAINST HUMANITY**, punishable under Article 5 (a) of the Statute of the Tribunal.

COUNT 3
(Murder)

Count 3: Murder, a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (murder) of the Geneva Conventions.

COUNT 4
(Persecutions)

Count 4: Persecutions on political, racial and religious grounds, a **CRIME AGAINST HUMANITY**, punishable under Article 5(h) of the Statute of the Tribunal.

Louise Arbour
Prosecutor

22 May 1999
The Hague, The Netherlands

Schedule A
Persons Known by Name Killed at Racak - 15 January 1999

Name	Approximate Age	Sex
ASLLANI, Lute	30	Female
AZEMI, Banush		Male
BAJRAMI, Ragip	34	Male
BEQIRI, Halim	13	Male
BEQIRI, Rizah	49	Male
BEQIRI, Zenel	20	Male

BILALLI, Lutfi		Male
EMINI, Ajet		Male
HAJRIZI, Bujar		Male
HAJRIZI, Myfail	33	Male
HALILI, Skender		Male
HYSENAJ, Haqif		Male
IBRAHIMI, Hajriz		Male
IMERI, Hakip		Male
IMERI, Murtez		Male
IMERI, Nazmi		Male
ISMALJI, Meha		Male
ISMALJI, Muhamet		Male
JAKUPI, Ahmet		Male
JAKUPI, Esref	40	Male
JAKUPI, Hajriz		Male
JAKUPI, Mehmet		Male
JAKUPI, Xhelal		Male
JASHARI, Jasher	24	Male
JASHARI, Raif	20	Male
JASHARI, Shukri	18	Male
LIMANI, Fatmir	35	Male
LIMANI, Nexhat	19	Male
LIMANI, Salif	23	Male
MEHMETI, Bajram		Male
MEHMETI, Hanumshah		Female
METUSHI, Arif		Male
METUSHI, Haki	70	Male
MUSTAFA, Ahmet		Male
MUSTAFA, Aslani	34	Male
MUSTAFA, Muhamet	21	Male
OSMANI, Sadik	35	Male
SALIHU, Jashar	25	Male
SALIHU, Shukri	18	Mal

De Groene Amsterdammer van 8-9-2001

Twijfelen aan het tribunaal

Is het Joegoslavië Tribunaal rechtmatig? Sinds Milosevic' halsstarrige weigering het te erkennen rijst de twijfel. Dat het tribunaal wel degelijk te manipuleren is, bleek in de rechtszaak tegen Tadic. — door Joeri Boom

«De grote Milosevic-show» *(Algemeen Dagblad)* en «circus-Milosevic» *(Nova)* wordt het proces in Den Haag tegen de oud-president van Joegoslavië al genoemd. Toegegeven, het schouwspel heeft iets tragikomisch. Milosevic die het tribunaal met hooghartig gefronste wenkbrauwen afdoet als een «illegaal instituut», de openbaar aanklager Carla del Ponte en haar medewerkers in zwarte tuniek met witte bef lispelend over aanklachten die nog niet helemaal rond zijn, en de opperrechter Robert May die het allemaal aanhoort met Britse bedachtzaamheid en zo nu en dan zijn bril afzet en zijn ogen uitwrijft alvorens een van beide partijen streng toe te spreken.
Nu voor het eerst een oud-staatshoofd door een VN-tribunaal wordt vervolgd wegens oorlogsmisdrijven en misdaden tegen de mensheid, steekt twijfel de kop op. Want Milosevic' weigering het tribunaal te erkennen mag dan worden afgeschilderd als de puberale stuip van een moreel gedegenereerde man, de gewezen president van Joegoslavië is uiterst vasthoudend in zijn stellingname dat het tribunaal een illegale en partijdige rechtbank is.
«Het lijkt haast tactiek zo vaak mogelijk te roepen dat het tribunaal onrechtmatig en bevooroordeeld is in de hoop dat mensen het dan gaan geloven», zegt Göran Sluiter, volkenrechtdeskundige van de universiteit van Utrecht. Het valt hem op dat de aanklagers niet sterk reageren op dergelijke beschuldigingen. Niet verstandig, meent Sluiter, «want de laatste die aan het touwtje trekt, doet het licht uit».
Na Milosevic' uitlevering aan Den Haag werd een Internationaal Comité ter Verdediging van Slobodan Milosevic (ICDSM) opgericht. Voorzitter is de Canadese advocaat Christopher Black die eerder voor het tribunaal in Arusha Rwandezen verdedigde die werden verdacht van volkerenmoord. Verder zijn enkele prominente Grieken lid, onder wie de componist Théodorakis en de oud-verzetsheld Manolis Glezos, en de Amerikaanse oud-minister en linkse bekeerling Ramsey Clark. Clark was minister van Justitie onder president Lyndon B. Johnson en in die functie mede verantwoordelijk voor het scherpe optreden jegens anti-Vietnamdemonstranten en de radicaliserende zwarte mensenrechtenbeweging. Na Johnsons verkiezingsnederlaag in 1968

maakte hij een zwaai naar links. Hij begon de oorlog in Vietnam te veroordelen en leidde een onafhankelijk onderzoek naar de FBI-moorden op twee Black Panter-leiders. Tegenwoordig is Ramsey Clark er als de kippen bij om aan de hegemonie van de Verenigde Staten te knabbelen. Aangezien Milosevic het Joegoslavië Tribunaal niet erkent, kondigde advocaat Black aan zijn uitlevering en gevangenschap aan te vechten bij de Nederlandse rechter. Net als de overige leden van het ICDSM toont hij zich persoonlijk zeer bij de zaak betrokken. «De echte oorlogsmisdadigers moet u zoeken op het hoofdkwartier van de Navo», meent hij. En over de slachtoffers van Srebrenica: «Welke slachtoffers bedoelt u? Die zevenduizend soldaten van wie er later vijfduizend met hun namen op kieslijsten verschenen?» Het zal Milosevic' zaak weinig goed doen.
Afgelopen week diende het kort geding tegen de staat, aangespannen door drie Nederlandse advocaten onder aanvoering van Nico Steijnen. Uit naam van het ICDSM daagden zij de Staat der Nederlanden en eisten ze in een ellenlang pleidooi Milosevic' vrijlating. Steijnen, geflankeerd door de advocaten Olof en Hummels, hekelde «de heksenjacht van door de VS gefinancierde premiejagers van Kfor» die «mensen roven en ze spoorslags naar Den Haag brengen». Volgens Steijnen waren dergelijke praktijken onderdeel van een «decenniumlange anti-Servische hetze». Het Milosevic-steuncomité verloor de zaak.

De vraag of het Joegoslavië Tribunaal rechtmatig is, is al bij de eerste rechtszaak uit zijn bestaan — die tegen Dusko Tadic — aan de orde geweest en bevestigend beantwoord. «Door de rechters van het tribunaal zélf», zeggen criticasters. Zij houden vol dat het tribunaal niet door de Veiligheidsraad van de Verenigde Naties opgericht had mogen worden. Alleen de Algemene Vergadering zou een rechtmatig strafhof in het leven kunnen roepen.
Voor dat argument is het te laat meent volkenrechtspecialist Göran Sluiter: «Bijna alle staten hebben wetgeving aangenomen die in verband staat met het tribunaal en meegestemd over de aanstelling van rechters. Daarmee hebben ze het tribunaal feitelijk erkend. Mexico is het enige VN-land dat stelselmatig heeft geweigerd iets te doen wat het tribunaal zou erkennen. Maar de Chinezen, die het tribunaal in de pers doorgaans afbranden, zijn al vanaf het begin bij het tribunaal betrokken. Ze leveren een rechter.»
Sluiter meent dat advocaat Steijnen cum suis een kans hebben laten liggen door niet te wijzen op de merkwaardige «aansporing» van de Veiligheidsraad aan het tribunaal om de oorlogsmisdaden in Kosovo te gaan onderzoeken toen beelden van Albanese vluchtelingen over de wereld gingen. «De Veiligheidsraad heeft plechtig beloofd zich na de oprichting van het tribunaal niet meer inhoudelijk met de zaken te bemoeien. Dat ze dat nu toch heeft gedaan, klopt niet.»
Een ander argument tegen het tribunaal is dat het bevooroordeeld zou zijn. Er zou zelfs sprake zijn van overwinnaars-rechtsspraak. Volgens de statuten worden de rechters echter gekozen door de Algemene Vergadering, op voorspraak van de Veiligheidsraad. Ook rechters afkomstig uit landen die welwillend stonden tegenover Milosevic' regime, zoals China en Rusland (die bovendien beide zitting hebben in de Veiligheidsraad), zouden gekozen kunnen worden. *Sluiter:* «Welke rechters op welke zaken worden gezet, wordt bepaald door de president. Het moet iemand zijn die zo'n zaak aankan en niet al zwaar is belast.
Over het kaliber van Chinese rechters bestaan twijfels. Maar in theorie kunnen Russische en Chinese rechters zitting hebben in het college dat een

zaak als die van Milosevic behandelt. Mijn indruk is dat het tribunaal in de praktijk een redelijk onafhankelijk en onbevooroordeeld vervolgingsbeleid heeft ontwikkeld.»
Toch zijn twijfels mogelijk bij de objectiviteit van het tribunaal. In de statuten staat dat de kosten zullen worden gedragen door het reguliere budget van de VN. Buiten de statuten om werd echter bepaald dat afzonderlijke landen ook «vrijwillige bijdragen» konden doen in valuta of natura (het uitlenen van personeel). Uit cijfers van het tribunaal blijkt dat die vooral komen van de Verenigde Staten — die overigens nog een enorme schuld hebben aan de reguliere VN-kas — en de Europese Unie. Navo-lidstaten als Nederland (gastland en belangrijk financieel sponsor), de Verenigde Staten en Italië maken vrijwel elk jaar meer dan twee miljoen dollar over op rekening van het tribunaal. Pakistan, dat de VS graag te vriend houdt, betaalt jaarlijks een miljoen. Dat zijn bedragen die schril afsteken bij de jaarlijkse vijfhonderd dollar van Namibië en de vijftienhonderd van Malta. *Sluiter:* «De vrijwillige bijdrage van de VS was aanvankelijk een probleem. Vooral met het leveren van gratis personeel hebben ze in het begin hun stempel kunnen drukken.»

Dat het tribunaal wel degelijk te manipuleren is, bleek in de rechtszaak tegen Dusko Tadic. Hij werd geconfronteerd met een getuige die werd geleverd door de Bosnische regering. Deze «getuige L.» was een Servische krijgsgevangene die volgens de Bosniërs samen met Tadic burgers had gedood, verkracht en anderszins mishandeld. Maar L. bleek een valse getuige, zo wist Tadic' advocaat Michaïl Wladimiroff aan te tonen. Hij bleek door de Bos niërs gedwongen te zijn om valse verklaringen af te leggen omdat hij anders zou worden gedood. Goran Trkulja, tribunaal-*watcher* en journalist, speurde voor het vpro-programma *Argos* naar de achtergronden van getuige L. Zijn echte naam bleek Opacic, hij had nauwelijks een opleiding genoten en geen vlieg kwaad gedaan. Hij was zelf een vluchteling en werd als kanonnenvlees naar het front gestuurd. Daar raakte hij bijna onmiddellijk gewond en werd hij gevangengenomen. Hij was nog heel jong en stond nergens geregistreerd. Dus hij was makkelijk te beïnvloeden.
Na zijn ontmaskering werd Opacic terug gestuurd naar Bosnië. «Het tribunaal wist niet hoe snel ze van hem af moesten komen. Hij was een kroongetuige in die belangrijke allereerste rechtszaak. De regering in Sarajevo had met haar bedrog het hele tribunaal doen wankelen. In Bosnië werd Opacic door de Moslim-regering vastgezet. Hij werd veroordeeld tot tien jaar gevangenis op basis van de getuigenis voor het tribunaal die hij nota bene onder dwang van de Moslim-regering zelf bij elkaar had gelogen. *Trkulja:* «Je kunt je afvragen of zoiets niet nog eens kan gebeuren. Ik hoorde laatst dat iemand na een getuigenis met hulp van het tribunaal uit Bosnië weg kon en zich in Zweden kon gaan vestigen. Dat lijkt een beloning.»

