SCSL-2003-11-PT
(2826 — 2914)

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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

IN THE TRIAL CHAMBER

Before: Judge Bankole Thompson
Judge Pierre Boutet
Judge Benjamin Mutanga Itoe

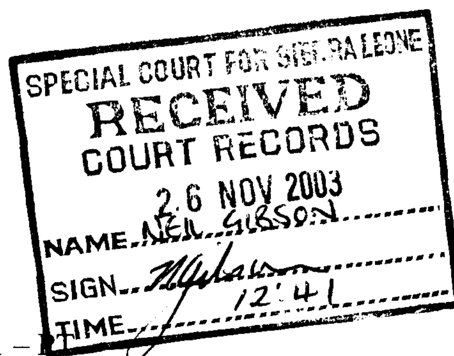
Registrar: Mr Robin Vincent

Date filed: 26 November 2003

THE PROSECUTOR

Against

MOININA FOFANA



CASE NO. SCSL – 2003 – 11 – PT

PROSECUTION RESPONSE TO THE DEFENCE PRELIMINARY MOTION ON LACK OF PERSONAL JURISDICTION

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CASE NO. SCSL – 2003 – 11 – PT

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I. INTRODUCTION

1. The Prosecution files this response to the Defence Preliminary Motion entitled "Preliminary Defence Motion on the Lack of Personal Jurisdiction" (the "**Preliminary Motion**"), filed on behalf of Moinina Fofanah (the "**Accused**") on 17 November 2003.[1]

2. The Preliminary Motion argues essentially that the Special Court only has jurisdiction over persons who bear the "greatest responsibility" for the serious violations of international law that are within the subject-matter of the jurisdiction of the Court. The Preliminary Motion argues that as the Accused does not belong to this category of persons the Special Court cannot exercise jurisdiction over him.

3. For the reasons given below, the Preliminary Motion should be dismissed in its entirety.

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[1] Registry Page ("RP") 1335-1341.

II. ARGUMENT

4. Article 1(1) of the Statute of the Special Court provides that the Special Court has the power "to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996". The Defence argues that the Accused does not fall into the category of "persons who bear the greatest responsibility for serious violations of international humanitarian law", and that the Special Court therefore lacks jurisdiction over him.

5. In proposing the Statute of the Special Court, the Secretary-General of the United Nations suggested that Article 1(1) of the Statute should refer to "persons most responsible" rather than to "persons who bear the greatest responsibility".[2] He said:

> "While those "most responsible" obviously include the political or military leadership, others in command authority down the chain of command may also be regarded "most responsible" judging by the severity of the crime or its massive scale. "Most responsible", therefore, denotes both a leadership or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime. It must be seen, however, not as a test criterion or a distinct jurisdictional threshold, but as a guidance to the Prosecutor in the adoption of a prosecution strategy and in making decisions to prosecute in individual cases."[3]

6. The Security Council subsequently indicated its desire to retain the expression "persons who bear the greatest responsibility" in Article 1(1).[4] However, the Security Council expressed no disagreement with the opinion of the Secretary-General that the relevant wording must be seen "not as a test criterion or a distinct jurisdictional threshold, but as a guidance to the Prosecutor in the adoption of a prosecution strategy and in making decisions to prosecute in individual cases". The Prosecution submits that it is thus clear from the documents leading to the establishment of the Special Court that it was intended that the question whether a person is one of the "persons

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[2] Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, S/2000/915 (the "**Report of the Secretary-General**"), para. 29 and page 15.

[3] Report of the Secretary-General, para. 30.

[4] Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, U.N. Doc. S/2000/1234, 22 December 2000, para. 1.

who bear the greatest responsibility" for the purposes of Article 1(1) of the Statute is to be decided as a matter of prosecutorial discretion.

7. The Prosecution submits that it is self-evident that this must be the case. If the words "persons who bear the greatest responsibility" were interpreted to be a test criterion or a distinct jurisdictional threshold, it would be necessary to determine, at the pretrial stage, as a matter of *fact*, that there is no person who has not been indicted by the Prosecution who bears greater responsibility than the Accused. In order to determine this fact, it would be necessary to determine, at the pretrial stage, as a matter of fact, not only the precise extent of the criminal responsibility of the Accused but the precise extent of the criminal responsibility of every other person believed to have committed crimes within the jurisdiction of the Special Court, in order to be able to determine whether the Accused had greater responsibility than they did. Essentially, on the Defence's theory it would be necessary, before it would be possible to conduct a trial of any accused, to conduct a fact-finding trial of every person who was involved in the commission of crimes within the jurisdiction of the Special Court in order to determine which of them bore the greatest responsibility. This would clearly be absurd.

8. It is clear that at the pretrial stage, the precise scope of the criminal liability of the Accused cannot be known. It cannot be known at the pretrial stage whether at the end of the trial the Accused will be convicted on all of the counts with which he or she has been charged. Furthermore, the Prosecution may have evidence that the Accused committed other crimes with which, in the interests of efficiency, the Prosecution has decided not to charge the Accused in the Indictment. At the pre-trial stage, it is also impossible to know the precise scope of the criminal liability of any other person who was involved in the conflict in Sierra Leone. As no proceedings before the Special Court have yet been finalised, it cannot be known exactly what is the precise scope of the criminal liability of any other person who has been indicted by the Special Court. There is also no way of determining with any certainty what is the precise scope of the criminal liability of any person who has not been, or has not yet been, indicted by the Special Court.

9. Accordingly, the only sensible interpretation of the words "persons who bear the greatest responsibility" is that these words are, as indicated by the Secretary-General, intended to provide guidance to the Prosecutor in the adoption of a prosecution strategy and in making decisions to prosecute in individual cases. In other words, the Prosecution is called upon to decide, based upon all of the evidence it has collected in the course of its investigations, which persons it considers to bear the greatest responsibility for the crimes within the jurisdiction of the Special Court, and to indict those persons. Because that decision is one that must be based upon all of the evidence that the Prosecution has collected in the course of its investigations as a whole, it is a decision that cannot be susceptible to judicial review on the merits. For a Chamber to review that decision, it would be necessary for the Chamber to review all of the evidence that the Prosecution has collected in the course of its investigations as a whole, in order to determine whether the Prosecution's decision based upon all of that evidence was justified. That would clearly be an impossibility.

10. It is acknowledged that the wording of Article 1(1) of the Statute of the Special Court is slightly different to Article 1 of the Statutes of the ICTY and ICTR. Article 1 of the ICTY Statute provides that the ICTY has the power "to prosecute persons responsible for serious violations of international humanitarian law", without that power being limited to those "who bear the greatest responsibility". However, if the Defence's argument were correct, there would be no reason why the words "persons responsible" in Article 1 of the ICTY Statute should not also be considered to be a jurisdictional requirement. In other words, if Article 1 were interpreted as imposing a jurisdictional threshold, the Prosecution of the ICTY would only be able to prosecute those who are actually guilty, so that it would be necessary to determine guilt at the pretrial stage. Such a reading would clearly be an absurdity. At the pretrial stage, it cannot be known whether or not the Accused is guilty. In the same way, it cannot be known at the pretrial stage whether the Accused is one of the "persons who bear the greatest responsibility". Indeed, it would be contrary to the presumption of innocence enshrined in Article 17(3) of the Special Court Statute to determine at the pretrial stage that the Accused is one of the "persons who bear the greatest responsibility".

11. Despite the difference of wording between Article 1(1) of the Special Court Statute and Article 1 of the Statutes of the ICTY and ICTR, the structure of the legal system of the Special Court is materially the same as that of the other two international criminal tribunals. Under Rule 47(B) of the Rules of Procedure and Evidence of the Special Court, as under the equivalent provisions of the Rules of the ICTY and ICTR,[5] it is for the Prosecutor to be "satisfied" in the course of an investigation that a suspect has committed a crime or crimes within the jurisdiction of the court and to prepare an indictment. In exercising this function, the Prosecutor is required to act independently as a separate organ of the Special Court, and must not seek or receive instructions from any Government or from any other source.[6] Within the structure of the legal system of these institutions, the decision as to which persons are to be indicted, and for what crimes, is a matter of prosecutorial discretion. In the ICTY and ICTR, this prosecutorial discretion is well established.[7]

12. This prosecutorial discretion is subject to certain limits. As the Appeals Chamber of the ICTY has said:

> "The discretion of the Prosecutor at all times is circumscribed in a more general way by the nature of her position as an official vested with specific duties imposed by the Statute of the Tribunal. The Prosecutor is committed to discharge those duties with full respect of the law. In this regard, the Secretary-General's Report stressed that the Tribunal, which encompasses all of its organs, including the Office of the Prosecutor, must abide by the recognised principles of human rights."[8]

13. Thus, for instance, it would be impermissible for the Prosecutor to act inconsistently with an accused's right to equality before the law, by basing a decision to prosecute on impermissible discriminatory motives such as, *inter alia*, race, colour, religion,

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[5] Rule 47(B) of ICTR and ICTY Rules of Procedure and Evidence respectively.

[6] Special Court Statute, Article 15(1). Article16 (2) ICTY Statute and Article 15(2) ICTR Statute.

[7] See *Prosecutor v. Delalic et al. (Celebici case), Judgement*, Case No. IT-96-21-T, Trial Chamber, 16 November 1998, para. 179; *Prosecutor v. Furundzija, Decision on the Defendant's Motion to Dismiss Counts 13 and 14 of the Indictment (Lack of Subject Matter Jurisdiction)*, Case No. IT-95-17/1-PT, Trial Chamber, 29 May 1998, para. 16; *Prosecutor v. Barayagwiza, Decision on the Extremely Urgent Motion by the Defence for Orders to Review and/or Nullify the Arrest and Provisional Detention of the Suspect*, Case No. ICTR-97-19-I, Trial Chamber II, 17 November 1998, p. 6; *Prosecutor v. Ntuyahaga, Decision on the Prosecutor's Motion to Withdraw the Indictment*, Case No. ICTR-98-40-T, Trial Chamber, 18 March 1999, p. 6.

