

Annex C

IT-96-21-A
A785-A615
02 July 1999

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**IN THE APPEALS CHAMBER OF THE
INTERNATIONAL TRIBUNAL FOR
FORMER YUGOSLAVIA**

NO. IT-96-21-A

Before: Judge Fouad Abdel-Momem Riad, Presiding
Judge Wang Tieya
Judge Rafael Nieto-Navia
Judge David Hunt
Judge Mohamed Bennouna

Registrar: Mrs. Dorthée de Sampayo Garrodi-Nijgh

Date Filed: 2 July 1999

**APPELLANT – ZDRAVKO MUCIC’S [aka PAVO] BRIEF ON APPEAL AGAINST
CONVICTION AND SENTENCE**

The PROSECUTOR

vs.

**ZEJNIL DELALIC
ZDRAVKO “PAVO” MUCIC
HAZIM DELIC
ESAD LANDZO, a.k.a. “ZENGA”**

FOR THE OFFICE OF THE PROSECUTOR:

**Mr. Yapa Upawsana
Mr. Christopher Staker
Mr. Rodney Dixon**

FOR THE DEFENCE

**Mr. John Ackerman and Prof. Eugene O’Sullivan, for Zejnil Delalic
Ms. Nihada Buturovic and Mr. Howard Morrison, for Zdravko Mucic
Mr. Salih Karabdic and Mr. Tom Moran, for Hazim Delic
Ms. Cynthia Sinatra and Prof. Peter Murphy, for Esad Landzo**

The Trial Chamber has found Zdravko Mucic, a.k.a. 'Pavo', guilty, pursuant to Article 7[3] of the Statute, in respect of:-

the wilful killing and murder of Zeljko Cecez, Petko Gligorevic, Gojko Miljanic, Miroslav Vujicic, Pero Mrkajic, Scepco Gotovac, Zeljko Milosevic, Simo Jovanovic and Bosko Samoukovic, and for wilfully causing great suffering or serious injury to the body or health of, and cruel treatment of Slavo Susic [counts 13 and 14];

the torture of Milovan Kuljanin, Momir Kuljanin, Grozdana Cecez, Milojka Antic, Spasoje Milevic and Mirko Dordic [counts 33 and 34];

the wilful causing of great suffering or serious injury to the body or health of, and cruel treatment of, Dragan Kuljanin, Vukasin Mrkajic and Nedeljko Draganic, and the inhuman and cruel treatment of Mirko Kuljanin, [counts 38 and 39],

and for the inhuman and cruel treatment of Vaso Dordic, Veseljko Dordic, Danilo Kuljanin, Miso Kuljanin, Milenko Kuljanin and Novica Dordic, [counts 44 and 45].

The Trial Chamber also convicted the appellant, in respect of his participation in the maintenance of inhumane conditions in the Celebici camp, as well as by his failure to prevent or punish the violent acts of his subordinates, by which the detainees in the Celebici camp were subjected to an atmosphere of terror, of wilfully causing great suffering or serious injury to body and health, and cruel treatment, [counts 46 and 47].

The appellant was also convicted of the unlawful confinement of civilians pursuant to Article 7[1] of the Statute, [count 48].

In respect of all convictions the appellant was sentenced to 7 years imprisonment on all counts concurrently, making 7 years in total.

The appellant has entered an appeal against each and every conviction and the corresponding sentence, both individually and collectively.

The appellant hereinafter sets out his grounds of appeal against conviction and sentence.

APPEAL OF ZDRAVKO MUCIC aka 'PAVO'

CASE NUMBER IT-96-21-A

GROUND OF APPEAL AGAINST CONVICTION AND SENTENCE

APPEAL AGAINST CONVICTION

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Acknowledgements:-

Jean Allain Esq. Materials on Judicial Independence

Param Cumaraswamy Esq. Materials on Judicial Independence

Blackstones Criminal Practice : Copy text re. PACE 1984 and materials

APPEAL AGAINST CONVICTION

SECTION 1

JUDICIAL INDEPENDENCE AND DISQUALIFICATION

JUDICIAL INDEPENDENCE AND DISQUALIFICATION

[1]

On the 8th day of May 1998, one of the learned judges of the Trial Chamber, Her Honour Judge Odio Benito, took the oath of office of the vice-president of the Republic of Costa Rica in accordance with Articles 136 and 137 of the Constitution of the Republic of Costa Rica.

It is submitted that by doing so, the learned judge compromised her judicial independence by becoming a member of the executive of her country and, that from at the latest, the 8th day of May 1998, she was disqualified from sitting, and she should not have sat, as a judge of the Trial Chamber, or taken part in any judicial act at the ICTY.

[2]

The reasoning behind the submission is that, by becoming a member of the executive she had acquired an association wholly outside the realm of judicial independence that *may* have affected her impartiality, within the contemplation of Rule 15[A] of the ICTY Rules of Evidence and Procedure. It is submitted that she had taken a disqualifying step and, thereby, breached the fundamental rule of any properly constituted judicial body that justice must not only be done but must manifestly be seen to be done.