Dat het tribunaal notoir anti-Servisch zou zijn, zoals Milosevic' medestanders beweren, is moeilijk hard te maken. Vooralsnog zijn de meeste veroordeelden van Bosnisch-Kroatische huize, en ook Moslims worden voorgeleid. Wel is opvallend dat de media maar moeilijk overweg kunnen met het bewijs dat niet alleen Serviërs schuld hebben gehad aan de misdaden in Bosnië en Kroatië.
Zo was er maar weinig aandacht voor de voorgeleiding van drie hoge

Moslim-officieren. Net als Milosevic worden ze op grond van hun commandoverantwoordelijkheid in staat van beschuldiging gesteld voor de oorlogs misdaden van hun ondergeschikten: moslim strijders van buiten Bosnië, die er een jihad kwamen uitvechten, en fanatieke Bosnische strijders van de beruchte Zevende Moslim-bergbrigade die honderden Bosnisch-Kroatische en -Servische burgers uitmoordden.
En toen het *Journaal* onlangs Belgrado bezocht, had de verslaggever slechts aandacht voor de minimale belangstelling van de Ser viërs in de berechting van hun gewezen president, terwijl de kranten er volstonden van de zojuist vastgestelde betrokkenheid van de CIA bij Operatie Storm — de bliksemactie waarmee Kroatische troepen de Krajina terugveroverden op de Servische opstandelingen en etnisch schoonveegden — met tweehonderdduizend vluchtelingen als gevolg. De Kroatische generaal Gotovina is onlangs bijna geruisloos door het tribunaal aangeklaagd voor de moord op honderdvijftig hoogbejaarden (sommigen ouder dan negentig jaar) die niet tijdig konden wegkomen.
Was er meer aandacht geweest voor andere rechtszaken dan alleen die tegen Milosevic, dan was er van een «circus» of een «show» geen sprake geweest. En dan had zijn klacht, geuit tijdens zijn voorgeleiding afgelopen week, over de «machinerie van geheime diensten en media» die tegen hem in stelling werd gebracht, slechts hilariteit gewekt. Geen twijfel.

X

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Verklaring van President Slobodan Milosevic over De onwettigheid van het Joegoslaviëtribunaal in Den Haag [30 August 2001]

"Kan een straftribunaal voor Joegoslavië, dat geen oog heeft voor het grootschalig geweld van de VS en aandacht van het publiek afleidt van het gedrag van de VS, dat bij stilzwijgende afspraak de lucht- en raketaanvallen op burgers en het gebruik van illegale wapens tegen een reeks van landen legitimeert, bijdragen aan het vertrouwen in de kracht van de wet, gerechtigheid en vrede?"

Er bestaan drie fatale tekortkomingen in het zogenaamde Internationale Tribunaal voor Misdaden in Voormalig Joegoslavië. Elk van hen heeft rampzalige gevolgen voor de queeste van de mensheid naar vrede, kracht van de wet, democratie, waarheid en gerechtigheid.

1. Het handvest van de Verenigde Naties geeft de Veiligheidsraad niet het recht tot instelling van een Straftribunaal

De VN-veiligheidsraad heeft zich een recht aangemeten, die zij niet bezit en corrumpeert daarmee het Handvest van de VN, plaatst zichzelf boven de wet en bedreigt ons, 'de volkeren van de Verenigde Naties', met een wetteloze toekomst waarin een supermacht de gesel van de oorlog gebruikt om zijn zin te krijgen.

Er bestaat in de geschiedenis van het plannen, ontwerpen, bespreken, goedkeuren of ratificeren van het VN-handvest niets, dat impliceert of in overeenstemming is met de opzet enig lichaam, ingesteld door of onder het Handvest, te machtigen tot het instellen van een strafhof. De letter en de geest van het Handvest, de structuur en de verdeling van volmachten en functies, inclusief die welke opgenomen zijn in het Statuut voor het Internationaal Gerechtshof, ontkennen allemaal het bestaan van iedere ruimte onder het Handvest tot het installeren van strafhoven. Het Strafhof voor Voormalig Joegoslavië is onwettig en de instelling daarvan betekent misbruik van de Verenigde Naties.

De Verenigde Naties zouden er nooit gekomen zijn wanneer haar Handvest zou stellen of impliceren, dat er onder haar autoriteit een strafhof zou kunnen worden ingesteld. Niemand, die gelooft in het bestaan van historische waarheid of dat woorden een betekenis hebben, kan na bestudering van de ontstaansgeschiedenis en de tekst van het Handvest, volhouden, dat het Handvest van de Verenigde Naties de Veiligheidsraad machtigt tot het instellen van een strafhof.

1.1. Een Internationaal Strafhof kan slechts worden ingesteld door een multinationaal verdrag of een amendement op het Handvest van de Verenigde Naties

De nationale afgevaardigden, die gediend hebben bij de Veiligheidsraad en in de Algemene Assemblee en de geleerden, juristen en deskundigen, die voor meer dan dertig jaar gewerkt hebben aan de oprichting van een internationaal strafhof, erkennen, dat de enig wettige en bindende wijze waarop een dergelijk hof kan worden ingesteld, een overeenkomst is tussen naties middels een verdrag tot dat doel gesloten, of via een strikt volgens de regels aangebracht amendement op het Handvest van de Verenigde Naties om een dergelijk hof te autoriseren of op te richten.

Toen 120 landen, vergaderd in Rome in juli 1998, eindelijk tot overeenstemming kwamen over een Internationaal Strafhof, was dat bij een verdrag dat jarenlang was bestudeerd, bewerkt en bediscussieerd. De Verenigde Staten, de machtigste deelnemer in dat lange proces, probeerden stelselmatig dat verdrag te verzwakken om leiders en militairen van de VS van

vervolging te vrijwaren. Toen zij daarin niet slaagden, toen behoorden de VS, de prominentste en machtigste, tot het handvol naties dat weigerde te tekenen. Tot 1 augustus 2001 hebben 37 naties, Nederland pas kort geleden, dat verdrag geratificeerd.

De VS proberen met alle middelen landen te bewegen, te dwingen of om te kopen tot het niet ratificeren van dat verdrag.

1.2. De oprichting van het Internationaal Straftribunaal voor Voormalig Joegoslavië was een wetteloze daad van politiek eigenbelang door de Verenigde Staten, bedoeld om een vijand te demoniseren en te vernietigen en de instelling van een wettig Internationaal Strafhof te frustreren.

Op aandringen van de VS heeft de Veiligheidsraad bijna vijftig jaar na zijn ontstaan een nieuw en machtig wapen gesmeed voor het demoniseren van een land en volk en het voor de rest van hun leven van hun vrijheid beroven van personen en legde dat wapen grotendeels in handen van de Verenigde Staten. De belangrijkste precedenten voor dergelijke pseudo-juridische daden gedurende de millennia voorafgaande aan de oprichting van de VN zijn de tribunalen van overwinnaars tegen leiders en soldaten van in oorlogen verslagen volkeren en de rechtbanken van koloniale machten ter overheersing en bestraffing van onderworpen volkeren. Deze precedenten zijn talrijk en het geweld en de wreedheid en de haat die zij lieten blijken en opriepen, was extreem.

1.3. Zolang de Veiligheidsraad niet ingetoomd wordt door het VN-handvest en het internationaal recht, kan hij doen wat hij maar wil

Zolang niet ingetoomd door het handvest van de VN, kan de Veiligheidsraad ongehinderd door enige wet, alles doen wat hij wil. Eerdere adepten van de wereldmacht van de VS hebben openlijk een dergelijke ongebreidelde vrijheid voor de Veiligheidsraad opgeëist. Zo schreef John Foster Dulles in 1950: "De Veiligheidsraad is niet een lichaam voor de versterking van erkende wetten. Hij is zelf de wet ... Er gelden geen rechtsprincipes als richtlijn, hij kan naar eigen goeddunken handelen."

Wanneer men instemt met deze opvatting over de macht van de Veiligheidsraad, stemt men er mee in, dat het machtigste internationale orgaan, opgericht onder het Handvest van de Verenigde Naties 'ter vernietiging van de gesel van de oorlog', boven iedere nationale en internationale wet is verheven.

Maar absolute vrijheid is de wetteloosheid per definitie en door William O. Douglas van het Opperste Gerechtshof van de VS betiteld als 'vernietigender voor de vrijheid dan elke andere uitvinding van de mens'. De rechten van alle naties, rassen, religies, culturen, politieke partijen en personen worden daardoor ondergeschikt aan de wil van de Veiligheidsraad en de enkele supermacht die hem maar al te vaak domineert. Op vijftien na zijn alle naties uitgesloten van de Veiligheidsraadvergaderingen. Elk van de vijf permanente leden kan een veto uitbrengen tegen zijn besluiten.

De Veiligheidsraad wordt overheerst door één enkele natie. Iedere vertegenwoordiger in de Veiligheidsraad stemt volgens de instructies van de regering die hem heeft benoemd en in dienst van de belangen van die regering, niet als internationaal staatsman in dienst van alle volkeren en van de doelen waarvoor de VN was opgericht. De Veiligheidsraad is ontoegankelijker, anoniemer en ongevoeliger voor democratische processen dan enig ander internationaal politiek instrument.

2. Een eenmalig gelegenheidshof gericht op één land, opgericht door een internationale politieke macht om haar geopolitieke belangen te dienen is onbevoegd tot rechtspreken en strekt tot verdeeldheid en geweld

Het onwettige straftribunaal voor voormalig Joegoslavië tast recht en wet aan omdat het onbevoegd is recht te spreken tussen de naties, of binnen de politiek beoogde natie. Het zal geweld, verdeeldheid en gevaar voor oorlog met de naburige naties en volkeren doen toenemen evenals binnen Joegoslavië tussen de segmenten van de maatschappij, die door de VS-politiek van balkanisering van voormalig Joegoslavië tegen elkander zijn opgezet en tegen de nieuwe, door de VS geïnstalleerde, regering.

Als het Handvest de Veiligheidsraad al gemachtigd zou hebben strafhoven op te richten, dan zou het nooit een tijdelijk met politieke bedoelingen opgericht gelegenheidshof kunnen zijn ter vervolging van geselecteerde groepen of personen in één land want een dergelijk hof is niet bevoegd tot rechtsbedeling. Een dergelijk *ad hoc*hof schendt de hoofdprincipes van alle wetten. Gelijkheid is de moeder van het recht. Een internationaal hof, indien niet primair dan toch hoofdzakelijk, opgericht ter vervolging van de daden van een beperkte groep mensen binnen één land is niet bevoegd tot rechtsbedeling.

Wanneer de Veiligheidsraad een strafhof zou kunnen oprichten ter vervolging van gedrag binnen één enkel land als Joegoslavië, dan kan hij voor elk land een hof aanwijzen en naar gelang zich politieke en economische gelegenheden voordoen, stuk voor stuk zijn vijanden viseren en zichzelf en de hem onderdanige landen vrijwaren van een dergelijke vervolging. Wanneer ooit de VS of een door hen beschermde bondgenoot dan wel een politiek, economisch of militair van de VS afhankelijke staat het subject zouden worden van een serieuze inspanning van de Veiligheidsraad hen te vereren met een straftribunaal, dan zouden de VS daartegen hun veto uitspreken.