[8] *Prosecutor v. Delalic et al. (Celebici case), Judgement*, Case No. IT-96-21-A, Appeals Chamber, 20 February 2001, paras. 602-604.

opinion, national or ethnic origin.[9] However, as the Appeals Chamber of the ICTY has added:

> "The burden of the proof rests on ... appellant alleging that the Prosecutor has improperly exercised prosecutorial discretion, to demonstrate that the discretion was improperly exercised in relation to him ... [and]. must therefore demonstrate that the decision to prosecute him or to continue his prosecution was based on impermissible motives, such as race or religion, and that the Prosecution failed to prosecute similarly situated defendants. ... The breadth of the discretion of the Prosecutor, and the fact of her statutory independence, imply a presumption that the prosecutorial functions under the Statute are exercised regularly. This presumption may be rebutted by an appellant who can bring evidence to establish that the discretion has in fact not been exercised in accordance with the Statute; here, for example, in contravention of the principle of equality before the law in Article 21."[10]

14. The Accused in this case has in no way established that the prosecutorial discretion was not lawfully exercised. The Indictment of the Accused was approved by the designated Judge on 26 June 2003, who was "... SATISFIED from the material tendered by the Prosecutor that the indictment charges the suspect with crimes within the jurisdiction of the Special Court, and that the allegations in the Prosecutor's case summary would, if proven, amount to crimes specified and particularised in the indictment".

15. The Defence argues that it is unclear what the phrase "persons who bear the greatest responsibility for serious violations of international humanitarian law" means. It proffers two explanations. The first is that it refers to leaders of the parties that had the greatest responsibility for the continuation of the conflict and the threat to the establishment and implementation of the peace process. The Defence then submits that because there are numerous reports of the Secretary-General stating that the CDF acted in concert with ECOMOG and that they fought on the side of the Government of President Kabbah, the Accused could not belong to the category of persons who bear the greatest responsibility. With respect to the Defence, the Prosecution submits

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9 *Ibid.*, para. 605.
10 *Ibid.*, paras. 607-611.

that this evidence does not establish that the Accused could not belong to the category of persons who bear the greatest responsibility.

16. The second interpretation offered by the Defence is that the phrase refers simply to those individuals who were responsible for the majority of crimes committed during the armed conflict in Sierra Leone. The Defence argues that because the Accused's name was never mentioned in certain public reports on the conflict, he does not fall into this category. With all due respect to the Defence, this argument is insubstantial and unpersuasive. It is the Indictment that sets out the crimes with which the Accused is charged. It is only after the trial, when all of the evidence in the case has been adduced, that the Trial Chamber will be in a position to determine whether or not the Accused is responsible for those crimes. The criminal liability of the Accused cannot be determined at the pre-trial stage, by reference to whether or not he was named in certain reports published by Amnesty International and Human Rights Watch documenting atrocities committed by the CDF, of which the Accused was a member.

17. The meaning of the expression "persons bearing the greatest responsibility" remains, in the Prosecution's submission, that described in the Report of the Secretary-General, quoted in paragraph 5 above, namely:

> "While those "most responsible" obviously include the political or military leadership, others in command authority down the chain of command may also be regarded "most responsible" judging by the severity of the crime or its massive scale. "Most responsible", therefore, denotes both a leadership or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime."[11]

18. The Indictment in this case clearly alleges that the Accused was in a leadership role, stating:

    a) That the Accused was the National Director of War of the Civil Defence Forces (CDF) and that together with others he was one of the top leaders of the CDF.

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11 Report of the Secretary-General, para. 30.

b) That he acted as leader of the CDF in the absence of Chief Hinga Norman and was regarded as the second in command.

c) That the Accused together with others exercised authority, command and control over all subordinate members of the CDF.

19. The specific crimes with which the Accused in this case is charged are specified in the Indictment.

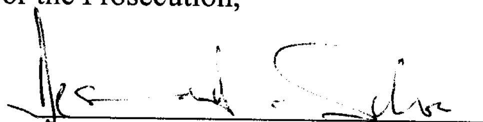
20. It has not been established by the Defence that it was in any way improper for the Prosecution to consider the Accused in the circumstances one of the persons "bearing the greatest responsibility" for crimes within the jurisdiction of the Special Court. In view of the failure of the Defence to adduce any evidence to establish that the Prosecutor had a discriminatory or otherwise unlawful or improper motive in indicting or continuing to prosecute the Accused, the Preliminary Motion must be rejected.[12]

CONCLUSION

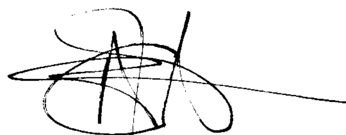
21. The Court should therefore dismiss the Preliminary Motion in its entirety.

Freetown, 26 November 2003.

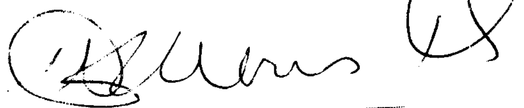
For the Prosecution,



Desmond de Silva, QC
Deputy Prosecutor



PP Luc Côté
Chief of Prosecutions



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Appellate Counsel

12 See also *Prosecutor v. Ntakirutimana, Judgement and Sentence*, Cases No. ICTR-96-10 & ICTR-96-17-T, Trial Chamber, 21 February 2003, para. 871.

PROSECUTION INDEX OF AUTHORITIES

1. Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, S/2000/915 (the "Report of the Secretary-General").
2. Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, U.N. Doc. S/2000/1234, 22 December 2000, para. 1.
3. See Prosecutor v. Delalic et al. (Celebici case), Judgement, Case No. IT-96-21-T, Trial Chamber, 16 November 1998, para. 179;
4. Prosecutor v. Furundzija, Decision on the Defendant's Motion to Dismiss Counts 13 and 14 of the Indictment (Lack of Subject Matter Jurisdiction), Case No. IT-95-17/1-PT, Trial Chamber, 29 May 1998, para. 16
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7. Prosecutor v. Delalic et al. (Celebici case), Judgement, Case No. IT-96-21-A, Appeals Chamber, 20 February 2001, paras. 602-604.
8. Prosecutor v. Ntakirutimana, Judgement and Sentence, Cases No. ICTR-96-10 & ICTR-96-17-T, Trial Chamber, 21 February 2003, para. 871.

ANNEX 1

Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, S/2000/915 (the "Report of the Secretary-General").

United Nations

S/2000/915

Security Council

Distr.: General
4 October 2000

Original: English

Report of the Secretary-General on the establishment of a Special Court for Sierra Leone

I. Introduction

1. The Security Council, by its resolution 1315 (2000) of 14 August 2000, requested me to negotiate an agreement with the Government of Sierra Leone to create an independent special court (hereinafter "the Special Court") to prosecute persons who bear the greatest responsibility for the commission of crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone.

2. The Security Council further requested that I submit a report on the implementation of the resolution, in particular on my consultations and negotiations with the Government of Sierra Leone concerning the establishment of the Special Court. In the report I was requested, in particular, to address the questions of the temporal jurisdiction of the Court; an appeals process, including the advisability, feasibility and appropriateness of an appeals chamber in the Special Court, or of sharing the Appeals Chamber of the International Tribunals for the Former Yugoslavia and for Rwanda; and a possible alternative host State, should it be necessary to convene the Special Court outside the seat of the Court in Sierra Leone, if circumstances so require.

3. Specific recommendations were also requested by the Security Council on the following issues:

(a) Any additional agreements that might be required for the provision of the international assistance necessary for the establishment and functioning of the Special Court;

(b) The level of participation, support and technical assistance of qualified persons required from Member States, including, in particular, States members of the Economic Community of West African States (ECOWAS) and the Commonwealth, and from the United Nations Mission in Sierra Leone (UNAMSIL) that would be necessary for the efficient, independent and impartial functioning of the Special Court;

(c) The amount of voluntary contributions of funds, equipment and services, including expert personnel from States, intergovernmental organizations and non-governmental organizations;

(d) Whether the Special Court could receive, as necessary and feasible, expertise and advice from the International Tribunals for the Former Yugoslavia and for Rwanda.

4. The present report, submitted in response to the above requests, is in two parts. The first part (chaps. II-VI) examines and analyses the nature and specificity of the Special Court, its jurisdiction (subject-matter, temporal and personal), the organizational structure (the Chambers and the nature of the appeals process, the offices of the Prosecutor and the Registry), enforcement of sentences in third States and the choice of the alternative seat. The second part (chaps. VII and VIII) deals with the practical implementation of the resolution on the establishment of the Special Court. It describes the requirements of the Court in terms of personnel, equipment, services and funds that would be required of States, intergovernmental and non-governmental organizations, the type of advice and expertise that may be expected from the two International Tribunals, and the logistical support and

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security requirements for premises and personnel that could, under an appropriate mandate, be provided by UNAMSIL. The Court's requirements in all of these respects have been placed within the specific context of Sierra Leone, and represent the minimum necessary, in the words of resolution 1315 (2000), "for the efficient, independent and impartial functioning of the Special Court". An assessment of the viability and sustainability of the financial mechanism envisaged, together with an alternative solution for the consideration of the Security Council, concludes the second part of the report.

5. The negotiations with the Government of Sierra Leone, represented by the Attorney General and the Minister of Justice, were conducted in two stages. The first stage of the negotiations, held at United Nations Headquarters from 12 to 14 September 2000, focused on the legal framework and constitutive instruments establishing the Special Court: the Agreement between the United Nations and the Government of Sierra Leone and the Statute of the Special Court which is an integral part thereof. (For the texts of the Agreement and the Statute, see the annex to the present report.)

6. Following the Attorney General's visit to Headquarters, a small United Nations team led by Ralph Zacklin, Assistant Secretary-General for Legal Affairs, visited Freetown from 18 to 20 September 2000. Mr. Zacklin was accompanied by Daphna Shraga, Senior Legal Officer, Office of the Legal Counsel, Office of Legal Affairs; Gerald Ganz, Security Coordination Officer, Office of the United Nations Security Coordinator; and Robert Kirkwood, Chief, Buildings Management, International Tribunal for the Former Yugoslavia. During its three-day visit, the team concluded the negotiations on the remaining legal issues, assessed the adequacy of possible premises for the seat of the Special Court, their operational state and security conditions, and had substantive discussions on all aspects of the Special Court with the President of Sierra Leone, senior government officials, members of the judiciary and the legal profession, the Ombudsman, members of civil society, national and international non-governmental organizations and institutions involved in child-care programmes and rehabilitation of child ex-combatants, as well as with senior officials of UNAMSIL.