It is significant to note the foreword to the standard handbook of the ICTY [*The practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, John R.W.D. Jones] by the former President of the

Tribunal, Professor Antonio Cassese, "...as everybody knows, Justice must not only be done but must also be seen to be done".

More specifically, the act of taking the executive oath was, by virtue of both the rules governing the appointment of judges to the ICTY and the Constitution of the Republic of Costa Rica, a disqualifying act from either, or both, of the judicial and executive offices.

[3]

Article 12 of the ICTY Statute notes that the "*Chambers shall be composed of 14 independent judges, no two of whom may be nationals of the same State*". However, nowhere in the Statute or the Rules is the notion of independence defined. It may be inferred from Article 13(1) that to qualify as an ICTY Judge, an individual must be a person of high moral character, impartiality and integrity, who possesses the qualifications required in his or her respective country for appointment to the highest judicial office. If one is to follow this line of argument, the submission can be made that Judge Odio Benito should have resigned because, under rule 15 (A) of the Rules of Procedure and Evidence, an ICTY Judge "*may not sit on a trial or appeal in any case in which he has a personal interest or concerning which he has or has had any association which might affect his impartiality*".

By parity of reasoning it follows that, as holding an office within a State's executive branch must carry at least a risk of affecting independence, holding such office leads inexorably to the conclusion that such a position would be grounds for disqualification as an "association which might affect [a judges] impartiality" [Rule 15A].

[4]

It is further submitted that, had Judge Odio Benito already been a vice-president of Costa Rica, she could not have been elected as a Judge for the Tribunal on 19th September 1993, unless she had first resigned her vice-presidential office. This follows from Article 13[1] of the ICTY Statute which requires its judges to “*possess the qualifications required in their respective countries for appointment to the highest judicial offices*”.

The Constitution of Costa Rica makes it clear that an individual may not hold positions within judicial and executive branches at the same time. Consequently, as the vice-president of Costa Rica, Judge Odio Benito would be disqualified from holding the highest of judicial offices. Article 132 of the Constitution states that the titular magistrates of the Supreme Court of Justice may not be elected President or vice-president. Alternatively, article 161 determines that “*the position of magistrate is incompatible with that of an official of the other supreme powers [e.g. executive power]*”.

[*Constitution of Costa Rica, Gisbert H. Flanz [Ed.] Constitutions of the Countries of the World, Vol. 5, 1995*]

These issues were in part raised on a motion by the Defence that was filed with the Trial Chamber on the 25th May 1998. The prosecutor filed no response. The reasoning behind the decision to continue with the learned Judge as a member of the Trial Chamber is to be found in the decision of the Bureau which consisted of President McDonald, Vice-President Shahabuddeen, Judge Cassese and Judge Jorda dated the 4th September

1998 and is referred to in the judgment of the Trial Chamber in paragraph 80 at page 35. [D9528]

[5]

It is submitted on behalf of the Appellant that the issue of judicial independence is so fundamental to the administration of justice that the decision of the Bureau is one that should not be allowed to stand as a matter of law or practice. This issue should be considered by the Appeal Chamber upon its merits as a substantive ground of appeal against conviction on all counts.

It is submitted that the Bureau, sitting without the accused being present or represented by counsel, does not have the appellate status of the Appeal Chamber. Any determination by the Bureau is, therefore, still liable to be the subject of a substantive appeal to the Appeal Chamber, the latter having primacy over all the judicial decisions of the ICTY in the absence of any other appellate court. (Save perhaps the International Court of Justice which could correct any erroneous decision or order, were a matter raised by a state.)

Additional actual or apparent conflict

A matter hitherto not considered by the bureau is that Judge Odio Benito was sitting as a member of the Trial Chamber whilst a serving trustee of the United Nations Voluntary Fund for the Victims of Torture. This fund was established by a General Assembly Resolution 36/151 of 28th January 1982. Its purpose is to receive and distribute voluntary contributions in respect of

those who have had their Human Rights violated as a result of torture and to members of their families. The fund is administered in accordance with the Financial Regulations of the United Nations by the Secretary- General, assisted by a Board of Trustees. Those trustees serve in a personal capacity and are appointed by the Secretary General for renewable 3-year terms of office.

At all material times Judge Odio Benito was a trustee of the fund [*see the 1998 report of the UN High Commissioner for Human Rights*]. It is submitted that by virtue of holding this post, Judge Odio Benito had, not only morally but also legally, an obligation to further the goals of the fund. It is not suggested that the objects of the fund, and therefore the duties of the trustees, are anything but laudable. However, it can reasonably be assumed that, by agreeing to be a trustee of the fund, Judge Odio Benito was sympathetic to its objectives and thus hostile to acts of torture and to those who were, or alleged to have been, engaged in those acts. It is submitted that, since the indictment in the Celebici trial included allegations of torture and other acts analogous to torture, there is a very strong appearance of bias, or the risk of bias, against the appellant.