Een Hof opgericht voor misdaden in slechts één land is per definitie discriminerend en niet bevoegd voor rechtsbedeling, een wapen tegen beoogde vijanden of vijandige belangen en hetzelfde als oorlog, maar dan met andere middelen. Als er al een internationaal strafhof zou moeten zijn, dan zou het gelijkelijk moeten optreden tegenover alle naties waarbij er niet één boven de wet staat. Een *ad hoc* tribunaal voor één enkel land corrumpeert het internationale recht.

Een *ad hoc* tribunaal kan uiteraard alleen opgericht worden na het begaan van daden, die volgens de Veiligheidsraad de oprichting van een dergelijk hof rechtvaardigen, omdat er geen andere redenen kunnen bestaan. Het is dus altijd *ex post facto* (na de feiten). Daarmee wordt een oeroud rechtsbeginsel met voeten getreden. Als rationele basis voor zijn optreden dient de Veiligheidsraad ook een aantal te onderzoeken beschuldiging op tafel te leggen, hoewel een dergelijk politiek lichaam daarvoor niet is opgericht, omdat een land of factie daarmee inherent gecriminaliseerd wordt door het op een in feite politiek besluit gedrukte stempel van de Veiligheidsraad van de Verenigde Naties. Alleen al de beschuldiging door de Veiligheidsraad van genocide, misdaden tegen de vrede, oorlogsmisdaden, of misdaden tegen de mensheid demoniseert eenieder die daarvan wordt beschuldigd.

2.1. Het op politieke gronden viseren van een natie ter vervolging van genocide, oorlogsmisdaden en misdaden tegen de mensheid schept een onweerstaanbare dwang tot veroordelen

Onderzoekers, aanklagers en griffiers bij een tijdelijk tribunaal ter vervolging van één volk en zijn reeds gedemoniseerde leiders wegens de grootste misdaden van de mensheid, zullen denken dat zij gefaald hebben als het niet tot veroordelingen komt. De hele onderneming is doordrenkt van een geest van onderdrukking. Van de rechters, benoemd in een onder dergelijke omstandigheden opgericht tribunaal, zullen weinigen zich vrij voelen vrij

te spreken anders dan om, in het geval van uiterst marginale of duidelijk onterecht beschuldigden, een schijn van objectiviteit te creëren.

2.2. *Landen die ad hoc internationale tribunalen oprichten, willen de aandacht afleiden van hun eigen misdrijven en fouten of van die van hun bondgenoten en politieke stromannen terwijl zij zelf ongestraft doorgaan met het uitvoeren van en dreigen met massavernietiging*

Een tegen één land gericht *ad hoc* tribunaal kan niet de misschien wel grotere, misdaden vervolgen, die door een ander land, coalitie, bondgenoot of hun politieke agenten in hetzelfde conflict zijn begaan en die een nog grotere bron van geweld en bedreiging voor de vrede waren en zijn. Het land dat de oprichting van het speciale tribunaal er door wist te drukken ter verdere beschadiging en demonisering van zijn vijand, wordt vaak afgeschermd van kritiek door een lawine van propaganda, gesteund door de schijn van neutraliteit van de Verenigde naties en van vredesinspanningen.

Welk hof zal een vonnis vellen over de misdaad van de luchtbombardementen door VS-vliegtuigen op hulpeloze burgers, hun huizen, drinkwatervoorziening, energiecentrales, fabrieken, kantoorgebouwen, scholen, ziekenhuizen waardoor direct duizenden levens getroffen werden en miljarden dollars schade toegebracht is in Belgrado, Nis, Novi Sad en talloze andere steden en dorpen? Is de bomaanval van de VS op de Chinese ambassade dan geen misdaad tegen de vrede?

Wie zal er verantwoordelijk gehouden worden voor de vernietiging van Pristina door NAVO-vliegtuigen, of voor de aanvallen op vluchtelingencolonnes in Kosovo en Metohia? Is het gebruik door de VS van clusterbommen, die messcherpe metaaldeeltjes uitbraken over een oppervlak zo groot als een voetbalveld, in de tuin van een ziekenhuis in Nis geen misdaad. Zal de Veiligheidsraad ooit optreden ter voorkoming en bestraffing van het gebruik van verarmd uranium door de VS, dat geen onderscheid maakt bij de bestraling van lucht, water en grond en de voedselketen en voor miljoenen jaren vergiftigt?

Het internationale recht doet niets tegen het bombarderen van de hulpeloze bevolkingen met militair geavanceerde technologie waarmee een land vernietigd kan worden zonder er zelfs een voet in te zetten, omdat een supermacht bepaalt wat misdaden zijn en de vervolging internationaal controleert. Het belangrijkste element in de moderne militaire macht is massavernietiging. Landen met het grootste potentieel aan massavernietiging zijn de winnaars. Dit stelt de burgerbevolking bloot aan het allergrootste gevaar; het directe doel van de lucht- en raketaanvallen van de VS was de infrastructuur van de het leven— gebouwen, water, energie, transport, communicatie, voedselvoorziening, opslag en distributiesystemen, gezondheidszorg, scholen, kerken, moskeeën, synagogen, buitenlandse ambassades. Verscheidene duizenden burgers werden onmiddellijk gedood en velen stierven later aan de gevolgen. De VS zegt dat aan hun kant 159 slachtoffers vielen waarvan een derde door eigen vuur, niet een is er in het gevecht gesneuveld.

In 1998 vuurden de VS vanuit internationale wateren 21 Tomahawk Kruisraketten af ter vernietiging van de farmaceutische fabriek El Shifa te Gartoem in Soedan, die voor meer dan de helft voorzag in de behoefte aan medicijnen voor de zeer arme plaatselijke bevolking, die tot nu toe geen vervanging heeft gekregen voor die verloren gegane voorziening. De VS blijven de opstand in Zuid-Soedan steunen en dreigen Soedan te vervolgen voor een *ad hoc* straftribunaal

De NAVO laat er zich niet op voorstaan het geweld tussen Serven, etnische Albanezen en andere volkeren in Kosovo en Metohia te hebben voorkomen. Maar in feite heeft de NAVO dat geweld aangewakkerd. De NAVO bombardeerde Servië voor 79 dagen met gebruikmaking van illegale wapens als clusterbommen en had het vooral gemunt op de bevolking daarbij voor miljarden dollars schade aanrichtend aan civiele instellingen en

gebouwen als de Servische TV en radio-omroep. Kosovo en Metohia werden het zwaarst van al gebombardeerd, waarbij bijna heel Pristina werd verwoest en duizend Albanezen, Moslims, Serven, Roma, Turken en anderen werden gedood en honderdduizenden op de vlucht gedreven uit Kosovo en Metohia. De schade toegebracht aan het Joegoslavische leger was verwaarloosbaar. In de zomer van 2001 gebruiken de VS nog bijna dagelijks clusterbommen in Noord- en Zuid-Irak. Maar als in 1999 de VS en de NAVO-landen als 'vredesmacht' Kosovo en Metohia binnentrekken, weigeren zij op de grond bescherming te bieden aan mensen die daar in gevaar verkeren.

Er zal geen oplossing of hulp komen voor Servische slachtoffers van wreedheden, noch voor de 500.000 Serven die, ware het niet op instructie van de VS dan toch met hun goedkeuring, door Kroatië voor altijd uit hun huizen in de Krajina werden verdreven; noch voor de 330.000 Serven die sedert het staakt het vuren in 1999 voor altijd uit Kosovo en Metohia werden verdreven, noch voor de duizenden Serven, Roma en anderen die omkwamen bij de bomaanvallen van de VS en de NAVO, noch voor hen die voor, tijdens en na de luchtaanvallen vermoord zijn door de, door de VS gesteunde, terroristen van het zogenaamde UÇK.

De Macedoniërs uit hun huis verdreven , vermoord en gewond in de, door de VS getolereerde, indien niet opgezette UÇK-agressie, die op een burgeroorlog in Macedonië of zelfs een algemene oorlog in de Balkan dreigt uit te lopen, zullen de Veiligheidsraad er niet toe kunnen brengen een hof op te richten ter vervolging van de misdadigers.

2.3. Grootmachten zijn niet verantwoordelijk voor hun daden die oorlog, opstand en geweld veroorzaken binnen geviseerde landen.

De VS, Duitsland en andere naties die het uiteenvallen van Joegoslavië hebben geforceerd, door Slovenië, Kroatië, Bosnië, Macedonië af te scheuren en die pogen andere delen zoals Kosovo en Metohia van Servië af te scheiden, zal niet gevraagd worden rekening en verantwoording af te leggen.

De VS en een aantal Europese naties hebben de Balkan gebalkaniseerd en daar een apartheid ingevoerd zoals die nog nergens op de wereld is vertoond. Door hun optreden zijn daar vrede, stabiliteit en welvaart onmogelijk geworden. Het versplinterde gebied is economische afhankelijk gemaakt van buitenlandse economische belangen die de regio willen overheersen en uitbuiten. De nieuwe apartheid leidt tot door de VS opgezette conflicten tussen Katholieke Kroaten in het westen en Orthodoxe Serven in het oosten daarmee een scheidsmuur creërend tussen West- en Oost Europa.

Nog gevaarlijker is, dat alles gericht is op geweld, waardoor op internationale schaal conflicten worden aangewakkerd tussen Slaven en Moslims om ruim baan te maken voor de wereldorde van de VS. Kosovo en Metohia, delen van Servië, zijn actuele voorbeelden van een lange lijst van tragisch en vermijdbaar geweld tussen Moslims en Slaven zoals in Afghanistan, Dagestan, Tsjetsjenië, Kazachstan, Kirgizië, Tadzjikistan, Turkmenië, Oezbekistan en Bosnië.

2.4. Een federale republiek, van sedert oudsher door buitenlandse machten tegen elkander opgezette Balkanstaten, werd opgericht om vrede, samenwerking en voorspoed te bereiken

Joegoslavië als Balkanfederatie ter heling van verdeeldheid en vergroting van de kansen voor het samenleven in vrede en voorspoed, werd in de jaren na de Eerste Wereldoorlog gezien als een zeer belangrijk middel voor vrede. Terwijl dat idee tussen de twee ergste oorlogen in de geschiedenis bijna de geest gaf, beleefde het na de Tweede Wereldoorlog een opmerkelijk succes. Het land was verwoest, maar niet veroverd. Een onafhankelijke en verenigde Federale Republiek Joegoslavië werd een op lange termijn succesvolle oplossing voor de Zuid-Slavische volkeren en een bolwerk van de Beweging van Ongebonden Landen.

Na de ineenstorting van de Sovjet-Unie en het Oostblok, bleek daar de enige nog overgebleven socialistische regering te zetelen, die een bedreiging bleek voor de kapitalistische controle over Europa. Met haar gemengde markteconomie bood het de voormalige Oostbloklanden een voorbeeld voor de herleving van hun economie en voor hun politieke onafhankelijkheid. De vruchtbaar functionerende Federale Republiek van Joegoslavië bewees in levende lijve, dat de geschiedenis nog niet tot haar eind gekomen was en dat meer dan één economisch systeem mogelijk was.

Na de ineenstorting van de Oostblokeconomie, werd een grotere Balkanfederatie, een Zuidoost-Europese Unie, door velen in de regio gezien als een middel tegen economische uitbuiting, ter voorkoming van geweld en ter ontwikkeling van een sterke, politiek en maatschappelijk onafhankelijke economische regio.

Het buitenlands kapitaal en de geopolitieke belangen van de VS zagen dit als een gevaarlijk obstakel voor hun plannen voor de Nieuwe Wereldorde, de globalisering, het nieuwe kolonialisme.