7. In its many meetings with Sierra Leoneans of all segments of society, the team was made aware of the high level of expectations created in anticipation of the establishment of a special court. If the role of the Special Court in dealing with impunity and developing respect for the rule of law in Sierra Leone is to be fully understood and its educative message conveyed to Sierra Leoneans of all ages, a broad public information and education campaign will have to be undertaken as an integral part of the Court's activities. The purpose of such a campaign would be both to inform and to reassure the population that while a credible Special Court cannot be established overnight, everything possible will be done to expedite its functioning; that while the number of persons prosecuted before the Special Court will be limited, it would not be selective or otherwise discriminatory; and that although the children of Sierra Leone may be among those who have committed the worst crimes, they are to be regarded first and foremost as victims. For a nation which has attested to atrocities that only few societies have witnessed, it will require a great deal of persuasion to convince it that the exclusion of the death penalty and its replacement by imprisonment is not an "acquittal" of the accused, but an imposition of a more humane punishment. In this public information campaign, UNAMSIL, alongside the Government and non-governmental organizations, could play an important role.

8. Since the present report is limited to an analysis of the legal framework and the practical operation of the Special Court, it does not address in detail specifics of the relationship between the Special Court and the national courts in Sierra Leone, or between the Court and the National Truth and Reconciliation Commission. It is envisaged, however, that upon the establishment of the Special Court and the appointment of its Prosecutor, arrangements regarding cooperation, assistance and sharing of information between the respective courts would be concluded and the status of detainees awaiting trial would be urgently reviewed. In a similar vein, relationship and cooperation arrangements would be required between the Prosecutor and the National Truth and Reconciliation Commission, including the use of the Commission as an alternative to prosecution, and the prosecution of juveniles, in particular.

II. Nature and specificity of the Special Court

9. The legal nature of the Special Court, like that of any other legal entity, is determined by its constitutive instrument. Unlike either the International Tribunals for the Former Yugoslavia and for Rwanda, which were established by resolutions of the Security Council and constituted as subsidiary organs of the United Nations, or national courts established by law, the Special Court, as foreseen, is established by an Agreement between the United Nations and the Government of Sierra Leone and is therefore a treaty-based sui generis court of mixed jurisdiction and composition. Its implementation at the national level would require that the agreement is incorporated in the national law of Sierra Leone in accordance with constitutional requirements. Its applicable law includes international as well as Sierra Leonean law, and it is composed of both international and Sierra Leonean judges,[1] prosecutors and administrative support staff.[2] As a treaty-based organ, the Special Court is not anchored in any existing system (i.e., United Nations administrative law or the national law of the State of the seat) which would be automatically applicable to its non-judicial, administrative and financial activities. In the absence of such a framework, it would be necessary to identify rules for various purposes, such as recruitment, staff administration, procurement, etc., to be applied as the need arose.[3]

10. The Special Court has concurrent jurisdiction with and primacy over Sierra Leonean courts. Consequently, it has the power to request at any stage of the proceedings that any national Sierra Leonean court defer to its jurisdiction (article 8, para. 2 of the Statute). The primacy of the Special Court, however, is limited to the national courts of Sierra Leone and does not extend to the courts of third States. Lacking the power to assert its primacy over national courts in third States in connection with the crimes committed in Sierra Leone, it also lacks the power to request the surrender of an accused from any third State and to induce the compliance of its authorities with any such request. In examining measures to enhance the deterrent powers of the Special Court, the Security Council may wish to consider endowing it with Chapter VII powers for the specific purpose of requesting the surrender of an accused from outside the jurisdiction of the Court.

11. Beyond its legal and technical aspects, which in many ways resemble those of other international jurisdictions, the Special Court is Sierra Leone-specific. Many of the legal choices made are intended to address the specificities of the Sierra Leonean conflict, the brutality of the crimes committed and the young age of those presumed responsible. The moral dilemma that some of these choices represent has not been lost upon those who negotiated its constitutive instruments.

III. Competence of the Special Court

A. Subject-matter jurisdiction

12. The subject-matter jurisdiction of the Special Court comprises crimes under international humanitarian law and Sierra Leonean law. It covers the most egregious practices of mass killing, extrajudicial executions, widespread mutilation, in particular amputation of hands, arms, legs, lips and other parts of the body, sexual violence against girls and women, and sexual slavery, abduction of thousands of children and adults, hard labour and forced recruitment into armed groups, looting and setting fire to large urban dwellings and villages. In recognition of the principle of legality, in particular *nullum crimen sine lege*, and the prohibition on retroactive criminal legislation, the international crimes enumerated, are crimes considered to have had the character of customary international law at the time of the alleged commission of the crime.

1. Crimes under international law

13. In its resolution 1315 (2000), the Security Council recommended that the subject-matter jurisdiction of the Special Court should include crimes against humanity, war crimes and other serious violations of international humanitarian law. Because of the lack of any evidence that the massive, large-scale killing in Sierra Leone was at any time perpetrated against an identified national, ethnic, racial or religious group with an intent to annihilate the group as such, the Security Council did not include the crime of genocide in its recommendation, nor was it considered appropriate by the Secretary-General to include it in the list of international crimes falling within the jurisdiction of the Court.

14. The list of crimes against humanity follows the enumeration included in the Statutes of the International Tribunals for the Former Yugoslavia and for Rwanda, which were patterned on article 6 of the Nürnberg Charter. Violations of common article 3 of the Geneva Conventions and of article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law, and in particular since the establishment of the two International Tribunals, have been recognized as customarily entailing the individual criminal responsibility of the accused. Under the Statute of the International Criminal Court (ICC), though it is not yet in force, they are recognized as war crimes.

15. Other serious violations of international humanitarian law falling within the jurisdiction of the Court include:

(a) Attacks against the civilian population as such, or against individual civilians not taking direct part in hostilities;

(b) Attacks against peacekeeping personnel involved in a humanitarian assistance or a peacekeeping mission, as long as they are entitled to the protection given to civilians under the international law of armed conflict; and

(c) Abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities.

16. The prohibition on attacks against civilians is based on the most fundamental distinction drawn in international humanitarian law between the civilian and the military and the absolute prohibition on directing attacks against the former. Its customary international law nature is, therefore, firmly established. Attacks against peacekeeping personnel, to the extent that they are entitled to protection recognized under international law to civilians in armed conflict, do not represent a new crime. Although established for the first time as an international crime in the Statute of the International Criminal Court, it was not viewed at the time of the adoption of the Rome Statute as adding to the already existing customary international law crime of attacks against civilians and persons hors de combat. Based on the distinction between peacekeepers as civilians and peacekeepers turned combatants, the crime defined in article 4 of the Statute of the Special Court is a specification of a targeted group within the generally protected group of civilians which because of its humanitarian or peacekeeping mission deserves special protection. The specification of the crime of attacks against peacekeepers, however, does not imply a more serious crime than attacks against civilians in similar circumstances and should not entail, therefore, a heavier penalty.

17. The prohibition on the recruitment of children below the age of 15, a fundamental element of the protection of children, was for the first time established in the 1977 Additional Protocol II to the Geneva Conventions, article 4, paragraph 3 (c), of which provides that children shall be provided with the care and aid they require, and that in particular:

> "Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities".

A decade later, the prohibition on the recruitment of children below 15 into armed forces was established in article 38, paragraph 3, of the 1989 Convention on the Rights of the Child; and in 1998, the Statute of the International Criminal Court criminalized the prohibition and qualified it as a war crime. But while the prohibition on child recruitment has by now acquired a customary international law status, it is far less clear whether it is customarily recognized as a war crime entailing the individual criminal responsibility of the accused.

18. Owing to the doubtful customary nature of the ICC Statutory crime which criminalizes the conscription or enlistment of children under the age of 15, whether forced or "voluntary", the crime which is included in article 4 (c) of the Statute of the Special Court is not the equivalent of the ICC provision. While the definition of the crime as "conscripting" or "enlisting" connotes an administrative act of putting one's name on a list and formal entry into the armed forces, the elements of the crime under the proposed Statute of the Special Court are: (a) abduction, which in the case of the children of Sierra Leone was the original crime and is in itself a crime under common article 3 of the Geneva Conventions; (b) forced recruitment in the most general sense — administrative formalities, obviously, notwithstanding; and (c) transformation of the child into, and its use as, among other degrading uses, a "child-combatant".

2. Crimes under Sierra Leonean law

19. The Security Council recommended that the subject-matter jurisdiction of the Special Court should also include crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone. While most of the crimes committed in the Sierra Leonean conflict during the relevant period are governed by the international law provisions set out in articles 2 to 4 of the Statute, recourse to Sierra Leonean law has been had in cases where a specific situation or an aspect of it was considered to be either unregulated or inadequately regulated under international law. The crimes considered to be relevant for this purpose and included in the Statute are: offences relating to the abuse of girls under the 1926 Prevention of Cruelty to Children Act and offences relating to the wanton destruction of property, and in particular arson, under the 1861 Malicious Damage Act.

20. The applicability of two systems of law implies that the elements of the crimes are governed by the respective international or national law, and that the Rules of Evidence differ according to the nature of the crime as a common or international crime. In that connection, article 14 of the Statute provides that the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda shall be applicable mutatis mutandis to proceedings before the Special Court, and that the judges shall have the power to amend or adopt additional rules, where a specific situation is not provided for. In so doing, they may be guided, as appropriate, by the 1965 Criminal Procedure Act of Sierra Leone.

B. Temporal jurisdiction of the Special Court

21. In addressing the question of the temporal jurisdiction of the Special Court as requested by the Security Council, a determination of the validity of the sweeping amnesty granted under the Lomé Peace Agreement of 7 July 1999 was first required. If valid, it would limit the temporal jurisdiction of the Court to offences committed after 7 July 1999; if invalid, it would make possible a determination of a beginning date of the temporal jurisdiction of the Court at any time in the pre-Lomé period.

1. The amnesty clause in the Lomé Peace Agreement

22. While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict,[4] the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.

23. At the time of the signature of the Lomé Peace Agreement, the Special Representative of the Secretary-General for Sierra Leone was instructed to append to his signature on behalf of the United Nations a disclaimer to the effect that the amnesty provision contained in article IX of the Agreement ("absolute and free pardon") shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. This reservation is recalled by the Security Council in a preambular paragraph of resolution 1315 (2000).

