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Perjury hinders the course of justice and might even lead to miscarriages of justice. Especially in the serious cases pending before the International Criminal Tribunal it is important that the Trial Chamber can rely on those giving evidence. Whenever this trust is abused it deserves a reaction. The Trial Chamber has therefore ordered the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for false testimony.

The investigation of the Prosecutor is also necessary with a view to an assessment of its internal procedures. Are procedures for verifying the testimony of witnesses sufficient? It obviously can not be excluded that perjury will be committed again. Another reason for serious investigation in the matter is that the witness says that his testimony has been prepared by the Bosnian authorities. Should this allegation be true, it would constitute a serious violation of the obligation of all states to cooperate with the Tribunal, and frustrate its work.

In my view it is not desirable that the Prosecutor indicts Opavić and that the International Criminal Tribunal for the Former Yugoslavia tries him. This is based on both legal and practical arguments. Whatever can be said of the crime of perjury it is certainly not one of the crimes for which the Tribunal was established. Article 1 of its Statute limits its powers to prosecute “persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991”. The crime in this case is not a serious violation of international humanitarian law and it is not committed in the territory of the former Yugoslavia. The Tribunal therefore lacks the competence to deal with it.1

Rule 91 on False Testimony under Solemn Declaration which provides a maximum penalty of $10,000 or imprisonment of twelve months or both, should be regarded as not binding upon individuals, being beyond the mandate given to the Tribunal under Article 15 of the Statute.2 Article 16 of the Statute is completely silent on any powers of investigation or indictment with respect to prosecuting others than those who have committed serious violations of international humanitarian law. Also Article 23, paragraph 1 of the Statute only gives a Trial Chamber the power to “ pronounce and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.” In my opinion this means that punishment of false testimony does not belong within the so called “inherent powers” of the Tribunal.

This does not entail that perjury could not constitute a criminal offence under national criminal law. The criminal law of the host state may support the Tribunal here. Article 207A of the Penal Code of the Netherlands provides for a penalty with a maximum of nine years imprisonment and a fine of 100,000 Dutch Guilders (approximately $50,000) for those who commit perjury before an international tribunal. However, a Dutch Prosecutor can only begin proceedings against such a witness on request of the Tribunal before which the false testimony was given.

The Prosecutor decided that “the testimony by Dragam Opavić is not sufficiently material to the proceedings to justify prosecution.” There is no evidence that the Tribunal or the Prosecutor took prosecution by the host country into consideration. On 27 May 1997 the Tribunal ordered Opavić’s return to Bosnia-Herzegovina, without responding to his allegations that he might be subject to torture in that country. The Tribunal supposes that Bosnia will respect (legally not binding) Principle 6 of the Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment adopted by the General Assembly of the United Nations on 9 December 1988. An appeal to the District Court in The Hague in which Opavić argued that hoststate the Netherlands would violate the European Convention on

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1 See Julian Schurte, Legal and Practical Implications, from the Perspective of the Host Country, Relating to the Establishment of the International Tribunal for the Former Yugoslavia, 5 Criminal Law Forum 1994, p. 423-450 at 432-433
Human Rights by enforcing the return was unsuccessful. In its decision of 30 May 1997, the District Court decided that the proceedings before the Tribunal provide sufficient guarantees for due process. In addition, the Netherlands are bound by their obligations as a host state.

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