2.5. *De Verenigde Staten vallen Joegoslavië straffeloos aan en vervolgen haar staatshoofd na die te hebben gedemoniseerd*

Gedurende 79 dagen hebben de VS Joegoslavië onbarmhartig gebombardeerd. Ze hebben geprobeerd mij te vermoorden door mijn huis, mijn kantoren en mijn andere vermoedelijke verplijfplaatsen te bombarderen. Zij hebben ook in 1986 geprobeerd het staatshoofd van Libië, Muammar Qaddafi, te vermoorden in een aanval op Tripoli. Sedert 1991 hebben ze talloze keren aanslagen gepleegd op de president van Irak, Saddam Hoessein en zelfs in 1993 met kruisraketten op de Al Rashid moskee in Bagdad waar ze dachten dat hij internationale Islamitische leiders zou ontmoeten.

de VS hebben de Veiligheidsraad middels economische sancties, de meest extreme en brutale vorm van moedwillige verarming en economische oorlog, gedwongen tot medeplichtigheid in de langste, dodelijkste en wreedste genocide van het laatste decennium— de sancties tegen hun vijand Irak, die minsten 2 miljoen mensen, voornamelijk kinderen, het leven hebben gekost. De Verenigde Staten hebben economische sancties tegen Joegoslavië afgedwongen waardoor de civiele economie zwaar is beschadigd en de wil tot onafhankelijkheid is verzwakt.

Kan een strafhof voor Joegoslavië, dat het alomtegenwoordige geweld van de VS niet wil zien en dat de openbare mening afleidt van het gedrag van de VS, en door zijn stilzwijgen de lucht- en raketaanvallen op burgers en het gebruik van illegale wapens in een reeks van landen legitimeert, enige bijdrage leveren aan vertrouwen in de kracht van de wet, de gerechtigheid en vrede?

De Verenigde Staten, immuun voor controle of vervolging en boven de wet verheven, gebruiken hun macht om willekeurig vijanden te vervolgen en te terroriseren en verder te demoniseren. Zij fabriceren en verkopen wapens aan uitverkoren naties en aan groepen die er op uit zijn regeringen omver te werpen die niet naar de zin zijn van de VS, zij gebruiken straffeloos illegale wapens tegen hulpeloze mensen, zij gaan door hun schiermonopolie op kernwapens en gesofisticeerde raketten te consolideren en uit te bouwen, zij geven triljoenen dollars uit aan de unilaterale bescherming tegen Star Wars die strekt tot de voortzetting van de bewapeningswedloop terwijl miljarden mensen worden overweldigd door armoede, miljoenen lijden aan ondervoeding en honderdduizenden van honger creperen en AIDS explodeert in de arme landen.

De VS verminken de internationale bescherming van het milieu, ondermijnen de controle van kernwapens met de dreiging zicht terug te trekken uit de reeds lang bestaande ABM- en non-proliferatieverdragen. Zij weigeren verdragen te ratificeren tegen mijnen en blijven die gevaarlijke wapens produceren verkopen en gebruiken. Zij dreigen een verdrag ter controle

van biologische- en chemische oorlogsvoering te ondermijnen en zij zijn regelmatig betrokken in geheime organisaties en gewelddadige militaire interventies in andere landen en schenden daarbij het internationaal recht en de soevereiniteit van die landen.

Het zogenaamde Joegoslaviëtribunaal is niet alleen een andere pijl op de boog van de Verenigde Staten voor de vervolging en de demonisering van vijanden en de verminking van het internationale recht. Het Joegoslaviëtribunaal rechtvaardigt de ongelijkheid in rechtsbedeling door misdadige straffen op te leggen ter vernietiging van bepaalde leiders en regeringen. Het is een vergiftigde pijl, gericht tegen de fundamenten van vreedzame betrekkingen tussen onafhankelijke landen en rechtsgelijkheid en waardigheid.

3. Het Internationale strafhof voor voormalig Joegoslavië is niet bevoegd tot het beschermen van de fundamentele rechten of de juiste rechtsbedeling

Een dergelijk *ad hoc* tribunaal heeft een tijdelijke en beperkt doel zonder dienstige precedent, traditie of relevante ervaring. Het kan geen orders uitvaardigen of dwang uitoefenen bewijzen en getuigen aan de verdediging bekend te maken. Het kan geen eerlijk onderzoek doen naar feiten of principes vaststellen en gelijkelijk toepassen. Het kan geen recht doen.

Het Joegoslaviëtribunaal staat vijandig tegen de zorg voor de rechten van de gedaagden, omdat het verteld is dat de ten laste gelegde misdaden zijn begaan en de verdachten zijn gedemoniseerd.

Het recht op juridische bijstand, zo stevig gefundeerd in het internationaal recht, wordt ontzegt en gefrustreerd door het tribunaal zelfs in de meest prominente gevallen. De griffier ontzegde mij voor een aantal weken na mijn voorgeleiding het recht van overleg met advocaten van mijn keuze inzake juridische vraagstukken.

De griffier schreef, dat het voor de enige advocaat die mij in die tijd voor slechts twee uur mocht bezoeken niet dienstig zou zijn de zaak te bespreken omdat het gesprek afgeluisterd zou worden en de vertrouwelijkheid geschonden. Joegoslavische advocaten, die ik wilde raadplegen is zeven weken na mijn voorgeleiding, nog steeds toelating en visa's voor Nederland geweigerd, behalve dan diegene, welke mij twee uur mocht bezoeken, terwijl dat bezoek werd afgeluisterd.

Ik werd daarentegen aan eenzame opsluiting onderworpen. Pas na twee weken gevangenschap mocht ik mijn vrouw ontmoeten en dan nog gescheiden door geluiddicht glas via afgeluisterde microfoons. Haar was verboden met de pers te spreken en ze werd geïsoleerd van alle publieke contacten tijdens haar verblijf in Nederland en werd, buiten haar reizen van en naar de gevangenis en de luchthaven, in feite gevangen gehouden op haar hotelkamer.

3.1. Het ad hoc *tribunaal is bedoeld ter demonisering en vernietiging van de beklaagde en niet voor een eerlijk onderzoek van de feiten, de bescherming van de rechten van de beklaagde en voor de gelijke toepassing van juridische principes*

Oneerlijkheid is inherent aan het doel en de aard van het *ad hoc* tribunaal, dat mank gaat aan in een juridische traditie gebed personeel, dat ver weg is van de plaats waar de aangeklaagde vandaan komt en waar de gebeurtenissen hebben plaatsgevonden, dat door zijn maker is opgedragen niet uit te gaan van de onschuld van de aangeklaagde, maar er van uit te gaan dat beklaagde lid is van een groep welke die vreselijke misdaden heeft begaan. Het hof moet dit doen om de echte misdadigers, de NAVO-leiders die bij hun misdadige agressie duizenden onschuldige mensen hebben gedood, te beschermen.

3.2. *De waarheid ligt ver buiten het bereik en het doel van het ad hoc tribunaal dat bedoeld is om te straffen, te vernietigen en verdeeldheid te zaaien*

In alle zaken van het *ad hoc* tribunaal is het voor de beschuldigden onmogelijk gebleken de benodigde bewijzen en getuigen ter hunner verdediging aan te voeren of te laten verschijnen. Het Joegoslaviëtribunaal is niet in staat gebleken vele beschuldigden in voormalig Joegoslavië in bewaring te stellen en het gebruikt of staat het gebruik van onwettige en illegale middelen toe om hun uitlevering af te dwingen.

3.3. *Het* ad hoc *tribunaal terroriseert en straft hen die zich in Joegoslavië tegen de NAVO-agressie durfden keren en te reageren op de misdaden van terroristen die Serven, Alabanezen, Moslims, Turken, enz. ombrachten.*

De VS hebben tegen het internationale en nationale recht in van zowel Joegoslavië als de VS, een voor hen dienstige regering geïnstalleerd in de Republiek Servië en hebben mij via bombardementen, economische druk en sancties, fysieke bedreiging, geheime operaties en verstoring van het electorale proces uit het ambt van president van de Federale Republiek van Joegoslavië gezet.

3.4. *De VS schept cliëntregeringen door verkiezingen te forceren door met miljoenen dollars aanhang van hun kandidaat te kopen vervolgen een campagne te financieren voor het kopen van stemmen en de corruptie van de democratie.*

De VS hebben meer dan 100 miljoen dollar uitgetrokken om de regering van de Volkseenheid die tot oktober 2000 aan de macht was te verslaan.

De VS hebben in vele verkiezingen in het buitenland ingegrepen en vaak aan hun belangen dienstbare regeringen aan de macht gebracht.

De oprichting van een *ad hoc* internationaal strafhof ter bedreiging en beschuldiging van het regeringshoofd dat moet verdwijnen is een zoveelste vernietigende aanval op het democratisch proces en de regering die ze beogen te vernietigen.

3.5. *Mijn ontvoering en uitlevering aan het Joegoslaviëtribunaal, terwijl het Federale Constitutionele Hof van Joegoslavië het verzoek tot uitlevering nog in behandeling had, voor een omkoopsom ter grote van ongeveer 1,3 miljard dollar door de, door de VS geïnstalleerde, regering is geschiedt in strijd met de constituties van de Federale Republiek van Joegoslavië, de Republiek Servië en het Oprichtingsstatuut van het Joegoslaviëtribunaal*

De door de VS geïnstalleerde regering van Servië heeft mij ontvoerd en uitgeleverd in weerwil van de Constitutie van de Federale Republiek van Servië en haar wetten terwijl het verzoek tot uitlevering in behandeling was bij het Constitutionele Hof van Joegoslavië, dat iedere actie ter uitlevering had verboden tot het Hof een besluit zou hebben genomen. Dat was ook een overtreding van de resolutie van de VN Veiligheidsraad voor de oprichting van het tribunaal, dat zegt, dat de uitlevering zal geschieden in overeenstemming met de wetten van het land dat een uitleveringsverzoek krijgt. De VS dreigden een bedrag van1,3 miljard dollar aan internationale leningen en hulp aan Joegoslavië te zullen tegenhouden wanneer de uitlevering niet was gebeurd voor een door hen bepaalde datum. Een dergelijke houding, deelname en de acceptatie daarvan toont de minachting van de wet door het tribunaal, de nieuwe regering van Servië en de Verenigde Staten.

De vrijheid van elk mens wordt nu bedreigt met illegale arrestatie, uitlevering naar een vreemd land en geïsoleerde opsluiting in de gevangenis van een illegale internationale strafhof. Wanneer de Verenigde Naties betrokken raken bij de internationale ontvoering van politieke leiders of dat accepteren dan zeggen de Verenigde Naties daarmee aan de wereld ,dat de oude methoden van geweld, misleiding en dwang ook hun methoden zijn. Deze methoden zullen beantwoord worden met dezelfde methoden.

3.6. De nieuwe door de VS geïnstalleerde regering van Servië gebruikt haar politieke macht om de politieke oppositie in Servië te vernietigen.

De huidige regering van Servië is betrokken bij het vernietigen en demoniseren van de politieke oppositie. Het regiem zal aangeklaagde personen uitleveren aan het Joegoslaviëtribunaal, zoals het mij heeft uitgeleverd, tegen de eigen wetten in, om de binnenlandse politieke oppositie te vernietigen en betalingen in geld en steun te krijgen uit het buitenland voor de heerschappij van hun politici. Zij doet alles om iedere steun of onderzoek ter mijner verdediging te frustreren, tot en met het weigeren van toegang en de deportatie van Ramsey Clark toen hij in juni naar Belgrado vloog om mijn politieke vervolging aan de orde te stellen. Ter eliminering van de rivaliserende politieke macht werpt zij honderden mensen op zuiver politieke gronden in de gevangenis.