In accordance with the determination of the English House of Lords in the Pinochet case (*see post, page 29*) it can be said that the position of Judge Odio Benito is identical in principle to the position of Lord Hoffmann. Accordingly, she should have declared her status and interest as a trustee at the outset of the proceedings to enable all parties to consider their position and make appropriate representations.

In the absence of that declaration and opportunity to make such representations, she should not have sat as a Judge. In the circumstances, by analogy to the decision of the House of Lords in the Pinochet matter, it must be concluded that the trial and verdict are nullified as a matter of substantive law and, in any event, by the rules of natural justice. The only remedy consistent with the maintenance of judicial independence is to allow the appeal against conviction and then to consider whether or not the interests of justice demand a retrial

[6]

Since the early 1990s the international community has seen a considerable increase in the number of international judges. It is submitted that, in order to retain their credibility, it is essential that those judges observe the notion and quality of judicial independence common to all judges in national jurisdictions, as developed by both national and international jurisprudence. Whilst still a member of the International Court of Justice, Judge Tanaka wrote that, “judicial independence was the *conditio sine qua non* of an International Judge.” [*Kotaro Tanaka, “Independence of International Judges”, Comunicazioni e Studi, Vol. 14 1975, p. 858*]

It is submitted that it is self-evident that one of the most essential ingredients of judicial independence is complete and genuine independence from the executive in any shape or form, either at mundane or high-level. By standing for, and accepting, the office of vice-president of the Republic of Costa Rica and by maintaining the duties of the trusteeship of the said U. N. Fund, Judge Odio Benito violated that essential principle. Nothing done thereafter, short of resignation from the vice presidency and the trusteeship

or her judicial office, could remedy that position; although it is submitted that her trusteeship made her membership of the Celebici Trial Chamber invalid *ab initio* for the reasons later set out.

[7]

The Appellant makes it plain that it is not suggested that the learned judge did or said anything during the course of the trial which of itself was specifically indicative of a lack of impartiality. It is, however, submitted that the very act of joining the executive of her country, and at a high level, strikes at the very heart of the norms of judicial independence. As a result, it cannot be said that justice was manifestly seen to be done; the learned judge had an association which *might* have affected her impartiality, and emphatically affected her qualification.

It is submitted that the learned judge should either have refused to take the oath of office of vice-president until the conclusion of the trial, or having taken such an oath, should have immediately resigned as a judge of the Trial Chamber. Anything less than that is an unacceptable compromise that so dilutes the principle of judicial independence that that principle would be of no practical effect. It has the danger of creating a precedent which could and, if allowed to stand, would, lead to further instances when the strict and proper application of the separation of the powers of the judiciary and the executive, and thus the qualification for holding judicial office, would be compromised for subjective and transient benefit to an individual or an executive or judicial body.

[8]

History

On the 20th May 1997, the General Assembly of the United Nations elected 11 judges for the second mandate of the ICTY. Among those 11 were 8 judges already at the ICTY. Of those eight judges, five had their judicial terms renewed and three did not. Those three were the judges of the Celebici Trial Chamber including Her Honour Judge Odio Benito. All three were due to end their mandates on the 17th November 1997, and the question arose whether the three judges would be able to remain to hear the Celebici case beyond their judicial term. Unlike the International Court of Justice, which has a clear provision allowing judges, although replaced, to finish any cases which they may have begun [*Article 13[4], Statute of the International Court of Justice*], the ICTY statute makes no such contingency.

In their decision of 23rd June 1997 [*D3887-D3882*], the Trial Chamber took the view that Article 13 of the ICJ Statute applied to their position as judges of the ICTY and gave them tenure to continue to hear the Celebici case beyond 17th November 1997.

Whether that was a correct view or not, it certainly indicates that the Trial Chamber saw primacy in the ICJ Statute. This is of significance when considering the application of Article 16[1] of the Statute of the ICJ, *post*, under the sub-heading of International Custom.

By resolution 1126 the U.N. Security Council resolved the issue by stating that the three judges could finish the Celibici case which they had begun before the expiry of their terms of office.

[*United Nations Security Council Resolution 1126, 27th. August 1997, U.N. Doc. S/RES/1126*]

Whilst still a serving Judge at the ICTY, Judge Odio Benito joined the election ticket of the Partido Unidad Social Cristiana as one of the two vice-presidential candidates. On the 1st February 1998, the United Social Christian Party's Presidential candidate, Miguel Angel Rodriguez, won the Costa Rican election carrying into power as vice-president Judge Odio Benito.

According to Article 136 of the Costa Rican Constitution, the new executive was to appropriate political power shortly thereafter as "*the President and vice-presidents of the Republic [and] shall assume office on 8th May [1998].*"

Correspondingly Judge Odio Benito became a Vice-President of the Republic of Costa Rica. The learned Judge of course declared her position and the motion and corresponding decision of the bureau flowed from those events.

[9]

It is submitted that the act of declaration by the learned Judge, and the determinations which flowed in consequence, are in themselves eloquent examples of how fundamental the concept of judicial independence is to the

administration of justice. The decisions which followed should have been designed to strictly uphold the concept and not in any way to compromise it.

