SEPARATE OPINION OF JUDGE SHAHABUDDEEN

1. I agree with the judgment of the Appeals Chamber, but propose to offer some supporting reasons for the existence of the power of reconsideration and to note the limits within which the power may be exercised.

A. Whether it is necessary to pronounce on reconsideration

2. But, first, having had the advantage of reading in draft the joint concurring opinion of President Meron and Judge Pocar, I must attend to the important question raised by them as to the necessity for much of the discussion in paragraphs 48-53 of the judgment concerning the authority of the Appeals Chamber to reconsider its judgments and the circumstances in which such authority should be exercised, including the question whether the power extends to a final judgment.

3. In support of the view that there was no such necessity, it may be said that it was open to the Appeals Chamber to say that, even if a power of reconsideration exists and is applicable to a final judgment, it is not exercisable in favour of Delić for the reason that the ground for its exercise, as given by him, does not exist. On that approach, the matter could be disposed of without the necessity to determine whether there is a power of reconsideration and, if it exists, whether it is applicable to a final judgment. That would accord with traditional, and wise, warnings against making unnecessary judicial pronouncements.

4. And, no doubt, that was an approach open to the Appeals Chamber. But it was not the approach which it took. The Appeals Chamber can choose its approach.[1] It can take the view that it has logically first to satisfy itself that a power, which it is asked to exercise, exists, and then, if it exists, to determine whether it is exercisable in the case before it. If, as it appears to me, that is the approach taken by the Appeals Chamber, then it is within its competence to pronounce on the matter, as is proposed in paragraphs 48-53 of the judgment.

[1] See, by way of analogy, *Northern Cameroons, I.C.J.Reports 1963*, p. 15, in which the court reversed the usual procedural approach, determining admissibility before jurisdiction.

B. The existence of the power of reconsideration

5. As to the existence of the power of reconsideration, weight has to be given to the fact that, the Tribunal being international in character, its powers might be expected to be set out in its organic instrument and not left to be spelt out in accordance with the norms applicable to a particular legal system with which all the judges of the Tribunal or counsel appearing before it may not be familiar. Still, the fact is that the Tribunal was established to do justice; if, therefore it finds that its actions create injustice of a kind which cannot be remedied in its normal appellate or review processes, it must possess the power of reconsideration, limited though this necessarily is.

6. The silence on the matter in the regulatory regime of the Tribunal was mentioned in *Kordić*, in which it was said "that motions to reconsider are not provided for in the Rules and do not form part of the procedures of the International Tribunal".[2] But, as other cases have shown, the silence is not an impediment.

7. Without passing on cases involving additional evidence, it appears to me that in some domestic jurisdictions reconsideration is effectively made by way of rehearing. In *Metropolitan Water Dist. of Southern California v. Adams* (1942) 19 Cal. 2d 463 at 469, Shenk, J., said:

> There is no express provision of the Constitution or in the statutes for a rehearing of a cause in bank. It is, however, an essential ingredient of jurisdiction. This court has inherent power to revise, modify, and correct its judgments so long as they are under its control and may, in the exercise of that power, grant rehearings on applications of the parties or on it own motion.[3]

8. In my opinion, when the Security Council established the Tribunal as a judicial entity, the body which came into being was clothed with the essential ingredients of jurisdiction referred to by Shenk, J; those ingredients included the power of reconsideration, by whatever name called. As paragraph 52 of the judgement of the Appeals Chamber correctly notices, the power was exercised in *Pinochet's* case,[4] to which I have referred elsewhere[5] in connection with this subject. It could also be exercised in other cases.[6]

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[2] IT-95-14/2-PT, 15 February 1999. See similarly *Kovačević*, IT-97-24-PT, 30 June 1998.
[3] See too *Lane v. Mathews*, (1952) 75 Ariz. 1 at 2.
[4] *R. v. Bow Sreet Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No.2)* [1999] 1 All ER 577, HL, at 585-586, per Lord Browne-Wilkinson.
[5] *Barayagwiza*, ICTR 97-19-AR72, 31 March 2000, separate opinion.
[6] See *Halsbury's Laws of England*, 4th ed., vol.26, pp.279-288, referred to in footnote 3 of the separate opinion mentioned in footnote 5 above.