24. In the negotiations on the Statute of the Special Court, the Government of Sierra Leone concurred with the position of the United Nations and agreed to the inclusion of an amnesty clause which would read as follows:

> "An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution."

With the denial of legal effect to the amnesty granted at Lomé, to the extent of its illegality under international law, the obstacle to the determination of a beginning date of the temporal jurisdiction of the Court within the pre-Lomé period has been removed.

2. Beginning date of the temporal jurisdiction

25. It is generally accepted that the decade-long civil war in Sierra Leone dates back to 1991, when on 23 March of that year forces of the Revolutionary United Front (RUF) entered Sierra Leone from Liberia and launched a rebellion to overthrow the one-party military rule of the All People's Congress (APC). In determining a beginning date of the temporal jurisdiction of the Special Court within the period since

23 March 1991, the Secretary-General has been guided by the following considerations: (a) the temporal jurisdiction should be reasonably limited in time so that the Prosecutor is not overburdened and the Court overloaded; (b) the beginning date should correspond to an event or a new phase in the conflict without necessarily having any political connotations; and (c) it should encompass the most serious crimes committed by persons of all political and military groups and in all geographical areas of the country. A temporal jurisdiction limited in any of these respects would rightly be perceived as a selective or discriminatory justice.

26. Imposing a temporal jurisdiction on the Special Court reaching back to 1991 would create a heavy burden for the prosecution and the Court. The following alternative dates were therefore considered as realistic options:

(a) *30 November 1996* — the conclusion of the Abidjan Peace Agreement, the first comprehensive Peace Agreement between the Government of Sierra Leone and RUF. Soon after its signature the Peace Agreement had collapsed and large-scale hostilities had resumed;

(b) *25 May 1997* — the date of the coup d'état orchestrated by the Armed Forces Revolutionary Council (AFRC) against the Government that was democratically elected in early 1996. The period which ensued was characterized by serious violations of international humanitarian law, including, in particular, mass rape and abduction of women, forced recruitment of children and summary executions;

(c) *6 January 1999* — the date on which RUF/AFRC launched a military operation to take control of Freetown. The first three-week period of full control by these entities over Freetown marked the most intensified, systematic and widespread violations of human rights and international humanitarian law against the civilian population. During its retreat in February 1999, RUF abducted hundreds of young people, particularly young women used as forced labourers, fighting forces, human shields and sexual slaves.

27. In considering the three options for the beginning date of the temporal jurisdiction of the Court, the parties have concluded that the choice of 30 November 1996 would have the benefit of putting the Sierra Leone conflict in perspective without unnecessarily extending the temporal jurisdiction of the Special Court. It would also ensure that the most serious crimes committed by all parties and armed groups would be encompassed within its jurisdiction. The choice of 25 May 1997 would have all these advantages, with the disadvantage of having a political connotation, implying, wrongly, that the prosecution of those responsible for the most serious violations of international humanitarian law is aimed at punishment for their participation in the coup d'état. The last option marks in many ways the peak of the campaign of systematic and widespread crimes against the civilian population, as experienced mostly by the inhabitants of Freetown. If the temporal jurisdiction of the Court were to be limited to that period only, it would exclude all crimes committed before that period in the rural areas and the countryside. In view of the perceived advantages of the first option and the disadvantages associated with the other options, the date of 30 November 1996 was selected as the beginning date of the temporal jurisdiction of the Special Court, a decision in which the government negotiators have actively concurred.

28. As the armed conflict in various parts of the territory of Sierra Leone is still ongoing, it was decided that the temporal jurisdiction of the Special Court should be left open-ended. The lifespan of the Special Court, however, as distinguished from its temporal jurisdiction, will be determined by a subsequent agreement between the parties upon the completion of its judicial activities, an indication of the capacity acquired by the local courts to assume the prosecution of the remaining cases, or the unavailability of resources. In setting an end to the operation of the Court, the Agreement would also determine all matters relating to enforcement of sentences, pardon or commutation, transfer of pending cases to the local courts and the disposition of the financial and other assets of the Special Court.

C. Personal jurisdiction

1. Persons "most responsible"

29. In its resolution 1315 (2000), the Security Council recommended that the personal jurisdiction of the Special Court should extend to those "who bear the greatest responsibility for the commission of the crimes", which is understood as an indication of a limitation on the number of accused by reference to

their command authority and the gravity and scale of the crime. I propose, however, that the more general term "persons most responsible" should be used.

30. While those "most responsible" obviously include the political or military leadership, others in command authority down the chain of command may also be regarded "most responsible" judging by the severity of the crime or its massive scale. "Most responsible", therefore, denotes both a leadership or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime. It must be seen, however, not as a test criterion or a distinct jurisdictional threshold, but as a guidance to the Prosecutor in the adoption of a prosecution strategy and in making decisions to prosecute in individual cases.

31. Within the meaning attributed to it in the present Statute, the term "most responsible" would not necessarily exclude children between 15 and 18 years of age. While it is inconceivable that children could be in a political or military leadership position (although in Sierra Leone the rank of "Brigadier" was often granted to children as young as 11 years), the gravity and seriousness of the crimes they have allegedly committed would allow for their inclusion within the jurisdiction of the Court.

2. Individual criminal responsibility at 15 years of age

32. The possible prosecution of children for crimes against humanity and war crimes presents a difficult moral dilemma. More than in any other conflict where children have been used as combatants, in Sierra Leone, child combatants were initially abducted, forcibly recruited, sexually abused, reduced to slavery of all kinds and trained, often under the influence of drugs, to kill, maim and burn. Though feared by many for their brutality, most if not all of these children have been subjected to a process of psychological and physical abuse and duress which has transformed them from victims into perpetrators.

33. The solution to this terrible dilemma with respect to the Special Court[5] could be found in a number of options: (a) determining a minimum age of 18 and exempting all persons under that age from accountability and individual criminal responsibility; (b) having children between 15 to 18 years of age, both victims and perpetrators, recount their story before the Truth and Reconciliation Commission or similar mechanisms, none of which is as yet functional; and (c) having them go through the judicial process of accountability without punishment, in a court of law providing all internationally recognized guarantees of juvenile justice.

34. The question of child prosecution was discussed at length with the Government of Sierra Leone both in New York and in Freetown. It was raised with all the interlocutors of the United Nations team: the members of the judiciary, members of the legal profession and the Ombudsman, and was vigorously debated with members of civil society, non-governmental organizations and institutions actively engaged in child-care and rehabilitation programmes.

35. The Government of Sierra Leone and representatives of Sierra Leone civil society clearly wish to see a process of judicial accountability for child combatants presumed responsible for the crimes falling within the jurisdiction of the Court. It was said that the people of Sierra Leone would not look kindly upon a court which failed to bring to justice children who committed crimes of that nature and spared them the judicial process of accountability. The international non-governmental organizations responsible for child-care and rehabilitation programmes, together with some of their national counterparts, however, were unanimous in their objection to any kind of judicial accountability for children below 18 years of age for fear that such a process would place at risk the entire rehabilitation programme so painstakingly achieved. While the extent to which this view represents the majority view of the people of Sierra Leone is debatable, it nevertheless underscores the importance of the child rehabilitation programme and the need to ensure that in the prosecution of children presumed responsible, the rehabilitation process of scores of other children is not endangered.

36. Given these highly diverging opinions, it is not easy to strike a balance between the interests at stake. I am mindful of the Security Council's recommendation that only those who bear "the greatest responsibility" should be prosecuted. However, in view of the most horrific aspects of the child combatancy in Sierra Leone, the employment of this term would not necessarily exclude persons of young age from the jurisdiction of the Court. I therefore thought that it would be most prudent to demonstrate to the Security Council for its consideration how provisions on

prosecution of persons below the age of 18 — "children" within the definition of the Convention on the Rights of the Child — before an international jurisdiction could be formulated.[6] Therefore, in order to meet the concerns expressed by, in particular, those responsible for child care and rehabilitation programmes, article 15, paragraph 5, of the Statute contains the following provision:

> "In the prosecution of juvenile offenders, the Prosecutor shall ensure that the child-rehabilitation programme is not placed at risk, and that, where appropriate, resort should be had to alternative truth and reconciliation mechanisms, to the extent of their availability."

37. Furthermore, the Statute of the Special Court, in article 7 and throughout the text, contains internationally recognized standards of juvenile justice and guarantees that juvenile offenders are treated in dignity and with a sense of worth. Accordingly, the overall composition of the judges should reflect their experiences in a variety of fields, including in juvenile justice (article 13, para. 1); the Office of the Prosecutor should be staffed with persons experienced in gender-related crimes and juvenile justice (article 15, para. 4). In a trial of a juvenile offender, the Special Court should, to the extent possible, order the immediate release of the accused, constitute a "Juvenile Chamber", order the separation of the trial of a juvenile from that of an adult, and provide all legal and other assistance and order protective measures to ensure the privacy of the juvenile. The penalty of imprisonment is excluded in the case of a juvenile offender, and a number of alternative options of correctional or educational nature are provided for instead.

38. Consequently, if the Council, also weighing in the moral-educational message to the present and next generation of children in Sierra Leone, comes to the conclusion that persons under the age of 18 should be eligible for prosecution, the statutory provisions elaborated will strike an appropriate balance between all conflicting interests and provide the necessary guarantees of juvenile justice. It should also be stressed that, ultimately, it will be for the Prosecutor to decide if, all things considered, action should be taken against a juvenile offender in any individual case.

IV. Organizational structure of the Special Court

39. Organizationally, the Special Court has been conceived as a self-contained entity, consisting of three organs: the Chambers (two Trial Chambers and an Appeals Chamber), the Prosecutor's Office and the Registry. In the establishment of ad hoc international tribunals or special courts operating as separate institutions, independently of the relevant national legal system, it has proved to be necessary to comprise within one and the same entity all three organs. Like the two International Tribunals, the Special Court for Sierra Leone is established outside the national court system, and the inclusion of the Appeals Chamber within the same Court was thus the obvious choice.

A. The Chambers

40. In its resolution 1315 (2000), the Security Council requested that the question of the advisability, feasibility and appropriateness of sharing the Appeals Chamber of the International Tribunals for the Former Yugoslavia and for Rwanda should be addressed. In analysing this option from the legal and practical viewpoints, I have concluded that the sharing of a single Appeals Chamber between jurisdictions as diverse as the two International Tribunals and the Special Court for Sierra Leone is legally unsound and practically not feasible, without incurring unacceptably high administrative and financial costs.