In essence, the decision of the Bureau was that in becoming a vice-president of Costa Rica Judge Odio Benito was not disqualified from continuing to act as a judge of the ICTY, because of an undertaking by the learned Judge not to discharge vice-presidential functions or duties. That undertaking, it is submitted, illustrates the acceptance by the learned Judge and the Bureau of the fundamental disparity between executive and judicial office, and the fundamental conflicts between judicial and executive oaths, both of which the learned Judge had now undertaken by 8th May 1998.

[10]

The Appellant reiterates that to allow this situation to continue contravenes the notion of judicial independence and can only be remedied by allowing the appeal. It will then be for the Appeal Chamber to consider whether the interest of justice demands a retrial.

[11]

Reference having been made to the '**norms of international law**' regarding judicial independence, it is submitted that the following observations and illustrations indicate how fundamental the principle of judicial independence is. This is relevant not only in respect of ensuring that the accused has, and is shown to have had, a fair trial by an independent tribunal, but also in respect of the wider elements of safeguarding fundamental liberties and Human Rights.

OBSERVATIONS AND ILLUSTRATIONS.

a. Historical.

As early as 1328 the English Statute of Northampton recognised the fundamental importance of an independent judiciary and declared that no royal command should disturb the course of the common law and that the judges should ignore such a command, if issued.

Sir John Fortesque, writing in about 1470, set out in *De Laudibus Legum Anglie*, his assertion that a justice appointed by the king ‘ shall swear among other things that he will do justice without favour, to all men pleading before him, friends and foe alike, that he will not delay to do so even though the king should command him by his letters or by word of mouth to the contrary’

In the early seventeenth century, as part of his continuing endeavour to limit the claims of King James 1, Sir Edward Coke, Chief Justice, maintained that ‘ the King cannot change any part of the common law, nor create any offence by his proclamation , without Parliament, which was not an offence before’

[The Lion and the Throne, The Life and Times of Sir Edward Coke {1552-1634} Catherine Drinker Bowen, 1956, page 321]

Although such theories were generally espoused amongst jurists it was only with the ‘Glorious Revolution’ of 1688, as a reaction to the Stuart removal of judges for political reasons, that the appointment of judges for life, allowing only for their removal on the grounds of serious offences, came to

be accepted. This was enshrined in the Act of Settlement in 1701. However, with the publication of *De L'Esprit des Lois* in 1748 by Charles Louis de Secondat, Baron Montesquieu, judicial independence assumed form as part of the doctrine of the separation of powers, from whence it has become to be generally regarded as one of the most fundamentally integral parts of that doctrine.

Montesquieu, focusing on the English constitution as being the only one then in Europe having liberty as its direct aim, established the tripartite division of both government functions and of branches of government into legislative, executive and judicial. He considered that each agency should, for the most part, exercise only its own functions. In particular, the judicial power should not be located in the House of Lords where many English writers had placed it. In his own words :

' When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty. Again, there is no liberty if the judicial power be not separated from the legislative and the executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control for the judge would be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end to everything, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and that of trying the cases of individuals. '

[As quoted by Professor M.J.C.Vile '*Constitution and the Separation of Powers*' Oxford, Clarendon Press, 1967.]

b. Modern View

The importance of an independent judiciary, it is submitted, is in part a reflection of such independence being an essential element for safeguarding fundamental liberties and human rights as expressed or implied from various international and regional instruments, beginning with the Universal Declaration of Human Rights.

Article 10 of the Declaration provides:

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

Further, article 14 of the International Covenant on Civil and Political Rights provides, inter alia,

“All persons shall be equal before the courts and tribunals 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 fair and public hearing by a competent, independent and impartial tribunal established by law.”

The importance of such an institution in a democracy was again reiterated with greater emphasis in the Vienna Declaration and Programme for Action in 1993.

In paragraph 27, the Member States present declared, inter alia,

“Every state should provide an effective framework of remedies to address human rights grievances of violations. The administration of justice

including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development.”

On the regional levels, article 8[1] of the American Convention on Human Rights: “*Pact of San Jose, Costa Rica*”, 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, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal or any other nature.”

Article 6[1] of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides:

“In the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by independent and impartial tribunal established by law.”

Article 71 of the African Charter on Human and People’s Rights provides,

“Every individual shall have the right to have his cause heard. This comprises,

a. the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

- b. the right to be presumed innocent until proved guilty by a competent court or tribunal;*
- c. the right to defence, including the right to be defended by counsel of his choice;*
- d. the right to be tried within a reasonable time by impartial court or tribunal.*

It will be noted that, while the Declaration and the Covenant together with the American and European Conventions refer to an “*independent and impartial tribunal*”, the Vienna Declaration refers to an “*independent judiciary*” and the African Charter to an “*impartial court or tribunal*”. In 1996, the Chief Justice of the United States of America, in a speech described the independence of the judiciary in his country as the “*crown jewel of the United States*”.