9. There is a last point. In the *Adams* case, mentioned above, Shenk, J., expressed the view that the "inherent power [of a court] to revise, modify, and correct its judgments" was available "so long as they are under its control …" In principle, the limitation was right; it is reflected in the general view that the court is *functus officio* once the decision has been announced or formalised.[7] The idea is in keeping with the principle of finality, and the guillotine which it imposes has to be respected. However, in extreme cases reconsideration is thereafter still possible if the circumstances meet the tests mentioned below.[8]

C. The limits within which the power of reconsideration may be exercised

10. Paragraph 49(b)(i) of today's judgment speaks of the power of reconsideration being exercisable by the Appeals Chamber in relation to a judgment "where it is persuaded … that a clear error of reasoning in the previous judgment has been demonstrated by, for example, a subsequent decision of" certain senior judicial bodies, or "that the previous judgment was given *per incuriam*", and that "the judgment of the Appeals Chamber sought to be reconsidered has led to an injustice".

11. I accept that view, but would interpret it, my apprehension being that a party might seek to show that an ordinarily appealable "error" is a "clear error", that a resulting prejudice amounts to "injustice", and on that basis attempt, long after the case is closed in the normal judicial process, to bring what is effectively an appeal under the guise of reconsideration.

12. It seems to me that the proper criterion for determining what are the limits within which reconsideration is allowed is to be derived from holding a balance between the principle that a litigant has a right to a correct decision and the principle that his opponent has a right to rely on the finality of litigation. The balance would obviously be disturbed were the litigant, for example, to be given an open-ended right to relitigate the case after the Appeals Chamber has decided it; some restriction is required.

13. I consider that some guidance is to be had from the remarks made in 1947 on a petition for rehearing by the Tennessee Court of Appeals. The court observed:[9]

> The petition points out no matter of fact or law overlooked, but only reargues matters which counsel say were improperly decided. The office of a petition to rehear is to call the attention

[7] *Cross* (1973) 57 Cr. App. R. 660, and *Roberts* [1990] Crim. L.R. 122.
[8] See *Daniel*, (1977) 64 Crim. App. R. 50.
[9] *Black v. Love and Amos Coal Co.*, (1947) 206 S.W. 2d 432 at p. 437, per Felts J., Howell and Hickerson JJ. concurring, in the Tennessee Court of Appeals, Middle Section, 28 June 1947.

> of the court to matters overlooked, not to those which counsel suppose were improperly decided after full consideration.

Similarly, in 1950 the Ohio Court of Appeals said:[10]

> At present we have no rule permitting applications for rehearing and it is only in rare instances, where there is something which, manifestly, the court has overlooked in the original opinion that such applications are entertained.

14. Even where there are rules on the subject, some restriction is in principle required. Thus, in 1998 the Supreme Court of Nevada considered that, as it had "overlooked material matters and that rehearing will promote substantial justice, … rehearing is warranted".[11] Likewise, in 2000 the Ohio Court of Appeals in the 10th District said:

> The test generally applied upon the filing of a motion for reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious error in its decision, or raises an issue for consideration that was either not considered or was not fully considered by the court when it should have been … Here, Erie contends that this court committed an obvious error and failed to consider relevant Ohio law in two respects.[12]

15. It could be argued that the principle of finality is sufficiently honoured by the requirement, not only that there should be a "clear error", but also that the clear error should be one which causes "injustice". It may be, therefore, that what is involved is a question of nuance; be that as it may, I desire to state my understanding of the reference in the judgment to "clear error" to be a reference to something which the court manifestly or obviously overlooked in its reasoning and which is material to the achievement of substantial justice.

[10] *Wolf v. Glenn*, 99 N.E. 2d 320 at 323, 4 January 1950.
[11] *Calloway v. City of Reno*, (1998) 971 P. 2d 1250.
[12] *Erie Insurance Exchange v. Colony Development Corporation*, (2000) 736 N.E. 2d 950 at 952.

D. Conclusion

16. For these reasons, it appears to me that the power to reconsider exists; that, as the cases show, decisions which may be reconsidered include a final judgment; and that there are obvious restrictions which apply to the exercise of the power.

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

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Mohamed Shahabuddeen

Dated 8 April 2003
At The Hague
The Netherlands