Die regering kan bewijzen fabriceren, vernietigen en getuigen controleren en onder druk zetten om veroordeling door het Joegoslavië te begunstigen en zij zal proberen de inspanningen van de verdediging ter verkrijging van documenten, of ander bewijs en getuigen die nodig zijn voor de verdediging in Den Haag, te frustreren.

3.7. Een tragische toekomst van buitenlandse manipulatie en controle van hun regering bedreigt het volk van Servië en Joegoslavië

De nieuwe regering van Servië is een marionet van de Verenigde Staten. Wanneer men zou denken dat het volk van Servië beter af is met een door de VS gesteunde regering beter, vraag dan de Iraniërs maar eens of zij geloven, dat zij het beter hadden onder de Sjah van Iran, in 1953 voor 25 jaar op de troon gezet door de VS, dan onder de democratisch gekozen president Mossadegh en zijn gekozen opvolgers. Was de hele serie van militaire regeringen, die het volk van Guatemala decennia lang hebben onderdrukt, beter voor dat volk, dan de democratisch gekozen president Arbenz, die door de VS in 1954 is afgezet? Was Moboetoe, die decennia lang het land heeft gebrutaliseerd en gecorrumpeerd en tot een bankroet heeft geleid, beter voor het volk van Congo dan de democratisch gekozen Partrice Loemoemba, vermoord met de medeplichtigheid van de VS in 1960? Heeft generaal Pinochet gedurende decennia beter de democratie, de mensenrechten en het welzijn van het volk van Chili gediend dan de democratisch gekozen Salvador Allende vermoord in een door de VS gesteunde coupe in Chili in 1973 had kunnen doen?

Het zal moeilijk zijn vier nog grotere nationale tragedies te vinden in de laatste vijftig jaar aangericht door verbetenheid van de Verenigde Staten om deze regio's te controleren.

Vraag maar eens aan de vele landen die hebben moeten leven onder door de VS gesteunde tirannieën, zoals die van Somoza in Nicaragua, welk voordeel zij daarvan gehad hebben.

Een *ad hoc* strafhof, dat is opgericht om de leiding van de oppositie tegen een door de VS geïnstalleerde regering te vernietigen, kan geen vrede, verzoening en bescherming van mensenrechten bieden of een volk in voorspoed te laten samenleven. Het zal slechts haat, verdeeldheid en geweld creëren.

Kijk eens naar de volkeren van de armste landen van de wereld die gedurende de laatste decennia gehoorzaam zwoegend om de leningen af te betalen voor projecten en doelen, die zij niet hebben uitgekozen en waarvan zij nooit enig nut zullen hebben terwijl hun eigen inwoners van honger en onnodige ziekten sterven. Kijk eens naar de economieën van Oost Europa of van de Republieken van voormalig Joegoslavië en vraag waarom het hoofdelijk inkomen vaak met de helft verminderd is, en soms tot 25% gedaald is in vergelijking met het peil van twaalf jaar geleden. *Ad hoc* tribunalen zullen het lijden van de arme landen nog meer verlengen door steun aan regeringen, die op winst beluste buitenlandse overheersing verdedigen, waardoor de omstandigheden nog verder zullen verslechteren.

3.8. Het geweld en de verdeeldheid binnen Joegoslavië sedert de ineenstorting van de Sovjeteconomie is veroorzaakt via door de VS geleide acties bedoeld voor de balkanisering van de Federale Republiek van Joegoslavië en zijn deelnemende republieken met het Joegoslaviëtribunaal als hoofdwapen

De verenigde Staten, geholpen door een aantal Europese landen, is al een tiental jaren betrokken bij inspanningen ter vernietiging van de Federale Republiek van Joegoslavië, dat resulteerde in de afscheiding van het Duits georiënteerde Slovenië en Kroatië met de verdrijving van 500.000 Serven over hun grenzen. Toen werd Bosnië weg geroofd van de Federale Republiek van Joegoslavië en opgedeeld in een onnatuurlijke op drie godsdiensten gebaseerde apartheid—Islam, Katholicisme en Orthodoxie. Nu heerst er in Macedonië een naar burgeroorlog neigende chaos door de agressie van de door de VS gestimuleerde en gesteunde terroristische organisatie, UÇK. Zo heeft voormalig Joegoslavië de helft van haar bevolking en rijkdommen verloren en zijn alleen Servië en Montenegro daarin over gebleven. Kosovo en Metohia, een historisch en kostbaar deel van Servië wordt na 79 dagen van luchtbombardementen in 1999, nog steeds bezet door NAVO-legers.

De door de VS geleide luchtaanvallen hebben in naam van de NAVO over heel Servië enorme schade veroorzaakt aan civiele instellingen en duizenden mensen het leven gekost. Daarna keken de VS en de NAVO alleen maar toe hoe 330.000 Serven uit Kosovo en Metohia werden weggejaagd en er vele honderden werden vermoord door lieden die aangemoedigd waren door de VS. De gewelddadige uitdrijving van Serven uit Kosovo en Metohia gaat nog steeds door en het UÇK is versterkt geworden voor de aanval op Macedonië.

Het Joegoslaviëtribunaal is opgericht op aandrang van de VS, die zelf het geweld hebben gestimuleerd voor de afscheiding van de republieken van Slovenië, Kroatië, Bosnië-Herzegovina en Macedonië en verdeeldheid en conflicten hebben gezaaid in de Servische provincie Kosovo en Metohia, in de drie gemeenten in het zuiden van Servië en in alle zes voormalige republieken. De VS willen de leiders vervolgen, die samen met het volk bij de verdediging van de vrijheid en in hun verzet tegen de agressie van de NAVO-oorlogsmachine, de wil van de VS hebben getart en tegelijk het volk als onbeschaafd afschilderen. Madeleine Albright, toen zij Ambassadeur was bij de Verenigde Naties, was de drijvende kracht achter de oprichting van het Joegoslaviëtribunaal. De ambassadeur van de VS bij het tribunaal, David Scheffer, geeft met tegenzin toe dat het Joegoslaviëtribunaal vooral wordt 'ondersteund, gefinancierd, bemand en van informatie voorzien' door de VS.

Nu het idee van *ad hoc* tribunalen wordt bedreigt door het verdrag ter oprichting van het Internationaal Strafhof, oefenen de VS druk uit om landen te weerhouden van ratificatie van dat verdrag. Zij dringen ook aan op nieuwe *ad hoc* tribunalen voor de Democratische Republiek van Congo, Sierra Leone, Soedan en andere, om deze regio's te overheersen en het streven naar een Internationaal Strafhof te verdelen. Het verdrag dat in Rome in 1998 door 120 landen ondertekend werd geratificeerd door 37 landen, door Nederland eind juli 2001.

De VS willen andere landen vervolgen, maar zichzelf, hun bondgenoten en hun favoriete clientstaten buiten schot houden. *Ad hoc* tribunalen, die onwettig zijn, niet bevoegd tot rechtsbedeling, wezenlijk ongeschikt voor het voeren van eerlijke processen tegen beklaagden die al lang zijn veroordeeld in de door de VS gecontroleerde media, zijn een wapen van de VS voor het vestigen van hun controle en uitbuiting op lange termijn van de beoogde landen en regio's. Dat is hun globalisering; dat is het nieuwe kolonialisme.

Om al deze redenen dient het zogenaamde Joegoslaviëtribunaal illegaal verklaard te worden en zijn gevangenen, wettig of onwettig uitgeleverd, dienen te worden vrijgelaten.

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Verder lezen:

1) Over het 'tribunal,' zie NATO's Tribunal: Straight From the Horse's Mouth, at http://www.icdsm.org/more/horse.htm

2) On the huge U.S. effort to install a quisling regime in Belgrade, see:

'We Accuse!' Memorandum On Foreign Interference in the Yugoslav Elections - Statement of the Yugoslav government just prior to the Oct. 5th coup d'etat. At http://emperors-clothes.com/memor.htm

Milosevic's TV Speech to Yugoslavia. Delivered Oct. 2, 2000. At http://emperors-clothes.com/news/milosevi.htm

The International Monetary Fund And The Yugoslav Elections' by Michel Chossudovsky and Jared Israel. Summarizes devastating effects of World Bank/IMF intervention in several countries. Discusses link between Western financial takeover and social-political destruction.
http://emperors-clothes.com/analysis/1.htm

"Kostunica Says: Some Backers 'Unconsciously Serve Amercan Imperial Goals.'" Excerpts from 'NY Times' article and comments by Jared Israel and Max Sinclair. This is the article in which the 'Times' writer notes that "suitcases full of [US] cash" go the opposition.
http://emperors-clothes.com/news/erlang.htm

'Emperor's Clothes Interviews Radio B292'
Revealing interviews with two staff members at a U.S.-paid "independent" radio station in Belgrade.
http://emperors-clothes.com/interviews/emperor.htm

'Will the US Get Their Money's Worth in Yugoslav Elections?' by George Szamuely at http://emperors-clothes.com/articles/szamuely/willthe.htm

'U.S. Law Passed by House of Representatives on Funding Yugo Opposition and Harsh Terms for Lifting Sanctions'
http://emperors-clothes.com/news/1064.htm

3) President Milosevic uses **golpe**, Spanish for 'blow,' as the French use **coup d'état**.

www.icdsm.org

PRESENTATION OF THE ILLEGALITY OF THE ICTY AND THE ILLEGALITY OF THE SURRENDER

TO THE ICTY

By Slobodan Milosevic
The Hague, The Netherlands
August 30, 2001

Nations empowers the Security Council to create a criminal court. See Appendix A attached.

An International Criminal Court Can Be Created Only By A Multinational Treaty, Or Amendment To The Charter Of The United Nations

The national representatives who have served on the Security Council and in the General Assembly and the scholars, lawyers and experts who have labored for more than thirty years to bring into being an international criminal court have recognized that the only lawful and binding way such a court can be created is by an agreement among nations through a treaty agreed upon for that purpose, or by amending the Charter of the United Nations under its strict provisions regulating amendments to authorize, or establish such a court.

When an International Criminal Court was finally agreed upon in July 1998 by 120 nations meeting in Rome, it was by treaty which had been studied, drafted and debated for years. The United States, the most powerful participant in that long process, consistently sought to weaken the treaty to exempt U.S. leaders and military personnel from prosecution before it. Having failed the U.S. was then the most prominent and powerful of the handful of nations that refused to sign. As of August 1, 2001 37 nations, the Netherlands the most recent, had ratified the treaty.

The United States is vigorously trying to persuade, coerce, or bribe nations not to ratify.

means that the most powerful international organ created by the Charter of the United Nations "to end the scourge of war" is above all law, domestic and international.

But absolute discretion is the very definition of lawlessness and has been called "more destructive of freedom than any other of man's inventions," by U.S. Supreme Court Justice William O. Douglas. All rights of all nations, races, religions, cultures, political parties and individuals are thereby subordinated to the will of the Security Council, and the single superpower that too often will dominate it. All but fifteen nations are excluded from Security Council counsels. Each of the five permanent members can veto its actions.

The Security Council is subject to domination by a single nation. The representative of each member votes as instructed by the national governments that appoints him and to serve the interests of that government, not as an international statesman serving all peoples and the purposes for which the U.N. was created. The Security Council is inaccessible, anonymous and less responsive to democratic processes than any other international political institution.

2. A One Time, One Episode Court Targeting One Country, Created By International Political Power To Serve Its Geo-Political Interests Is Incapable Of Equality And Conducive Of Division And Violence

The illegitimate Criminal Tribunal for Former Yugoslavia corrupts justice and law because it is incapable of acting equally among nations, or within the politically targeted nation.