In a landmark judgment on judicial independence delivered by the Supreme Court of Canada recently, **Antonio Lamer C.J.** said:

“Judicial independence is valued because it serves important social goals, it is a means to secure those goals. One of those goals is the maintenance of public confidence in the impartiality of the judiciary, which is essential to the effectiveness of the court system. Independence contributes to the perception that justice will be done in individual cases. Another social goal served by judicial independence is the maintenance of the rule of law, one aspect of which is the constitutional principle that the exercise of all public power must find its ultimate source in a legal rule”.

[re. Remuneration of Judges of the Provincial Court of Prince Edward Island and others 1997]

The essence of judicial independence and impartiality.

It is submitted that the concept of judicial independence, and the separation of executive and judicial office, is not simply a right, requirement or obligation which is personal to an individual judge or judicial body. It is not analogous to a legal privilege which a holder may waive when it best suits him, but a fundamental and constituent part of both natural law and natural justice going to the root and foundation of the rule of law.

It is further submitted that the essence of judicial independence and impartiality was formulated succinctly by **Dr. L. M. Singhvi** in his final report to the U.N. Sub-Commission, [E/CN.4Sub.2/1985/18/Add.1.]

“Judges must be impartial and independent and free from any restrictions, inducements, pressures, threats or interference, direct or indirect, and should have the qualities of conscientiousness, equipoise, courage, objectivity, understanding, humanity and learning because those are the prerequisites of a fair trial and credible and reliable adjudication.”

In the case of **Valente v. The Queen** [[1985] 2.S.C.R. 673], the Supreme Court of Canada observed,

“that [judicial] independence focused on the status of the court or tribunal in its relationship with others particularly the executive branch of the Government”.

The Court went on to add that the traditional objective guarantees for judicial independence must be supplemented with the requirement that the court or tribunal be reasonably perceived as independent.

The reason for this additional requirement was that the guarantee of judicial independence has the goal not only of ensuring that justice is done in individual cases, but also of ensuring public confidence in the justice system. The Court further added:

“ Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception.”

In other words, it is submitted, that the test of impartiality connected with Judge Odio Benito’s undertaking not to exercise her executive functions is but part of the equation and, fundamentally, the least part. By far the greater is the fact and perception of the independence of the Tribunal as an entity.

If that is true for the national public perception of a national court, then how much greater, in the overall amalgam of jurisprudence and lay confidence, is the need for a positive international perception of an international tribunal.

c. International Custom

Article 38[1][b] of the Statute of the International Court of Justice dictates that international custom must be determined as: *“evidence of a general practice accepted as law”*, there arise, therefore, two elements to establish an international custom, those being **State practice** and **opinio juris**.

The ICJ in the North Sea Continental Shelf cases, pitting the Government of Denmark and the Netherlands against Germany, expressed itself at length on the process by which international customary law is formulated. The Court stated that international custom requires two elements so as to abide by the provisions of Article 38[b] which require “evidence of a general practice accepted as law”

Not only must acts concerned amount to settled practice, but they must also be such, or carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of **opinio juris sive necessitatis**.

The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts, is not enough. [ICJ Reports, 1969, p.44, para.77]

State Practice

The only two universal treaties establishing international adjudicative organs include in their statutes express provisions forbidding judges from exercising “*any political or administrative function*”.

Article 16[1] of the Statute of the International Court of Justice provides that “*no member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature*”.

The second judicial organ to which all States of the international community may be party, the International Tribunal for the Law of the Sea, incorporates

verbatim the provisions of Article 16(1) of the International Courts Statute and defines the subject matter further:

“ no member of the Tribunal may exercise any political or administrative function, or associate actively or be financially interested in any of the operations of any enterprise concerned with the exploration for, or exploitation of, the resources of the sea or the sea-bed or other commercial use of the sea or the sea-bed. ”

[Article 7, United Nations Convention on the Law of the Sea (Annex VI- Statute of the International Tribunal for the Law of the Sea)]

A simple examination of the statutory provisions, it is submitted, makes it plain that an international judge may not be a member of the executive organ of the municipal government. If, after having examined these statutory provisions, it remains ambiguous or unclear as to whether such a norm exists in international law, a supplementary means of interpretation is available: the **travaux préparatoires**. The preparatory work which led to the provision that *“no [judge] may exercise any political or administrative function”* was conducted in 1920, as a movement towards the establishment of the Permanent Court of International Justice.

At that time the League of Nations established an advisory committee of jurists made up of 10 eminent scholars and diplomats to draft the plans for the establishment of the Permanent Court of International Justice. This advisory committee met in June and July 1920 in The Hague and produced a draft which, with minor modifications, was accepted by the Council and the Assembly of the League of Nations as the statute of the Permanent Court of International Justice.