41. While in theory the establishment of an overarching Appeals Chamber as the ultimate judicial authority in matters of interpretation and application of international humanitarian law offers a guarantee of developing a coherent body of law, in practice, the same result may be achieved by linking the jurisprudence of the Special Court to that of the International Tribunals, without imposing on the shared Appeals Chamber the financial and administrative constraints of a formal institutional link. Article 20, paragraph 3, of the Statute accordingly provides that the judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the Yugoslav and the Rwanda Tribunals; article 14, paragraph 1, of the Statute provides that the Rules of Procedure and Evidence of the Rwanda Tribunal shall be applicable mutatis mutandis to the proceedings before the Special Court.

42. The sharing of one Appeals chamber between all three jurisdictions would strain the capacity of the already heavily burdened Appeals Chamber of the two Tribunals in ways which could either bring about the collapse of the appeals system as a whole, or delay beyond acceptable human rights standards the detention of accused pending the hearing of appeals from either or all jurisdictions. On the assumption that all judgements and sentencing decisions of the Trial Chambers of the Special Court will be appealed, as they have been in the cases of the two International Tribunals, and that the number of accused will be roughly the same as in each of the International Tribunals, the Appeals Chamber would be required to add to its current workload a gradual increase of approximately one third.

43. Faced with an exponential growth in the number of appeals lodged on judgements and interlocutory appeals in relation to an increasing number of accused and decisions rendered, the existing workload of the Appeals Chamber sitting in appeals from six Trial Chambers of the two ad hoc Tribunals is constantly growing. Based on current and anticipated growth in workload, existing trends[7] and the projected pace of three to six appeals on judgements every year, the Appeals Chamber has requested additional resources in funds and personnel. With the addition of two Trial Chambers of the Special Court, making a total of eight Trial Chambers for one Appeals Chamber, the burden on the Yugoslav and Rwanda Appeals Chamber would be untenable, and the Special Court would be deprived of an effective and viable appeals process.

44. The financial costs which would be entailed for the Appeals Chamber when sitting on appeals from the Special Court will have to be borne by the regular budget, regardless of the financial mechanism established for the Special Court itself. These financial costs would include also costs of translation into French, which is one of the working languages of the Appeals Chamber of the International Tribunals; the working language of the Special Court will be English.

45. In his letter to the Legal Counsel in response to the request for comments on the eventuality of sharing the Appeals Chamber of the two international Tribunals with the Special Court, the President of the International Tribunal for the Former Yugoslavia wrote:

> "With regard to paragraph 7 of Security Council resolution 1315 (2000), while the sharing of the Appeals Chamber of [the two International Tribunals] with that of the Special Court would bear the significant advantage of ensuring a better standardization of international humanitarian law, it appeared that the disadvantages of this option — excessive increase of the Appeals Chambers' workload, problems arising from the mixing of sources of law, problems caused by the increase in travelling by the judges of the Appeals Chambers and difficulties caused by mixing the different judges of the three tribunals — outweigh its benefits."[8]

46. For these reasons, the parties came to the conclusion that the Special Court should have two Trial Chambers, each with three judges, and an Appeals Chamber with five judges. Article 12, paragraph 4, provides for extra judges to sit on the bench in cases where protracted proceedings can be foreseen and it is necessary to make certain that the proceedings do not have to be discontinued in case one of the ordinary judges is unable to continue hearing the case.

B. The Prosecutor

47. An international prosecutor will be appointed by the Secretary-General to lead the investigations and prosecutions, with a Sierra Leonean Deputy. The appointment of an international prosecutor will guarantee that the Prosecutor is, and is seen to be, independent, objective and impartial.

C. The Registrar

48. The Registrar will service the Chambers and the Office of the Prosecutor and will have the responsibility for the financial management and external relations of the Court. The Registrar will be appointed by the Secretary-General as a staff member of the United Nations.

V. Enforcement of sentences

49. The possibility of serving prison sentences in third States is provided for in article 22 of the Statute. While imprisonment shall normally be served in Sierra Leone, particular circumstances, such as the security

risk entailed in the continued imprisonment of some of the convicted persons on Sierra Leonean territory, may require their relocation to a third State.

50. Enforcement of sentences in third countries will be based on an agreement between the Special Court[9] and the State of enforcement. In seeking indications of the willingness of States to accept convicted persons, priority should be given to those which have already concluded similar agreements with either of the International Tribunals, as an indication that their prison facilities meet the minimum standards of conditions of detention. Although an agreement for the enforcement of sentences will be concluded between the Court and the State of enforcement, the wishes of the Government of Sierra Leone should be respected. In that connection, preference was expressed for such locations to be identified in an East African State.

VI. An alternative host country

51. In paragraph 7 of resolution 1315 (2000), the Security Council requested that the question of a possible alternative host State be addressed, should it be necessary to convene the Special Court outside its seat in Sierra Leone, if circumstances so required. As the efforts of the United Nations Secretariat, the Government of Sierra Leone and other interested Member States are currently focused on the establishment of the Special Court in Sierra Leone, it is proposed that the question of the alternative seat should be addressed in phases. An important element in proceeding with this issue is also the way in which the Security Council addresses the present report, that is, if a Chapter VII element is included.

52. In the first phase, criteria for the choice of the alternative seat should be determined and a range of potential host countries identified. An agreement, in principle, should be sought both from the Government of Sierra Leone for the transfer of the Special Court to the State of the alternative seat, and from the authorities of the latter, for the relocation of the seat to its territory.

53. In the second phase, a technical assessment team would be sent to identify adequate premises in the third State or States. Once identified, the three parties, namely, the United Nations, the Government of Sierra Leone and the Government of the alternative seat, would conclude a Framework Agreement, or "an agreement to agree" for the transfer of the seat when circumstances so required. The Agreement would stipulate the nature of the circumstances which would require the transfer of the seat and an undertaking to conclude in such an eventuality a Headquarters Agreement. Such a principled Agreement would facilitate the transfer of the seat on an emergency basis and enable the conclusion of a Headquarters Agreement soon thereafter.

54. In the choice of an alternative seat for the Special Court, the following considerations should be taken into account: the proximity to the place where the crimes were committed, and easy access to victims, witnesses and accused. Such proximity and easy access will greatly facilitate the work of the Prosecutor, who will continue to conduct his investigations in the territory of Sierra Leone.[10] During the negotiations, the Government expressed a preference for a West African alternative seat, in an English-speaking country sharing a common-law legal system.

VII. Practical arrangements for the operation of the Special Court

55. The Agreement and the Statute of the Special Court establish the legal and institutional framework of the Court and the mutual obligations of the parties with regard, in particular, to appointments to the Chambers, the Office of the Prosecutor and the Registry and, the provision of premises. However, the practical arrangements for the establishment and operation of the Special Court remain outside the scope of the Agreement in the sense that they depend on contributions of personnel, equipment, services and funds from Member States and intergovernmental and non-governmental organizations. It is somewhat anomalous, therefore, that the parties which establish the Special Court, in practice, are dependent for the implementation of their treaty obligations on States and international organizations which are not parties to the Agreement or otherwise bound by its provisions.

56. Proceeding from the premise that voluntary contributions would constitute the financial mechanism of the Special Court, the Security Council requested the Secretary-General to include in the report recommendations regarding the amount of voluntary contributions, as appropriate, of funds, equipment and services to the Special Court, contributions in

personnel, the kind of advice and expertise expected of the two ad hoc Tribunals, and the type of support and technical assistance to be provided by UNAMSIL. In considering the estimated requirements of the Special Court in all of these respects, it must be borne in mind that at the current stage, the Government of Sierra Leone is unable to contribute in any significant way to the operational costs of the Special Court, other than in the provision of premises, which would require substantial refurbishment, and the appointment of personnel, some of whom may not even be Sierra Leonean nationals. The requirements set out below should therefore be understood for all practical purposes as requirements that have to be met through contributions from sources other than the Government of Sierra Leone.

A. Estimated requirements of the Special Court for the first operational phase

1. Personnel and equipment

57. The personnel requirements of the Special Court for the initial operational phase[11] are estimated to include:

(a) Eight Trial Chamber judges (3 sitting judges and 1 alternate judge in each Chamber) and 6 Appeals Chamber judges (5 sitting judges and 1 alternate judge), 1 law clerk, 2 support staff for each Chamber and 1 security guard detailed to each judge (14);

(b) A Prosecutor and a Deputy Prosecutor, 20 investigators, 20 prosecutors and 26 support staff;

(c) A Registrar, a Deputy Registrar, 27 administrative support staff and 40 security officers;

(d) Four staff in the Victims and Witnesses Unit;

(e) One correction officer and 12 security officers in the detention facilities.

58. Based on the United Nations scale of salaries for a one-year period, the personnel requirements along with the corresponding equipment and vehicles are estimated on a very preliminary basis to be US$ 22 million. The calculation of the personnel requirements is premised on the assumption that all persons appointed (whether by the United Nations or the Government of Sierra Leone) will be paid from United Nations sources.

59. In seeking qualified personnel from States Members of the United Nations, the importance of obtaining such personnel from members of the Commonwealth, sharing the same language and common-law legal system, has been recognized. The Office of Legal Affairs has therefore approached the Commonwealth Secretariat with a request to identify possible candidates for the positions of judges, prosecutors, Registrar, investigators and administrative support staff. How many of the Commonwealth countries would be in a position to voluntarily contribute such personnel with their salaries and emoluments is an open question. A request similar to that which has been made to the Commonwealth will also be made to the Economic Community of West African States (ECOWAS).

2. Premises

60. The second most significant component of the requirements of the Court for the first operational phase is the cost of premises. During its visit to Freetown, the United Nations team visited a number of facilities and buildings which the Government believes may accommodate the Special Court and its detention facilities: the High Court of Sierra Leone, the Miatta Conference Centre and an adjacent hotel, the Presidential Lodge, the Central Prison (Pademba Road Prison), and the New England Prison. In evaluating their state of operation, the team concluded that none of the facilities offered were suitable or could be made operational without substantial investment. The use of the existing High Court would incur the least expenditure (estimated at $1.5 million); but would considerably disrupt the ordinary schedule of the Court and eventually bring it to a halt. Since it is located in central Freetown, the use of the High Court would pose, in addition, serious security risks. The use of the Conference Centre, the most secure site visited, would require large-scale renovation, estimated at $5.8 million. The Presidential Lodge was ruled out on security grounds.