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There are three fatal legal flaws in the so called International Criminal Tribunal for the Former Yugoslavia. Each has disastrous consequences for the human quest for peace, the rule of law, democracy, truth and justice.

1. The Charter Of The United Nations Does Not Empower The Security Council to Create A Criminal Court

The U.N. Security Council has seized power it does not possess, corrupting the Charter of the United Nations, placing itself above the law and threatening "We Peoples of the United Nations" with a lawless future in which a superpower employs the scourge of war to have its way. Nothing in the history of the planning, drafting, discussion, approval or ratifications of the U.N. Charter implies, or is consistent with an intention to empower any body created by, or under, the Charter to establish any criminal tribunal. The words of the Charter and their textual inferences, the structure and allocation of power and duties, including those in the incorporated Statute for the International Court of Justice, all negate the existence of any capacity under the Charter to ordain criminal courts. The Criminal Tribunal for Former Yugoslavia is illegitimate and its creation a corruption of the United Nations.

There would never have been a United Nations if its Charter stated, or implied, that a criminal court could be created under its authority. No one who believes in historical truth, or that words have meaning can, after examining the history of its creation and its text, contend that the Charter of the United

Nations empowers the Security Council to create a criminal court. See Appendix A attached.

An International Criminal Court Can Be Created Only By A Multinational Treaty, Or Amendment To The Charter Of The United Nations

The national representatives who have served on the Security Council and in the General Assembly and the scholars, lawyers and experts who have labored for more than thirty years to bring into being an international criminal court have recognized that the only lawful and binding way such a court can be created is by an agreement among nations through a treaty agreed upon for that purpose, or by amending the Charter of the United Nations under its strict provisions regulating amendments to authorize, or establish such a court.

When an International Criminal Court was finally agreed upon in July 1998 by 120 nations meeting in Rome, it was by treaty which had been studied, drafted and debated for years. The United States, the most powerful participant in that long process, consistently sought to weaken the treaty to exempt U.S. leaders and military personnel from prosecution before it. Having failed the U.S. was then the most prominent and powerful of the handful of nations that refused to sign. As of August 1, 2001 37 nations, the Netherlands the most recent, had ratified the treaty.

The United States is vigorously trying to persuade, coerce, or bribe nations not to ratify.

Creation Of The International Criminal Tribunal For The Former Yugoslavia Was A Lawless Act Of Of Political Expediency By The United States Designed To Demonize And Destroy An Enemy And Frustrate Creation Of A Legitimate International Criminal Tribunal

At the insistence of the U.S. the Security Council nearly fifty years after it came into being forged a new and powerful weapon capable of demonizing a nation and its people and depriving individuals of their liberty for the rest of their lives and placed it largely in the hands of the United States. The principal precedents for such pseudo judicial actions over several millennia preceding the creation of the U.N. are trials of leaders and soldiers of vanquished populations by the victors in war, and courts used by colonial powers to control and punish subjugated peoples. The precedents are many and the violence and cruelty and hatred they usually exposed and caused was extreme.

Unless It is Limited By The U.N. Charter And International Law, The Security Council Can Do Whatever It Chooses To Do

If it is not restrained by the United Nations Charter, the Security Council can commit any act it desires disregarding all law. Early proponents of United States world power claimed such unbridled discretion for the Security Council publicly. Thus in 1950 John Foster Dullas wrote:

> "The Security Council is not a body that merely enforces agreed law. It is a law unto itself... No principles of law are laid down to guide it, it can decide in accordance with what it thinks is expedient.

If unchallenged, this concept of Security Council power

means that the most powerful international organ created by the Charter of the United Nations "to end the scourge of war" is above all law, domestic and international.

But absolute discretion is the very definition of lawlessness and has been called "more destructive of freedom than any other of man's inventions," by U.S. Supreme Court Justice William O. Douglas. All rights of all nations, races, religions, cultures, political parties and individuals are thereby subordinated to the will of the Security Council, and the single superpower that too often will dominate it. All but fifteen nations are excluded from Security Council counsels. Each of the five permanent members can veto its actions.

The Security Council is subject to domination by a single nation. The representative of each member votes as instructed by the national governments that appoints him and to serve the interests of that government, not as an international statesman serving all peoples and the purposes for which the U.N. was created. The Security Council is inaccessible, anonymous and less responsive to democratic processes than any other international political institution.

2. A One Time, One Episode Court Targeting One Country, Created By International Political Power To Serve Its Geo-Political Interests Is Incapable Of Equality And Conducive Of Division And Violence

The illegitimate Criminal Tribunal for Former Yugoslavia corrupts justice and law because it is incapable of acting equally among nations, or within the politically targeted nation.

It will increase violence, division and the risk of war with neighboring nations and peoples and within Yugoslavia among the segments of the society the U.S. policy of balkanization of Former Yugoslavia has set against each other and against the new government the U.S. has installed for its own purposes. If the United Nations Charter had authorized the Security Council to create criminal courts, it could not create a court for one nation, or episode for political purposes, to persecute selected groups, or persons and such a court is incapable of equal justice under law. An ad hoc court violates the most basic principles of all law. Equality is the mother of justice. An international court established to prosecute acts in a single nation and primarily, if not entirely, one limited group is pre programmed to persecute incapable of equality.

If the Security Council can create a criminal court to prosecute conduct in a single country like Yugoslavia, it can appoint a court for any country, selecting enemies or political and economic opportunities for targeting one at a time, while never exposing itself, or those who comply with its wishes to such selective prosecution. If the U.S., or any ally or client state it chose to protect was the subject of a serious effort by the Security Council to be honored with a criminal tribunal in its own name, the U.S. would veto the threatened action.

A Court created only for crimes in one country is by definition discriminatory, incapable of equal justice, a weapon against chosen enemies, or antagonistic interests and war by

other means. If there is to be any international criminal court, it must act equally as to all nations with none above the law. The ad hoc tribunal for a single nation corrupts international law.

By its very nature, the ad hoc Tribunal can be created only after the conduct the Security Council decides justifies creation of the Court since there is no other excuse for its creation. It is in every case ex post facto. This violates an ancient principle of law. It also requires the Security Council, if there is to be a rational basis for its action, to make some preliminary claim to finding of facts, a task such a political body is not designed for, that inherently incriminates a country, or faction by placing the imprimatur of the Security Council of the United Nations on a political decision of fact necessary to justify creation of the Tribunal. The very charge of the Security Council-- genocide, crimes against peace, war crimes, or crimes against humanity demonized any person thereafter accused.

The Selection Of A Nation For Prosecution On Political Findings Of Genocide, War Crimes And Crimes Against Humanity Creates A Compulsion to Convict.

Investigators, prosecutors and administrative personnel who join a temporary Tribunal to pursue allegations of humanities greatest crimes against a people and leaders already demonized will feel they have failed if there are not convictions. The very psychology of the enterprise is persecutorial. Few judges appointed to serve on a Tribunal created under such circumstances

will feel free to acquit any but the most marginal, or clearly mistaken, accused, or to create an appearance of objectivity.

Powers That Create Ad Hoc International Criminal Tribunals Divert Attention From Their Own Offenses, Or Failures, Or Those Of Allies And Their Political Surrogates While Continuing To Inflect And Threaten Mass Destruction With Impunity.

The ad hoc Tribunal which targets a country is incapable of prosecuting what may be greater crimes committed in the same conflict, by a power, coalition ally or political agents that was and remains a much greater source of violence and threat to peace. Most often the power which forced the creation of the target tribunal to further damage and demonize their enemy is shielded from criticism by the avalanche of propaganda against the accused supported by the appearance of United Nations neutrality and peace making efforts.

What court will consider the criminality of aerial bombardment by U.S. aircraft of defenseless civilians, their housing, water systems, power plants, factories, office buildings, schools, hospitals, which take thousands of lives directly and causes billions of dollars of property damages in Belgrade, Nis, Novi Sad and scores of other cities, towns and villages? What threat to peace continues from the U.S. bombing of the Chinese Embassy?

Who will be held accountable for the devastation of Pristina by NATO planes, or the attacks on refugee columns in Kosovo? Is the U.S. use of cluster bombs exploding razor sharp metal

fragments over an area as large as a soccer field in the courtyard at the hospital in Nis no crime? Will the Security Council act to prevent and punish the use of depleted uranium by the U.S. which is as indiscriminate in its radiation as the air, the water, the soil and food hain it touches and contaminates for millions of years?

International law accepts bombing of defenseless civilian populations by a militarily advanced technology that can destroy a country without even setting foot on its soil because supper power control international prosecutions and determine violations. The dominant element in modern military power is mass destruction. Victors are nations with the greatest capacity for m ass destruction. this places civilian populations at maximum peril

infrastructure supporting civilian life, buildings, water, power, transportation, communication, food production, storage and distribution, health care, schools, churches, mosques, synagogues, foreign embassies were the direct object of U.S. aerial and missile attacks. Many tens of thousands of civilians were killed directly and many more indirectly. The U.S. claims it had 159 casualties, a third from friendly fire, none from combat.

In 1998, the U.S. directed 21 Tomahawk Cruise missiles from international waters to destroy the El Shifa pharmaceutical plant in Khartoun, Sudan which provided more than half the medicines available for a people who are very poor and have been unable to replace that supply. The U.S. continues to support insurrection in the South of Sudan and threatens Sudan with prosecution in an ad hoc international criminal tribunal.

In 1999 the U.S. and NATO countries after they come in to Kosovo and the Metohia as a security forcesrefused to intervene on the ground to prptect people it said were enadngered in Kosovo.Instead NATO does not claim it prevented violence within Kosovo among the Serbain, ethnic Albanian and other peoples.In fact, NATO accelerated that violence.It bombed Serbia, Kosovo and Metohia heaviest of all, in Serbia for 79 days targeting civilians and citizens destroying billions of dollars of civilian facilities, usin illegal weapons including cluster bombs, destroying the civilian Serbian TV and radio buildings, destroying most of Pristina, killing thousands of Albanians, Muslims, Serbs, Romani, Turks and others and cousing hundreds of thousands of people, nearly.

all of whom have returned, to flee from Kosovo. Damage to the Yugoslavia military was negligible. In the summer of 2001 the U.S. continues to use cluster bombs in northern and southern Iraq which it attacks on most days.

There will be no remedy, or relief for Serbian victims of atrocities, some 500,000 purged by Croatia with the approval, if not on instructions of the U.S., forever from their homes in Krajina, the more than 330,000 permanently purged from Kosovo since the cease fire in 1999, or for the thousands of Serbs, Romani and others killed by the U.S. and NATO bombing assaults, or by U.S. supported terrorists otganisation so called the KLA before, during and after the assaultes. The Macedonians killed, injured and driven from their homes by U.S. condoned if not instigated KLA aggressions which threaten civil war in Macedonia and general war in the Balkans will not lead the Security Council to create a Court to prosecute the perpetrators.

Major Powers Are Not Accountable For Their Actions Which Cause War, Insurrection And Violence Within Targeted Countries.

There will be no accountability by the U.S., Germany and other nations whose acts and pressures forced the break-up of Yugoslavia, stripping Slovenia, Croatia, Bosnia, Macedonia, parts of Serbia like Kosovo, and Metohija —

The U.S. and several European nations have balkanized the region in the most artificial and forced apartheid the Balkans, or any other part of the world has ever known. Their acts have made peace, stability and prosperity impossible. Economic viability of small fragmented parts depends on foreign

economic intersts intend to dominate and exploit the region.The new apartheid leads to U.S. planned conflicts between the western Catholic Croatians and the eastern Orthodox Serbs, creating conflict and a wall between western and eastern Europe. More dangerous it sets the stage for violence attracting international participants between Slavic peoples and Muslems to decimate and debilitate obstacles to U.S. world order.Kosovo as a part of Serbia and Macedonia are current examples in a long list of tragic and avoidable violence between Muslem and Slaves including Afghanistan, Dagestan, Chechnya, Kazakstan, Kyrgyzstan, Tajikstan, Turkmenistan, Uzbekistan and Bosnia.