Verbal Observations

Lord of Phillimore, a member of the Privy Council of England, noted that a “*post as judge must be considered as incompatible with any political office*”. Professor Altamira, of the University of Madrid, thought that anyone holding an executive position should be excluded. During the course of the 8th meeting of the Committee of Jurists at the Peace Palace on the 24th June 1920, Professor De Lapradelle of the University of Paris considered whether or not the jurisconsultants attached to the Foreign Office could be judges of the Court. He concluded that they could not. Lord Phillimore, when asked whether Cabinet Ministers could accept such a position, concluded that the answer should be no. The President of the Committee, Baron Descamps, Belgian Minister of State, thought that all duties related to the political direction of States should be incompatible with the duties of the judge. (*Permanent Court of International Justice, Advisory Committee of Jurists, proces verbaux of the Proceedings of the Committee 1920 pages 191 to 193.*)

In his report to the Council of the League of Nations, Baron Descamps emphasized that:

“ A member of a Government, a Minister or Under-Secretary of State, a diplomatic representative, a director of a Ministry, or one of his subordinates, or the legal advisor to a Foreign Office, though they would be eligible for appointment as Arbitrators to the Court of 1899 [Permanent Court of Arbitration], are certainly not eligible for appointment as judges of our Court. {when}a judge accepts a post involving political work which

is incompatible with his retention of his seat on the Court, he may be called upon to make his choice... ..

The incompatibility between the duties of a judge and an active part in the political control of a particular country, also applies in the case of international political duties, such as those of a representative of a State which is a member of the League of Nations”

[Ibid page 716]

Beyond the provisions found in these universal treaties, States have also shown, through the establishment of regional courts, that the requirement of judicial independence is a part of State practice.

The fact that the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, establishing the European Court of Human Rights, did not have provisions requiring the independence of its judges was not lost on the Council of Europe. Thus, in drawing up Protocol No. 11, which came into force on 1st November 1998, the Council determined that a criterion for office would be that “*judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of full time office*”. [Article 21, Protocol No. 11 to the Convention for the Protection of Human Rights]

More precise in its nature are the provisions of the Inter-American system as found in both the American Convention on Human Rights and in the statute of the Inter-American court. The Inter-American court, which has its seat in San Jose, Costa Rica, a matter of particular note given the facts underlying this submission, would seem to have the most explicit and restrictive

annunciation of occupations which are incompatible with being a judge at the international level.

While the American Convention provides that the position of Judge of the court is incompatible with any other activity that might affect the independence or impartiality of such a judge, the Statute of the court goes further by determining that the position of a judge of the Inter-American Court of Human Rights is incompatible with the following oppositions and activities:

“Members or high-ranking officials of the executive branch of government, except for those who hold positions that do not place them under the direct control of the executive branch and those of diplomatic agents who are not chiefs of missions to the OAS or to any of its member states.”

[Article 18, Statute of the I-A C H R, OAS Res. 448 (IX-0/79), OAS Off. Rec. OEA/Ser.P/IX.o.2/80, Vol.1.p.98]

Opinio Juris

Having demonstrated that states have had recourse to including provisions in international instruments which preclude a judge of from sitting internationally while being a member of the state's executive, it is submitted that it is necessary to consider if this practice is accepted as law.

Opinio juris on the issue of judicial independence was expressed recently as a by-product of the movement towards establishing an International Criminal Court. The United Nations International Law Commission completed a draft statute for an International Criminal Court that includes a

provision which reads, inter alia, that *“judges shall not to engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence. In particular they shall not, while holding office of a judge, be a member of the legislative or executive of branches of the government of a state.”*

[Articles 10(1) and(2) of the International Law Commission draft Statute for an International Criminal Court [Yearbook of the International Law Commission, Volume 11, (Part 2), 1994, p.32] read:

- 1. In performing their duties, the judges shall be independent.*
- 2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence. In particular they shall not while holding the office of judge be a member of the legislative or executive branches of the Government of State, or of a body responsible for the investigation or prosecution of crimes.]*

In its commentary to this Article, the International Law Commission amplifies its understanding that a judge is not to be “a member of the legislative or executive branches...” *[Ibid]*

Furthering the movement towards an International Criminal Court, the United Nations General Assembly formed a Preparatory Committee on the Establishment of an International Criminal Court. The Committee requested proposals from States to supplement the International Law Commission’s draft. With respect to Article 10, no State took issue with the notion that judges would violate their independence if they were a member of the legislative or executive branches.

As **opinio juris** may be expressed in either of two ways: positively, through a State's active expressions of its opinion and/or negatively, through no expression at all or acquiescence, it is clear, it is submitted, that the provisions of Article 10 reflect the understanding of States as to the law concerning judicial independence as it currently subsists.

For example, France did not challenge the fundamental premise that an international judge may not be a member of the executive [in fact, quite the opposite], when it proposed the following amendment to Article 10(1):
"The judges of the Court shall be independent. They may not engage in any activity which is likely to be incompatible with their judicial functions or to affect confidence in their independence. They may not, moreover, be a member of the legislative or executive branches of the Government of a State or a body responsible for investigation or prosecution of crimes"
 [United Nations Report of the Preparatory Committee on the ICC, Volume 11: Parts 1-3, Proceedings of the Preparatory Committee during March-April and August 1996]

In addition to this reflection of **opinio juris** as expressed by States, other international commentators have expressed themselves as to the belief that a customary norm exists separating the municipal executive from the international judiciary.