61. In the light of the above, the team has considered the option of constructing a prefabricated, self-contained compound on government land. This option would have the advantage of an easy expansion paced with the growth of the Special Court, a salvage value at the completion of the activities of the Court, the prospect of a donation in kind and construction at no

rental costs. The estimated cost of this option is $2.9 million.

62. The two detention facilities visited by the team were found to be inadequate in their current state. The Central Prison (Pademba Road Prison) was ruled out for lack of space and security reasons. The New England Prison would be a possible option at an estimated renovation cost of $600,000.

63. The estimated cost requirements of personnel and premises set out in the present report cover the two most significant components of its prospective budget for the first operational stage. Not included in the present report are the general operational costs of the Special Court and of the detention facilities; costs of prosecutorial and investigative activities; conference services, including the employment of court translators from and into English, Krio and other tribal languages; and defence counsel, to name but a few.

B. Expertise and advice from the two International Tribunals

64. The kind of advice and expertise which the two International Tribunals may be expected to share with the Special Court for Sierra Leone could take the form of any or all of the following: consultations among judges of both jurisdictions on matters of mutual interest; training of prosecutors, investigators and administrative support staff of the Special Court in The Hague, Kigali and Arusha, and training of such personnel on the spot by a team of prosecutors, investigators and administrators from both Tribunals; advice on the requirements for a Court library and assistance in its establishment, and sharing of information, documents, judgements and other relevant legal material on a continuous basis.

65. Both International Tribunals have expressed willingness to share their experience in all of these respects with the Special Court. They have accordingly offered to convene regular meetings with the judges of the Special Court to assist in adopting and formulating Rules of Procedure based on experience acquired in the practice of both Tribunals; to train personnel of the Special Court in The Hague and Arusha to enable them to acquire practical knowledge of the operation of an international tribunal; and when necessary, to temporarily deploy experienced staff, including a librarian, to the Special Court. In addition, the International Tribunal for the Former Yugoslavia has offered to provide to the Special Court legal material in the form of CD-ROMs containing motions, decisions, judgements, court orders and the like. The transmission of such material to the Special Court in the period pending the establishment of a full-fledged library would be of great assistance.

C. Support and technical assistance from UNAMSIL

66. The support and technical assistance of UNAMSIL in providing security, logistics, administrative support and temporary accommodation would be necessary in the first operational phase of the Special Court. In the precarious security situation now prevailing in Sierra Leone and given the state of the national security forces, UNAMSIL represents the only credible force capable of providing adequate security to the personnel and the premises of the Special Court. The specificities of the security measures required would have to be elaborated by the United Nations, the Government of Sierra Leone and UNAMSIL, it being understood, however, that any such additional tasks entrusted to UNAMSIL would have to be approved by the Security Council and reflected in a revised mandate with a commensurate increase in financial, staff and other resources.

67. UNAMSIL's administrative support could be provided in the areas of finance, personnel and procurement. Utilizing the existing administrative support in UNAMSIL, including, when feasible, shared facilities and communication systems, would greatly facilitate the start-up phase of the Special Court and reduce the overall resource requirements. In that connection, limited space at the headquarters of UNAMSIL could be made available for the temporary accommodation of the Office of the Prosecutor, pending the establishment or refurbishment of a site for the duration of the Special Court.

VIII. Financial mechanism of the Special Court

68. In paragraph 8 (c) of resolution 1315 (2000), the Security Council requested the Secretary-General to include recommendations on "the amount of voluntary contributions, as appropriate, of funds, equipment and

services to the special court, including through the offer of expert personnel that may be needed from States, intergovernmental organizations and non-governmental organizations". It would thus seem that the intention of the Council is that a Special Court for Sierra Leone would be financed from voluntary contributions. Implicit in the Security Council resolution, therefore, given the paucity of resources available to the Government of Sierra Leone, was the intention that most if not all operational costs of the Special Court would be borne by States Members of the Organization in the form of voluntary contributions.

69. The experience gained in the operation of the two ad hoc International Tribunals provides an indication of the scope, costs and long-term duration of the judicial activities of an international jurisdiction of this kind. While the Special Court differs from the two Tribunals in its nature and legal status, the similarity in the kind of crimes committed, the temporal, territorial and personal scope of jurisdiction, the number of accused, the organizational structure of the Court and the Rules of Procedure and Evidence suggest a similar scope and duration of operation and a similar need for a viable and sustainable financial mechanism.

70. A financial mechanism based entirely on voluntary contributions will not provide the assured and continuous source of funding which would be required to appoint the judges, the Prosecutor and the Registrar, to contract the services of all administrative and support staff and to purchase the necessary equipment. The risks associated with the establishment of an operation of this kind with insufficient funds, or without long-term assurances of continuous availability of funds, are very high, in terms of both moral responsibility and loss of credibility of the Organization, and its exposure to legal liability. In entering into contractual commitments which the Special Court and, vicariously, the Organization might not be able to honour, the United Nations would expose itself to unlimited third-party liability. A special court based on voluntary contributions would be neither viable nor sustainable.

71. In my view, the only realistic solution is financing through assessed contributions. This would produce a viable and sustainable financial mechanism affording secure and continuous funding. It is understood, however, that the financing of the Special Court through assessed contributions of the Member States would for all practical purposes transform a treaty-based court into a United Nations organ governed in its financial and administrative activities by the relevant United Nations financial and staff regulations and rules.

72. The Security Council may wish to consider an alternative solution, based on the concept of a "national jurisdiction" with international assistance, which would rely on the existing — however inadequate — Sierra Leonean court system, both in terms of premises (for the Court and the detention facilities) and administrative support. The judges, prosecutors, investigators and administrative support staff would be contributed by interested States. The legal basis for the special "national" court would be a national law, patterned on the Statute as agreed between the United Nations and the Government of Sierra Leone (the international crimes being automatically incorporated into the Sierra Leonean common-law system). Since the mandate of the Secretary-General is to recommend measures consistent with resolution 1315 (2000), the present report does not elaborate further on this alternative other than to merely note its existence.

IX. Conclusion

73. At the request of the Security Council, the present report sets out the legal framework and practical arrangements for the establishment of a Special Court for Sierra Leone. It describes the requirements of the Special Court in terms of funds, personnel and services and underscores the acute need for a viable financial mechanism to sustain it for the duration of its lifespan. It concludes that assessed contributions is the only viable and sustainable financial mechanism of the Special Court.

74. As the Security Council itself has recognized, in the past circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace in that country. In reviewing the present report and considering what further action must be taken, the Council should bear in mind the expectations that have been created and the state of urgency that permeates all discussions of the problem of impunity in Sierra Leone.

Notes

[1] At the request of the Government, reference in the Statute and the Agreement to "Sierra Leonean judges" was replaced by "judges appointed by the Government of Sierra Leone". This would allow the Government flexibility of choice between Sierra Leonean and non-Sierra Leonean nationals and broaden the range of potential candidates from within and outside Sierra Leone.

[2] In the case of the Tribunals for the Former Yugoslavia and for Rwanda, the non-inclusion in any position of nationals of the country most directly affected was considered a condition for the impartiality, objectivity and neutrality of the Tribunal.

[3] This method may not be advisable, since the Court would be manned by a substantial number of staff and financed through voluntary contributions in the amount of millions of dollars every year.

[4] Article 6, paragraph 5, of the 1977 Protocol II Additional to the Geneva Conventions and Relating to the Protection of Non-international Armed Conflicts provides that:

> "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."

[5] The jurisdiction of the national courts of Sierra Leone is not limited by the Statute, except in cases where they have to defer to the Special Court.

[6] While there is no international law standard for the minimum age for criminal responsibility, the ICC Statute excludes from the jurisdiction of the Court persons under the age of 18. In so doing, however, it was not the intention of its drafters to establish, in general, a minimum age for individual criminal responsibility. Premised on the notion of complementarity between national courts and ICC, it was intended that persons under 18 presumed responsible for the crimes for which the ICC had jurisdiction would be brought before their national courts, if the national law in question provides for such jurisdiction over minors.

[7] The Appeals Chamber of the International Tribunal for the Former Yugoslavia has so far disposed of a total of 5 appeals from judgements and 44 interlocutory appeals; and the Appeals Chamber of the Rwanda Tribunal of only 1 judgement on the merits with 28 interlocutory appeals.

[8] Letter addressed to Mr. Hans Corell, Under-Secretary-General, The Legal Counsel, from Judge Claude Jorda, President of the International Criminal Tribunal for the Former Yugoslavia, dated 29 August 2000.

[9] Article 10 of the Agreement between the United Nations and the Government endows the Special Court with a treaty-making power "to enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Court".

[10] Criteria for the choice of the seat of the Rwanda Tribunal were drawn up by the Security Council in its resolution 955 (1994). The Security Council decided that the seat of the International Tribunal shall be determined by the Council "having regard to considerations of justice and fairness as well as administrative efficiency, including access to witnesses, and economy".

[11] It is important to stress that this estimate should be regarded as an illustration of a possible scenario. Not until the Registrar and the Prosecutor are in place will it be possible to make detailed and precise estimates.

Annex

Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone

Whereas the Security Council, in its resolution 1315 (2000) of 14 August 2000, expressed deep concern at the very serious crimes committed within the territory of Sierra Leone against the people of Sierra Leone and United Nations and associated personnel and at the prevailing situation of impunity;

Whereas by the said resolution, the Security Council requested the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court to prosecute persons who bear the greatest responsibility for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law;

Whereas the Secretary-General of the United Nations (hereinafter "the Secretary-General") and the Government of Sierra Leone (hereinafter "the Government") have held such negotiations for the establishment of a Special Court for Sierra Leone (hereinafter "the Special Court");

Now therefore the United Nations and the Government of Sierra Leone have agreed as follows:

Article 1
Establishment of the Special Court

1. There is hereby established a Special Court for Sierra Leone to prosecute persons most responsible for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.

2. The Special Court shall function in accordance with the Statute of the Special Court for Sierra Leone. The Statute is annexed to this Agreement and forms an integral part thereof.