A Federal Republic Of Balkan States Long Set Against Each Other By Foreign Powers Was Formed To Establish Peace, Cooperation And Prosperity.

The idea of Yugoslavia, a Balkan federation to heal divisions and provide a better chance for living together in peace and prosperity, was seen as important in the years after World War I as a means to peace. While the idea floundered between the two worst wars in history, it worked with remarkable success after World War Ii in which it was ravaged, but unconquered. An independent and unified Federal Republic of Yug[illegible]via was a long term succesful solution for south Slavic people.It was a bulwark of the Non Aligned Movement. With the collapse of the Soviet and Eastern bloc economy it was the remaining socialist government threatening capitalist control of Europe. With its mixed market economy it offered an example to former

Eastern bloc countries for revival of their economies and political independence. With a successful, functioning Federal Republic of Yugoslavia there was living proof history had not ended, that more than one economic system was possible.

After the collapse of the Eastern bloc economy a greater Balkan federation a south eastern European Union was seen by many in the region as the means to prevent economic exploitation, avoid violence and develop a strong and independent political, social and economic region.

Foreign capital and the geopolitical interests of the U.S. considered this a dangerous obstacle to their plans for the new world order , globalisation, new collonialisam

The United States Having Demonized Yugoslavia Attacks It With Impunity And Persecutes Its Leadership.

The U.S. mercilessly bombed Yugoslavia for 79 days without suffering a casualty. It tried to assassinate me by bombing my home, offices and other places, where it believed I might be. It attempted to kill Libya's head of State Mummar Qaddafi in its 1986 raid on Tripoli and Saddam Hussein on numerous occasions beginning in 1991, including its 1993 cruise missile attack on the Al Rashid hotel in Baghdad at a time it believed he would be there meeting international Islamic leaders.

Through economic sanctions, the most extreme and overt form of forced impoverishment and economic assault, the U.S. has coerced the Security Council into complicity in the longest deadliest and cruelest genocide of the last decade, the

sanctions against its enemy Iraq which have killed at least 2 million people, the majority children. The United States has forced economic sanctions against Yugoslavia, severely damaging its civilian economy and eroding its will to independence.

Can a criminal tribunal for Yugoslavia which ignores pervasive violence by the U.S. and diverts public awareness from United States conduct and legitimatizes by silent acceptance aerial and missile assaults on civilians and illegal weapons use against one country after another, making its repetition expected before it occurs, contribute to the hope for the rule of law, justice or peace?

The United States, itself, immune from control, or prosecution and above the law, uses its power to cause the persecution of enemies it selects to terrorize and further demonize. It manufactures and sells arms to chosen nations, to groups seeking to overthrow governments it opposes, uses illegal weapons against defenseless people with impunity, continues to consolidate and expand its near monopoly of nuclear weapons and sophisticated rocketry, spends trillion on unilateral protection from Star Wars assuring a continued arms race while poverty overwhelms billions, hunger cripples millions, starvation takes hundreds of thousands of lives and AIDS spreads among poor nations.

It cripples international environmental protection, undermines control of nuclear weapons by threatening to withdraw from long standing protections of the ABM and Non Proliferation

treaties. It refuses to ratify treaties to protect life from land mines which it continues to manufacture, sell and deploy. It threatens to undermine a treaty controlling biological and chemical warfare. And the United States regularly engages in covert operations and violent military interventions in other nations in violation of their sovereignty and law.

The so called ICTY is not just another arrow in the arsenal of the United States with which it persecutes and demonizes enemies and corrupts international law. The ICTY celebrates inequality in the rule of law using criminal sanctions to destroy selected leaders and governments.

It is a poisonous arrow destructive of the foundations of peace among independent nations of equal rights and dignity.

3. **The International Criminal Tribunal For Former Yugoslavia Is Incapable Of Protecting Fundamental Rights, Or Providing Due Process Of Law.**

Such an ad hoc Tribunal has a temporary and limited purpose without helpful precedent, common tradition or relevant experience. It lacks power to enforce orders, or compel the disclosure of evidence and presence of witnesses, particularly for the defense.

It is not capable of finding facts fairly, or defining and applying legal principles equally. It cannot do

held in solitary confinement. I was able to

justice.

The statutory mandate for the ICTY makes it hostile to concern for the rights of those accused before it, because it is told the crimes charged have occurred and the accused have been demonized.

The right to assistance of counsel, so firmly established in international law, has been denied and frustrated by the Tribunal even in its most prominent cases. The Registry denied to me the right to consult with lawvers of my choice on legal matters for several weeks after my arraignment

The Registrar wrote that for the one attorney who visited me during that time and for only two hours, it would have been "inappropriate" to discuss the case because the conversation was monitored and confidences would be violated. Lawyers from Yugoslavia I asked to consult, with one exception, a monitored two hours visit, were still denied approval and visa's to enter the Netherlands seven weeks after my arraignment.

held in solitary confinement. I was able to visit my wife only after more than two weeks imprisonment and then only through sound proof glass using monitored telephones. She was prohibited from speaking with the press and kept isolated from all public contacts while in the Netherlands, a virtual prisoner in her hotel room, except as she traveled between the airport, the prison and the hotel.

The Ad Hoc Tribunal Is Intended To Demonize And Destroy, Not To Fairly Determine Facts, Protect Rights Of The Accused, And Apply Legal Principles Equally.

Unfair phenomena is inherent in the purpose and the nature of temporary ad hoc tribunal, struggling without personnel who are part of a legal tradition, far removed from the place the accused came from and the events occurred where the court is charged by its creator not to presume innocence, but that terrible crimes have occurred and the accused are from the group that commited them.They do this to protect real criminales, NATO leaders who killed thousands of innocent people in NATO criminal agresion.

Truth Is Beyond The Reach And The Purpose Of The Ad Hoc Tribunal Which Is Intended To Punish, Destroy And Divide.

It has been impossible in all cases before powerless ad hoc Tribunals for the accused to obtain needed evidence and witnesses for their defense. The ICTY has been unable to obtain custody of many accused in the former Yugoslavia and has resorted to, or condoned, improper and illegal means to pressure their surrender.

Ad Hoc Tribunal Terrorize And Punish Those In Yugoslavia Who Dared To Oppose NATO agression And To React To Criminal Acts Of Terrorists who were Killing Serbs, Albanians muslims, Turks etc.

In Yugoslavia, the U.S. in violation of international and domestic laws of both Yugoslavia and the U.S., has installed a government of its choice in the Republic of Serbia and ousted President Milosevic for the presidency of the Federal Republic of Yugoslavia by bombing, economic coercion including sanctions,

[illegible] threats, covert operations and corruption of the electoral process.

The U.S. Creates Client Governments By Forcing Elections, Using Millions Of Dollars to Purchase Unity For Its Candidate, Then Finance A Campaign That Buys Votes And Corrupts Democracy.

The U.S. injected more than $100.000.000US to defeat the government at peoples unity in power until October 2000.

U.S. has intervened in many foreign elections and often installed governments subservient to its interests by that means.

The creation of an ad hoc international criminal tribunal with threats and indictments of the leadership of the government it seeks to remove is an additional devastating assault on the democratic process and the government targeted for destruction.

President Milosevic Was Surrendered To the ICTY By A U.S. Installed Servian Government In Violation Of The Constitutions Of The Federal Republic Of Yugoslavia, The Republic Of Serbia, The Statute Creating The ICTY While The Supreme Constitutional Court Of Yugoslavia Reviewed The Request For Surrender For A Bribe Of 1.3 Billion Dollars.

The U.S. installed government of Serbia surrendered President Milosevic in violation of the Constitution of the Federal Republic of Yugoslavia and the Republic of Serbia while the request for surrender was under review by the Constitutional Court of Yugoslavia and in violation of the Security Council statute creating the Tribunal which provides surrender shall be accomplished in accordance with domestic laws of the nation requested to make the surrender. The United States threatened to block $1.3 billion U.S. in international aid unless the surrender was accomplished by a date it set. Such conduct and the participation and acceptance of it reveals contempt for the rule of law by the Tribunal, the new government of serbia, or the United Nations.

the illegal seizure of an individual and his delivery to isolation in the prison of an illegal international criminal tribunal in a distant nation threatens the freedom of everyone. For the United Nations to engage in, or accept, international kidnaping of political leaders tells that world the old ways of violence, deceit and coercion are its ways. Those ways will be met in the only way they can be met, by the same means.

The new U.S. Installed Government Of Serbia Is Using Its Police Power To Crush Political Opposition In Serbia.

The current government of Serbia is engaged in crushing and demonizing its domestic political opposition. The Republic of Serbia will surrender accused persons to the ICTY in violation of its own laws as it did President Milosevic to destroy political opposition at home and receive payments of money and support from abroad. It acts to frustrate any support, or investigation for the defense of President Milosevic hoping to eliminate rival domestic political power. It attempted to bar entry and deport Ramsey Clark when he flew to Belgrade in June to discuss the ICTY prosecution of President Milosevic. It may fabricate evidence, destroy evidence and control and coerce witnesses to assist in convictions by the ICTY, but it will seek to frustrate defense efforts to obtain documents, other evidence, and witnesses in

Yugoslavia needed for the defense in the Hague.

The People Of Serbia And Yugoslavia Risk A Tragic Future From The External Manipulation And Control Of Their Governments.

The new government of Serbia is a puppet for the United States. If there is any expectation a U.S. supported government might be better for the people of Serbia, or Yugoslavia, ask Iranians if they believe they fared better under the Shah of Iran, enthroned in 1953 by the U.S. for 25 years, than they would have under democratically elected President Mossadegh and elected successors. Was a long line of military governments which brutally repressed the people of Guatamala for decades better for the people than democratically elected President Arbenz who was removed by United States forces in 1954. Was Mobutu, who for four decades brutalized, bankrupted and corrupted the country -- , better for the people than democratically elected Patrice Lumumba assassinated with U.S. complicity in 1960? Did General Pinochet better serve democracy human rights and the welfare of the people for decades than the democratically elected Salvador Allende murdered in a U.S. supported golpe in Chile in 1973? It would be difficult to find four greater national tragedies in the last fifty years, all brought about by the United States determination to control those regions.

Ask the people of the several score other countries who have lived under U.S. supported tyrannies, "our SOB's" as FDR called Somoza in Nicaragua, how they benefitted. An ad hoc criminal

tribunal created to crush the leadership of the opposition to a U.S. installed government cannot bring peace, reconciliation, protect human rights, or enable a people to live and prosper together. It will create fear, hatred, division and vilence.

Consider the peoples of the poorest countries of the world during these last decades obediently struggling to repay loans for projects and purposes they did not choose and that never benefitted them while their own citizens die from hunger and preventable illnesses. Consider the economies of eastern Europe, or the former Federal republic of Yugoslavia and ask why per capita income is often less than half, sometimes less than 25% what it was just twelve years ago. Ad hoc criminal tribunals will prolong the suffering in poor countries by supporting governments that will maintain foreign domination that seeks benefits that will worsen that condition.

The Violence And Division Within Yugoslavia Since The Collapse Of The Soviet Economy Was Caused By U.S. Lead Acts Designed To Balkanize The Federal Republic And Its Member Republics With The ICTY As Principal Weapon.