The Special Rapporteur on the Independence of Judges and Lawyers, who is mandated by the United Nations Commission on Human Rights and, by extension, the UN Economic and Social Council, to monitor States' actions in the area of judicial independence, has stated:

“... moreover, the Special Rapporteur is of the opinion that the general practice of providing independent and impartial justice is accepted by States as a matter of law and constitutes, therefore, an international custom in the sense of Article 38[1](b) of the Statute of the International Court of Justice.”

[Report of the Special Rapporteur, Mr. Param Cumaraswamy, submitted in accordance with the Commission on Human Rights resolution 1994/41, 6th. February 1995, UN Doc. E/CN.4/1995/39, para 35.]

It is therefore submitted that it is plain that an international custom exists which precluded Judge Odio Benito from sitting as a judge of the ICTY as soon as she took the oath of office of a vice-president of Costa Rica.

It is arguable that as soon as the learned judge became a nominated candidate, and stood for election, she was engaging in a political campaign that was an activity, *“likely to be incompatible with [her] judicial function or affect confidence in [her] independence.”* In that event the disqualification became effective at the moment of accepting the nomination as a candidate. *[UN Report of the Preparatory Committee of the ICC; Article 10, ante]*

[12]

General Principles Of Law.

It is submitted that beyond customary norms there is a general principle of law precluding an international judge from being a member of any municipal government's executive organ.

A “general principle of law” is a rule common to the internal laws of the majority of States. According to a former Judge of the International Court of Justice, Kotaro Tanaka, this “*principle of independence of judges and other provisions concerning the judicial administrations are more or less the same in almost all civilized nations. It is not an exaggeration to mention that there exist general principles of law recognized by civilized nations [Article 38, para 2 of the Statute of the Court] or a world law, namely a unified law on this matter.*” [Tanaka *op.cit. ante pp. 858 and 861*]

Judge Tanaka goes on to say that the criteria required of International Judges are the same as those for municipal judges: “*The principle of the independence of judges in general can be conceived as one of the general principles of law recognized by civilized nations.*” [Ibid *pp. 859-860*]

In addition, the UN Special Rapporteur also considers that judicial independence is a general principle. In relation to the underlying concepts of judicial independence and impartiality, which the Special Rapporteur asserts are “*general principles of law recognised by civilised nations*” in the sense of Article 38[1] c. of the statute of The International Court of Justice, the Special Rapporteur quoted the following passages of Mr Singhvi’s lucid final report to the Sub-Commission in 1985:

“Historical analysis and contemporary profiles of the judicial functions and the machinery of justice shows the worldwide recognition of the distinctive role of the judiciary. The principles of impartiality and independence are the hallmarks of the rationale and the legitimacy of the judicial function in every State. The concepts of the impartiality and independence of the judiciary postulate individual attributes as well as institutional conditions.

These are not mere vague nebulous ideas but fairly precise concepts in municipal and international law. Their absence leads to a denial of justice and makes the credibility of the judicial process dubious. It needs to be stressed that impartiality and independence of the judiciary is more a human right of the consumers of justice than a privilege of the judiciary for its own sake."

Mr Singhvi went on in his report to demonstrate that the principles of judicial independence and impartiality are reflected in the legal systems of the world by constitutional and legislative means supported by an overwhelming practice. As such, Mr Singhvi was moved to observe that *"there is in fact a coherent world profile of judicial independence and it is not merely a matter of ritual verbiage."* The Special Rapporteur fully shares the observation of Mr. Singhvi. [UN Doc. E/CN.4/1995/39.paras. 34-35]

It is therefore submitted that, while there would be room for debate when considering whether or not there is a statutory norm within the constitutive instruments of the ICTY which would have precluded Judge Odio Benito from remaining as a judge, the customary norms and general principles do not allow for a judge, once elected to an office such as vice-president, to remain sitting as an international judge.

[13]

Specific potential conflicts.

Beyond the requirement that an international judge not hold office within the executive organ of a State, it is submitted that there were specific potential conflicts that exacerbated the position into which Judge Odio Benito put herself.

As one of the two vice-presidents of Costa Rica the judge is a member of the cabinet and potentially replaced the President in his absence. [*Article 135, Constitution of the Republic of Costa Rica, Flanz op. Cit. Ante*]

On the 21st. October 1996, the Republic of Costa Rica was elected to a 2 year term as a non-permanent member of the UN Security Council, effective from the 1st. January 1997.

[*UN Doc. GA/9138*]

It is submitted that there is, within that fact alone, the scope for an ***appearance*** of bias no less than the apparent bias that was to result in the original Pinochet hearing being set aside, [see submissions at [14] *post*].

As a result of Costa Rica being so elected, Judge Odio Benito as Vice-President became superior in rank to her State's Permanent Representative to the United Nations who held one of 12 votes of the Security Council.