Article 2
Composition of the Special Court and appointment of judges

1. The Special Court shall be composed of two Trial Chambers and an Appeals Chamber.

2. The Chambers shall be composed of eleven independent judges who shall serve as follows:

(a) Three judges shall serve in each of the Trial Chambers, of whom one shall be appointed by the Government of Sierra Leone, and two judges appointed by the Secretary-General upon nominations forwarded by States, and in particular the member States of the Economic Community of West African States and the Commonwealth, at the invitation of the Secretary-General;

(b) Five judges shall serve in the Appeals Chamber, of whom two shall be appointed by the Government of Sierra Leone and three judges shall be appointed by

the Secretary-General upon nominations forwarded by States, and in particular the member States of the Economic Community of West African States and the Commonwealth, at the invitation of the Secretary-General.

3. The Government of Sierra Leone and the Secretary-General shall consult on the appointment of judges.

4. Judges shall be appointed for a four-year term and shall be eligible for reappointment.

5. In addition to the judges sitting in the Chambers and present at every stage of the proceedings, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate an alternate judge appointed by either the Government of Sierra Leone or the Secretary-General to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting.

Article 3
Appointment of a Prosecutor and a Deputy Prosecutor

1. The Secretary-General, after consultation with the Government of Sierra Leone, shall appoint a Prosecutor for a four-year term. The Prosecutor shall be eligible for reappointment.

2. The Government of Sierra Leone, in consultation with the Secretary-General and the Prosecutor, shall appoint a Sierra Leonean Deputy Prosecutor to assist the Prosecutor in the conduct of the investigations and prosecutions.

3. The Prosecutor and the Deputy Prosecutor shall be of high moral character and possess the highest level of professional competence and extensive experience in the conduct of investigations and prosecution of criminal cases. The Prosecutor and the Deputy Prosecutor shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.

4. The Prosecutor shall be assisted by such Sierra Leonean and international staff as may be required to perform the functions assigned to him or her effectively and efficiently.

Article 4
Appointment of a Registrar

1. The Secretary-General, in consultation with the President of the Special Court, shall appoint a Registrar who shall be responsible for the servicing of the Chambers and the Office of the Prosecutor, and for the recruitment and administration of all support staff. He or she shall also administer the financial and staff resources of the Special Court.

2. The Registrar shall be a staff member of the United Nations. He or she shall serve a four-year term and shall be eligible for reappointment.

Article 5
Premises

The Government shall provide the premises for the Special Court and such utilities, facilities and other services as may be necessary for its operation.

Article 6
Expenses of the Special Court[a]

The expenses of the Special Court shall ...

Article 7
Inviolability of premises, archives and all other documents

1. The premises of the Special Court shall be inviolable. The competent authorities shall take whatever action may be necessary to ensure that the Special Court shall not be dispossessed of all or any part of the premises of the Court without its express consent.

2. The property, funds and assets of the Special Court, wherever located and by whomsoever held, shall be immune from search, seizure, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

3. The archives of the Court, and in general all documents and materials made available, belonging to or used by it, wherever located and by whomsoever held, shall be inviolable.

Article 8
Funds, assets and other property

1. The Special Court, its funds, assets and other property, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process, except insofar as in any particular case the Court has expressly waived its immunity. It is understood, however, that no waiver of immunity shall extend to any measure of execution.

2. Without being restricted by financial controls, regulations or moratoriums of any kind, the Special Court:

(a) May hold and use funds, gold or negotiable instruments of any kind and maintain and operate accounts in any currency and convert any currency held by it into any other currency;

(b) Shall be free to transfer its funds, gold or currency from one country to another, or within Sierra Leone, to the United Nations or any other agency.

Article 9
Seat of the Special Court

The Special Court shall have its seat in Sierra Leone. The Court may meet away from its seat if it considers it necessary for the efficient exercise of its functions, and may be relocated outside Sierra Leone, if circumstances so require, and subject to the conclusion of a Headquarters Agreement between the Secretary-General of the United Nations and the Government of Sierra Leone, on the one hand, and the Government of the alternative seat, on the other.

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[a] The formulation of this article is dependent on a decision on the financial mechanism of the Special Court.

Article 10
Juridical capacity

The Special Court shall possess the juridical capacity necessary to:

(a) Contract;

(b) Acquire and dispose of movable and immovable property;

(c) Institute legal proceedings;

(d) Enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Court.

Article 11
Privileges and immunities of the judges, the Prosecutor and the Registrar

1. The judges, the Prosecutor and the Registrar, together with their families forming part of their household, shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic agents in accordance with the 1961 Vienna Convention on Diplomatic Relations. They shall, in particular, enjoy:

(a) Personal inviolability, including immunity from arrest or detention;

(b) Immunity from criminal, civil and administrative jurisdiction in conformity with the Vienna Convention;

(c) Inviolability for all papers and documents;

(d) Exemption, as appropriate, from immigration restrictions and other alien registrations;

(e) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic agents by the Vienna Convention;

(f) Exemption from taxation in Sierra Leone on their salaries, emoluments and allowances.

2. Privileges and immunities are accorded to the judges, the Prosecutor and the Registrar in the interest of the Special Court and not for the personal benefit of the individuals themselves. The right and the duty to waive the immunity, in any case where it can be waived without prejudice to the purpose for which it is accorded, shall lie with the Secretary-General, in consultation with the President.

Article 12
Privileges and immunities of international and Sierra Leonean personnel

1. Sierra Leonean and international personnel of the Special Court shall be accorded:

(a) Immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Such immunity shall continue to be accorded after termination of employment with the Special Court;

(b) Immunity from taxation on salaries, allowances and emoluments paid to them.

2. International personnel shall, in addition thereto, be accorded:

(a) Immunity from immigration restriction;

(b) The right to import free of duties and taxes, except for payment for services, their furniture and effects at the time of first taking up their official duties in Sierra Leone.

3. The privileges and immunities are granted to the officials of the Special Court in the interest of the Court and not for their personal benefit. The right and the duty to waive the immunity in any particular case where it can be waived without prejudice to the purpose for which it is accorded shall lie with the Registrar of the Court.

Article 13
Counsel

1. The Government shall ensure that the counsel of a suspect or an accused who has been admitted as such by the Special Court shall not be subjected to any measure which may affect the free and independent exercise of his or her functions.

2. In particular, the counsel shall be accorded:

(a) Immunity from personal arrest or detention and from seizure of personal baggage;

(b) Inviolability of all documents relating to the exercise of his or her functions as a counsel of a suspect or accused;

(c) Immunity from criminal or civil jurisdiction in respect of words spoken or written and acts performed in his or her capacity as counsel. Such immunity shall continue to be accorded after termination of his or her functions as a counsel of a suspect or accused.

Article 14
Witnesses and experts

Witnesses and experts appearing from outside Sierra Leone on a summons or a request of the judges or the Prosecutor shall not be prosecuted, detained or subjected to any restriction on their liberty by the Sierra Leonean authorities. They shall not be subjected to any measure which may affect the free and independent exercise of their functions.

Article 15
Security, safety and protection of persons referred to in this Agreement

Recognizing the responsibility of the Government under international law to ensure the security, safety and protection of persons referred to in this Agreement and its present incapacity to do so pending the restructuring and rebuilding of its security forces, it is agreed that the United Nations Mission in Sierra Leone shall provide the necessary security to premises and personnel of the Special Court, subject to an appropriate mandate by the Security Council and within its capabilities.

Article 16
Cooperation with the Special Court

1. The Government shall cooperate with all organs of the Special Court at all stages of the proceedings. It shall, in particular, facilitate access to the Prosecutor to sites, persons and relevant documents required for the investigation.

2. The Government shall comply without undue delay with any request for assistance by the Special Court or an order issued by the Chambers, including, but not limited to:

(a) Identification and location of persons;

(b) Service of documents;

(c) Arrest or detention of persons;

(d) Transfer of an indictee to the Court.

Article 17
Working language

The official working language of the Special Court shall be English.

Article 18
Practical arrangements

1. With a view to achieving efficiency and cost-effectiveness in the operation of the Special Court, a phased-in approach shall be adopted for its establishment in accordance with the chronological order of the legal process.

2. In the first phase of the operation of the Special Court, judges, the Prosecutor and the Registrar will be appointed along with investigative and prosecutorial staff. The process of investigations and prosecutions and the trial process of those already in custody shall then be initiated. While the judges of the Appeals Chamber shall serve whenever the Appeals Chamber is seized of a matter, they shall take office shortly before the trial process has been completed.

Article 19
Settlement of disputes

Any dispute between the Parties concerning the interpretation or application of this Agreement shall be settled by negotiation, or by any other mutually agreed-upon mode of settlement.

Article 20
Entry into force

The present Agreement shall enter into force on the day after both Parties have notified each other in writing that the legal instruments for entry into force have been complied with.

DONE at [place] on [day, month] 2000 in two copies in the English language.

For the United Nations   For the Government of Sierra Leone

Enclosure

Statute of the Special Court for Sierra Leone

Having been established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000, the Special Court for Sierra Leone (hereinafter "the Special Court") shall function in accordance with the provisions of the present Statute.

Article 1
Competence of the Special Court

The Special Court shall have the power to prosecute persons most responsible for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.

Article 2
Crimes against humanity

The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation;

(e) Imprisonment;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;

(h) Persecution on political, racial, ethnic or religious grounds;

(i) Other inhumane acts.

Article 3
Violations of article 3 common to the Geneva Conventions and of Additional Protocol II

The Special Court shall have the power to prosecute persons who committed or ordered the commission of serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include:

(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) Collective punishments;

(c) Taking of hostages;

(d) Acts of terrorism;

(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) Pillage;

(g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;

(h) Threats to commit any of the foregoing acts.

Article 4
Other serious violations of international humanitarian law

The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law:

(a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(b) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(c) Abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities.

Article 5
Crimes under Sierra Leonean law

The Special Court shall have the power to prosecute persons who have committed the following crimes under Sierra Leonean law:

(a) Offences relating to the abuse of girls under the Prevention of Cruelty to Children Act, 1926 (Cap. 31):

(i) Abusing a girl under 13 years of age, contrary to section 6;

(ii) Abusing a girl between 13 and 14 years of age, contrary to section 7;

(iii) Abduction of a girl for immoral purposes, contrary to section 12.