The United States engaged in a decade long effort aided by several European countries, to break-up and destroy the Federal Republic of Yugoslavia, causing the secession, (remember the American Civil War) of Slovenia and German oriented Croatia with 400,000 Serbs purged from its borders. Then Bosnia was pried away from the Federal Republic and segregated into an unnatural three region religious apartheid, Muslim, Roman Catholic and Eastern Orthodox Christian. Now Macedonia is in turmoil, nearing

civil war from U.S. stimulated and supported terrorists organisation KLA aggre Thus Yugoslavia became Former, losing most of its population and wealth and leaving only Serbia and Montenegro.

Kosovo, an historically precious part of Serbia remains occupied by NATO Forces after 79 days of aerial bombardment in 1999. U.S. lead aerial assaults inflicted billions in damages on civilian facilities, killed thousands of civilians throughout Serbia and in the name of NATO all without a U.S. casualty. Thereafter the United States and NATO watched as 330,000 Serbs were forced out of Kosovo and many hundreds murdered, emboldened by the United States. Violent efforts to remove all Serbs from Kosovo and Metohija continue. And the KLA has been empowered to attack Macedonia.

The ICTY was created at the insistence of the United States which had stimulated violence and secession in Slovenia, Croatia, Bosnia, Kosovo as a part of a Serbia, Macedonia and division and conflict in serbia and throughout the former six Republics. The U.S. intends to persecute and demonize leadership that had defied its will and make the people seem savage. Madeleine Albright, while U.S. Ambassador to the U.N., was the driving force for creation of the ICTY. The U.S. Ambassador to the Tribunal, David Scheffer, concedes the ICTY is "supported, financed, staffed and provided information" primarily by the United States.

Now as the idea and existence of ad hoc tribunals are threatened by the treaty creating the International Criminal Court the United States is exerting pressure to prevent nations

from ratifying it. It is also pressing for new ad hoc Tribunals for the Democratic Republic of Congo, Sierra Leone, Sudan and elsewhere, to dominate those regions and defuse the drive for the International Criminal Court. The treaty, signed in Rome in 1998 by 120 nations was ratified by the 37th nation, the Netherlands, in late July 2001.

The United States prefers to select nations for persecution while protecting itself, its allies and favored client states. Ad hoc tribunals which are illegitimate, incapable of equal justice under law, by their nature unable to conduct fair trials, or provide due process and whose victims have long since been convicted in the United States controlled media are a U.S. weapon for establishing long term control and exploitation of targeted nations and regions. That is their globalisam, that is new colonialisam

For these reasons as will be more definitively presented and documented as soon as possible under the circumstances, the so called ICTY should be declared illegal and its prisoner, legally and illegally surrendered, should be released.

The Hague
The Netherlands
August 30, 2001

APPENDIX A

The United States is and has been the essential member of the U.N. Failure of the United States to join the League of Nations made it imperative after World War II that the United States participate in the U.N. if it was to be effective. The Charter was "forged" at Dunbarton Oaks in Washington, D,C. in August and October 1944 and San Francisco during April from April to June 1945. As an essential inducement and protection, the United States and each of the other four permanent members of the Security Council, all victors in World War II though already wary allies, were given the power to veto Security Council's resolutions.

To bind the U.S. to the United Nations, its headquarters was located in New York. By 1994, years after the end of the Cold War which partially paralyzed U.N. activity and after the collapse of the Eastern block coalitions, the U.S. dominated the U.N. and controlled the Security Council.

The United States was responsible for the creation by the Security Council of the International Criminal Tribunal for

Former Yugoslavia in 1993 and the International Criminal Tribunal for Rwanda in late 1994 and early 1995. "The United States was at the forefront in creating both tribunals and continues to be their leading source of political financial, personnel, logistical and information-sharing support." International Judicial Intervention, David Schaffer, Foreign Policy, Spring 1996. Mr. Schaffer was the Legal Advisor in the U.S. Department of State on international criminal tribunals.

Geopolitical motivations of the United States led to the creation of these ad hoc criminal tribunals by the Security Council in the absence of authority in the Charter of the U.N.

The U.S. Executive committed these acts knowing that there is no legal restraint on the Security Council within the U.N. system. Judicial review by the International Court of Justice of the legality under the U.N. Charter of acts by U.N. organs was rejected during the drafting of the Charter. At the San

Francisco conference "the proposal to confer the point of preliminary determination [of each organ's competence] upon the International Court of Justice was rejected. The view was preferred that each organ would interpret its own competence." See, The Development of International Law Through the Political Organs of the United Nations, Rosalyn Higgins, now a Judge of the ICJ (1963).

This remarkable view is even more remarkably confirmed by Mohammed Bedjaoui, President of the International Court of Justice in his book, The New World Order And The Security Council, Dortrecht (1994). He demonstrates that the Security Council has interpreted its powers as being above the law and beyond any system of legal limits. He writes that whatever the Security Council does is ipso facto legal. He observed that the Security Council has consistently rejected any limits on its powers.

If unchallenged, this concept of Security Council power means that the most powerful international organ created by the Charter of the United Nations "to end the scourge of war" is above all laws, domestic and international. To it the Universal

Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Genocide Convention, international humanitarian laws including the Hague and Geneva Conventions are mere pieties. To base the hope for world peace on unrestrained will and power is to condemn humanity to endless violence, or an end in violence. This is precisely the lawless spirit in which the U.S. "forged" the ICTY

The probability of any legal restraint being imposed on the Security Council by the ICJ under the present terms of the Charter and its statute is negligible. See e.g. Question of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbee (Libya v. U.S.) Request for Indication of Provisional Measures, International Court of Justice; General Inst. No. 89, Order of April 14, 1992 The Powers of Appreciation: Who Is the Ultimate Guardian of the U.N. Legality?, Thomas M. Franck, American Journal of International Law, July 1992.

The history of the planning meetings, the preparations and instructions of the national delegations, particularly the five permanent Member nations of the Security Council which included the United States as the host country, the records of the drafting and consideration of the Charter by the delegates, if we are to believe the public record, leave no room for doubt that there would never have been a United Nations if the Charter had included either expressly, or by implication, the power to create an international court of criminal justice. From the four power Dumbarton Oaks conferences in 1944 to the fifty nation conference at San Francisco during April through June 1945, which ratified the Charter as drafted and imposed by the U.S., Britain, China, France and Russia, there was never any suggestion that an international criminal court would be authorized by the Charter or that it would have been accepted by major powers if it was. Those nations were not prepared to risk subjecting their leaders, armed services and citizens to the possibility of prosecution by an international criminal tribunal in the aftermath of World War II.

The U.S., France, Great Britain and the U.S.S.R., which were also permanent members of the U.N., initiated, drafted and established the Charter of the International Military Tribunal (Nuremberg Charter) at London between late June 1945 and August

8, 1945 when it was signed. They acted completely independently of the U.N. The Nuremberg Charter

provided that: "Any Government of the United Nations may adhere to this Agreement by notice given through the diplomatic channel to the Government of the United Kingdom." The Nuremberg Charter makes no reference to the International Court of Justice and claims no relationship to the U.N.

The prosecution of the defeated Axis leaders for crimes against peace, war crimes and crimes against humanity at Nuremberg ignored the U.N. completely and the U.N. made no protest. The permanent members of the Security Council and other membership of the U.N. would have vehemently opposed any power for the U.N. to create a permanent criminal tribunal, or accepted such a tribunal under U.N. authority, or otherwise. See, generally, Telford Taylor, The Anatomy of the Nuremberg Trials, Little, Brown and Co. (1992).

For the Security Council to assert the power to create such a court is a dangerous usurpation that can only damage faith in the United Nations, demean its constitutional integrity and corrupt the rule of law. If Security Council power to create this Tribunal is recognized, or accepted by member nations and their courts, there will be no limit on Security Council claims of power to selectively prosecute targeted peoples.

The decision and multiple opinions in Prosecutor v. Tadic, Case No. IT-94-I-AR72, by the Appellate Chamber for the

International Tribunal for Former Yugoslavia upholding the power of the Security Council to create ad hoc tribunals, including notably itself, failed to research and adequately consider the history of the Charter which leaves no doubt that it did not authorize creation if any criminal tribunal. Analysis of the Charter itself reveals the absence of power to create a criminal tribunal. The Tadic decision must be reconsidered and reversed.

The statement of purposes, the general framework created for the U.N. and the detailed provisions of the Charter with more than half a century of operations show the Security Council was never vested with power to create a criminal tribunal.

Pursuant to Article 13 the General Assembly initiated studies for the creation of an International Criminal Court. It assigned such duties to its International Law Commission which worked on the project for years. The contemplation has always been that such a court would be created by multinational treaty, or amendment to the U.N. Charter.

The General Assembly, which initiated the Universal Declaration of Human Rights, later authorized planning and drafting of a treaty to create a permanent International Criminal Court by the International Law Commission. See, James Crawford, The ICJ Adopts A Draft Statute for an International Criminal Court, 89 Am.J.Int'l.L. 404 (1995). After years of effort, in June 1998, 120 nations agreed on a treaty to create such a court. The United States and six other countries rejected the treaty.

The Statute of the International Court of Justice is

established by and part of the Charter. The Court can only consider cases submitted to it by States against States both of whom are parties to the Statute, or other States that otherwise agree to its jurisdiction. Articles 34 and 35. The ICJ has no criminal jurisdiction. The Court's limited function is to decide such disputes as are submitted to it, in accordance with international law

The establishment of so tightly restricted an International Court of Justice by and simultaneously with the U.N. Charter negates any implication that criminal courts can be created by the Security Council or any other organ of the Charter.

Amendments to the Statute for the ICJ can be effected only by the same procedure provided for amendments to the Charter. Article 69, Statute of the International Court of Justice. Article 108 of the U.N. Charter provides that amendments

> "... shall come into force for all Member of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations including all the permanent members of the Security Council."

Chapter VII of the Charter on which the Security Council based its claim to authority to create the Tribunal for Rwanda is part of the war powers provisions of the Charter. Chapter VII vests in the Security Council discretion to take such "action by air, or land forces as may be necessary to maintain or restore international peace and security."

It is the worst conceivable authority for creating a

judicial tribunal. Prosecutions become war by other means threatening political leadership, ethnic and national groups and individuals anywhere in the world whom the Security Council might choose to demonize and punish through a criminal tribunal. If former Yugoslavia and Rwanda can be singled out for prosecution before an ad hoc tribunal why not the United States?

Only Articles 39 and 41 in Title VII have been cited as relevant to a claim of authority to create a criminal court with power to try, convict, imprison, or executing individuals. Article 39 directs the Security Council to determine the existence of any threat, or breach of the peace, and to make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42. If the power to create a court exists it must be found in the itemized list of authorized acts in Article 41.

Under Article 41 the Security Council may decide what measures not involving the use of armed force may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations. It says nothing remotely suggesting a power to establish a criminal court.

The only existing methods under international law for creation of an international criminal tribunal is by a multinational treaty or amendment of the U.N. Charter.

Both the multinational treaty and amendment to the U.N. Charter have the important benefit of securing the express, considered and independent commitment of every Member, or signatory nation to the Court and its works.

There is a growing body of commentary from a variety of sources that recognizes the lack of power in the Security Council to create a criminal tribunal and the harm its creation does to the United Nations, the rule of law and hope for truth, peace and reconciliation. See, e.g. Olissa Gordon, Justice on Trial: The Efficacy of the International Criminal Tribunal for Rwanda, 1 ISLA J. Int'l. and Comp.L. 217 (1995); Tara Saptu, Comment: Into the Heart of Darkness: The Case Against the Foray of the Security Council Tribunal Into the Rwandan Crisis, 32 Tex.Int'l.L.J. 329 (1997).