In 1979 Judge Miguel Urquia, an international judge of the Inter-American Court of Human Rights, resigned his judicial office upon being appointed as Permanent Representative of El Salvador to the United Nations as he felt the positions were incompatible. His letter of resignation stated in part:

“Professor Robertson, former Director of Human Rights of the Council of Europe and one of the authorities in this area of international law, relates in his book Human Rights in Europe [pages 198 to 200, 2nd edition, Manchester University Press], that prior to the election of the judges of the European Court the question of the compatibility of the position of Judge with other activities was formally discussed, and the opinion that prevailed that being a government functionary, including holding a diplomatic post, was incompatible with the independence inasmuch as the assembly and its organs lacked the power to resolve required to be a Judge of a tribunal. The distinguished author adds that such questions,, no decision was taken, and that the court, in drafting its rules, said in Article 4[1] that a judge may not exercise his functions while he is a member of the government or while he holds a post or exercises a profession which is likely to affects confidence in his independence.

In contrast to the European, the American Convention contains a provision, Article 71, concerning the question of incompatibilities. That article establishing, inter alia, that the position of judge of the Court is incompatible with other activities that might affect his independence or impartiality according to what is decided in the respective statute.

It could be argued, based upon the last phrase of the article, that the question of incompatibilities was left to the criterion of the Court, which shall prepare its Statute, and finally, to that of the General Assembly of the Organisation of American States, which shall approve it. But it is obvious that the remainder of the provision, which is a key, cannot be eliminated from or avoided in the Statute: the incompatibility with activities that might affect the independence or impartiality of the of which Judge, one

as I understand, is the exercise of a diplomatic post, just as the European jurists decided.

In conclusion, and not without regret, I express with all respect to that Honourable Court that for the reasons set forth and others that I believe it unnecessary to mention here, I am forced to decline the high honour of participating in its work and to request, consequently, and to give proper course to this missive, considering it a declination of the position of judge or an irrevocable resignation."

[Documento relacionado con la nota de la Corte Interamericana de Derechos Humanos sobre el Planteamiento hecho por el Mr. Miguel Rafael Urquia, Juez de dicha Corte, OEA/Ser.P, AG/doc. 1085/79, add. 1,2 octubre 1979, Original: espanol, pp.5-7]

It is submitted that it is irreconcilable that, if a Permanent Representative to the United Nations would feel compelled to resign the position of international judge as being incompatible with his executive office, a vice-president with power to instruct a Permanent Representative, could remain as a judge without strong public disquiet and a material lack of confidence in independence and/or impartiality.

The matter is put even more into focus when it is considered that the Security Council established the ICTY and, of course, was instrumental in extending the effective terms of office of the Celebici judges, including Judge Odio Benito.

[14]

Many of the issues raised in these submissions have been recently and internationally aired following the proceedings in the United Kingdom concerning the former President of Chile, Senator Pinochet and the role of Lord Hoffman in the original judicial findings in the House of Lords. The relevant report is to be found under the reference, ***Regina v. Bow Street Metropolitan Stipendiary Magistrate and others, Ex parte Pinochet Ugarte (no. 2) [H.L.(E.)] 2.W.L.R. 1999***. The full text of that report is annexed to the back of these submissions for ease of reference.

It is submitted that that decision of the highest court in the oldest common law jurisdiction in the world is of very strong persuasive force in this matter. Amongst other points, it has been made plain that, by setting aside the judgment of the court as originally constituted with Lord Hoffman as a member, primacy has been given to the fundamental principle that justice should not only be done but that it should manifestly be seen to be done.

In dealing with that point Lord Nolan said at page 288 A of the report, “... *in any case where the impartiality of a judge is in question the appearance of the matter is just as important as the reality.*”

Lord Hutton said at page 292, “In his judgment in ***Regina v. Gough [1993] AC 646, 659*** my noble and learned friend, Lord Goff of Chieveley, made reference to the great importance of confidence in the integrity of the administration of justice, and he said:

“ *In any event, there is an overriding public interest that there should be confidence in the administration of justice, which is always associated with*

*the statement of Lord Hewart C.J. in **Rex v. Sussex Justices, Ex parte McCarthy** [1924] 1 K.B. 256, 259, that it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."*

[15]

Conclusion.

For the reasons set out *ante*, and considering the material referred to and the associated arguments, it is submitted that the Appellants contentions in this regard are compelling justifications for a finding that Judge Odio Benito should not have sat in judgement in the Celebici case after her election to the office of vice-president, and as a trustee of the U.N Torture Fund, and that the trial was, in effect, a nullity.

A former judge of the ICTY, Sir Ninian Stephen, spoke of the "fragile bastion" which is judicial independence. [*Report of the World Jurists Association 1991 p. 529*]

If the international judicial community is to retain the respect properly due from the diverse range of peoples and institutions over which it holds sway, the doctrine of judicial independence from any potential political pressure or influence, must be seen to be undiluted and pre-eminent whatever the fiscal or administrative inconveniences are that might result. It is respectfully submitted that such a truly independent judiciary must take every

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opportunity to demonstrate that it is neither a tool of the United Nations nor of any individual State.

Even less should it be a reflection of the personal interest of any individual, however eminent, who may seek to put what might appear to be in the eyes of the international lay community, avoidable self serving-interests above the pure rule of law.