(b) Offences relating to the wanton destruction of property under the Malicious Damage Act, 1861:

(i) Setting fire to dwelling-houses, any person being therein to section 2;

(ii) Setting fire to public buildings, contrary to sections 5 and 6;

(iii) Setting fire to other buildings, contrary to section 6.

Article 6
Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime.

2. The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Court determines that justice so requires.

5. Individual criminal responsibility for the crimes referred to in article 5 shall be determined in accordance with the respective laws of Sierra Leone.

Article 7
Jurisdiction over persons of 15 years of age

1. The Special Court shall have jurisdiction over persons who were 15 years of age at the time of the alleged commission of the crime.

2. At all stages of the proceedings, including investigation, prosecution and adjudication, an accused below the age of 18 (hereinafter "a juvenile offender") shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society.

3. In a trial of a juvenile offender, the Special Court shall:

(a) Consider, as a priority, the release of the juvenile, unless his or her safety and security requires that the juvenile offender be placed under close supervision or in a remand home; detention pending trial shall be used as a measure of last resort;

(b) Constitute a "Juvenile Chamber" composed of at least one sitting judge and one alternate judge possessing the required qualifications and experience in juvenile justice;

(c) Order the separation of his or her trial, if jointly accused with adults;

(d) Provide the juvenile with the legal, social and any other assistance in the preparation and presentation of his or her defence, including the participation in legal proceedings of the juvenile offender's parent or legal guardian;

(e) Provide protective measures to ensure the privacy of the juvenile; such measures shall include, but not be limited to, the protection of the juvenile's identity, or the conduct of in camera proceedings;

(f) In the disposition of his or her case, order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.

Article 8
Concurrent jurisdiction

1. The Special Court and the national courts of Sierra Leone shall have concurrent jurisdiction.

2. The Special Court shall have primacy over the national courts of Sierra Leone. At any stage of the procedure, the Special Court may formally request a national court to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence.

Article 9
Non bis in idem

1. No person shall be tried before a national court of Sierra Leone for acts for which he or she has already been tried by the Special Court.

2. A person who has been tried by a national court for the acts referred to in articles 2 and 4 of the present Statute may be subsequently tried by the Special Court if:

(a) The act for which he or she was tried was characterized as an ordinary crime; or

(b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the Special Court shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 10
Amnesty

An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution.

Article 11
Organization of the Special Court

The Special Court shall consist of the following organs:

(a) The Chambers, comprising two Trial Chambers and an Appeals Chamber;

(b) The Prosecutor; and

(c) The Registry.

Article 12
Composition of the Chambers

1. The Chambers shall be composed of eleven independent judges, who shall serve as follows:

(a) Three judges shall serve in each of the Trial Chambers, of whom one shall be a judge appointed by the Government of Sierra Leone, and two judges appointed by the Secretary-General of the United Nations (hereinafter "the Secretary-General");

(b) Five judges shall serve in the Appeals Chamber, of whom two shall be judges appointed by the Government of Sierra Leone, and three judges appointed by the Secretary-General.

2. Each judge shall serve only in the Chamber to which he or she has been appointed.

3. The judges of the Appeals Chamber and the judges of the Trial Chambers, respectively, shall elect a presiding judge who shall conduct the proceedings in the Chamber to which he or she was elected. The presiding judge of the Appeals Chamber shall be the President of the Special Court.

4. In addition to the judges sitting in the Chambers and present at every stage of the proceedings, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate an alternate judge appointed by either the Government of Sierra Leone or the Secretary-General, to be present at each stage of the trial, and to replace a judge, if that judge is unable to continue sitting.

Article 13
Qualification and appointment of judges

1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. They shall be independent in the performance of their functions, and shall not accept or seek instructions from any Government or any other source.

2. In the overall composition of the Chambers, due account shall be taken of the experience of the judges in international law, including international humanitarian law and human rights law, criminal law and juvenile justice.

3. The judges shall be appointed for a four-year period and shall be eligible for reappointment.

Article 14
Rules of Procedure and Evidence

1. The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable mutatis mutandis to the conduct of the legal proceedings before the Special Court.

2. The judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not, or do not

adequately, provide for a specific situation. In so doing, they may be guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone.

Article 15
The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons most responsible for serious violations of international humanitarian law and crimes under Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. The Prosecutor shall act independently as a separate organ of the Special Court. He or she shall not seek or receive instructions from any Government or from any other source.

2. The Office of the Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor shall, as appropriate, be assisted by the Sierra Leonean authorities concerned.

3. The Prosecutor shall be appointed by the Secretary-General for a four-year term and shall be eligible for reappointment. He or she shall be of high moral character and possess the highest level of professional competence and have extensive experience in the conduct of investigations and prosecution of criminal cases.

4. The Prosecutor shall be assisted by a Sierra Leonean Deputy Prosecutor, and by such other Sierra Leonean and international staff as may be required to perform the functions assigned to him or her effectively and efficiently. Given the nature of the crimes committed and the particular sensitivities of girls, young women and children victims of rape, sexual assault, abduction and slavery of all kinds, due consideration should be given in the appointment of staff to the employment of prosecutors and investigators experienced in gender-related crimes and juvenile justice.

5. In the prosecution of juvenile offenders, the Prosecutor shall ensure that the child-rehabilitation programme is not placed at risk and that, where appropriate, resort should be had to alternative truth and reconciliation mechanisms, to the extent of their availability.

Article 16
The Registry

1. The Registry shall be responsible for the administration and servicing of the Special Court.

2. The Registry shall consist of a Registrar and such other staff as may be required.

3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the Special Court and shall be a staff member of the United Nations. He or she shall serve for a four-year term and be eligible for reappointment.

4. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance

for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses. The Unit personnel shall include experts in trauma, including trauma related to crimes of sexual violence and violence against children.

Article 17
Rights of the accused

1. All accused shall be equal before the Special Court.

2. The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

(b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;

(c) To be tried without undue delay;

(d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

(f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Court;

(g) Not to be compelled to testify against himself or herself or to confess guilt.

Article 18
Judgement

The judgement shall be rendered by a majority of the judges of the Trial Chamber or of the Appeals Chamber, and shall be delivered in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 19
Penalties

1. The Trial Chamber shall impose upon a convicted person, other than a juvenile offender, imprisonment for a specified number of years. In determining the terms of imprisonment, the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone.

2. In imposing the sentences, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chamber may order the forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the State of Sierra Leone.

Article 20
Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by a Trial Chamber or from the Prosecutor on the following grounds:

(a) A procedural error;

(b) An error on a question of law invalidating the decision;

(c) An error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber.

3. The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the Former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone.

Article 21
Review proceedings

1. Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chamber or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit an application for review of the judgement.

2. An application for review shall be submitted to the Appeals Chamber. The Appeals Chamber may reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

(a) Reconvene the Trial Chamber;

(b) Retain jurisdiction over the matter.

Article 22
Enforcement of sentences

1. Imprisonment shall be served in Sierra Leone. If circumstances so require, imprisonment may also be served in any of the States which have concluded with the International Criminal Tribunal for Rwanda or the International Tribunal for the Former Yugoslavia an agreement for the enforcement of sentences, and which have indicated to the Registrar of the Special Court their willingness to accept convicted persons. The Special Court may conclude similar agreements for the enforcement of sentences with other States.

2. Conditions of imprisonment, whether in Sierra Leone or in a third State, shall be governed by the law of the State of enforcement subject to the supervision of the Special Court. The State of enforcement shall be bound by the duration of the sentence, subject to article 23 of the present Statute.

Article 23
Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Special Court accordingly. There shall only be pardon or commutation of sentence if the President of the Special Court, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

Article 24
Working language

The working language of the Special Court shall be English.

Article 25
Annual report

The President of the Special Court shall submit an annual report on the operation and activities of the Court to the Secretary-General and to the Government of Sierra Leone.

ANNEX 2

Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, U.N. Doc. S/2000/1234, 22 December 2000, para. 1.

United Nations

S/2000/1234

Security Council

Distr.: General
22 December 2000

Original: English

Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General

The members of the Security Council have carefully reviewed your report of 4 October 2000 on the establishment of a Special Court for Sierra Leone (S/2000/915). The Council members wish to convey their deep appreciation for the observations and recommendations set forth in your report.

The members of the Security Council reaffirm their support for resolution 1315 (2000) and its reiteration that the situation in Sierra Leone constitutes a threat to international peace and security. With the objective of conforming to resolution 1315 (2000) and related concerns, and subject to the agreement of the Government of Sierra Leone as necessary and appropriate, the members of the Council suggest that the draft Agreement between the United Nations and the Government of Sierra Leone and the proposed Statute of the Court be amended to incorporate the views set forth below.

1. *Personal jurisdiction.* The members of the Security Council continue to hold the view, as expressed in resolution 1315 (2000), that the Special Court for Sierra Leone should have personal jurisdiction over persons who bear the greatest responsibility for the commission of crimes, including crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone. The members of the Security Council believe that, by thus limiting the focus of the Special Court to those who played a leadership role, the simpler and more general formulations suggested in the appended draft will be appropriate. It is the view of the members of the Council that the Truth and Reconciliation Commission will have a major role to play in the case of juvenile offenders, and the members of the Security Council encourage the Government of Sierra Leone and the United Nations to develop suitable institutions, including specific provisions related to children, to this end. The members of the Security Council believe that it is the responsibility of Member States who have sent peacekeepers to Sierra Leone to investigate and prosecute any crimes they may have allegedly committed. Given the circumstances of the situation in Sierra Leone, the Special Court would have jurisdiction over those crimes only if the Security Council considers that the Member State is not discharging that responsibility. Therefore, Council members propose the inclusion of language in the Agreement to be concluded between the United Nations and the Government of Sierra Leone and in the Statute of the Special Court to that effect.

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2. *Funding.* Pursuant to resolution 1315 (2000), members of the Security Council support the creation of a Special Court for Sierra Leone funded through voluntary contributions. Such contributions shall take the form of funds, equipment and services, including the offer of expert personnel that may be needed from States, intergovernmental organizations and non-governmental organizations. It is understood that you cannot be expected to create any institution for which you do not have adequate funds in hand for at least 12 months and pledges to cover anticipated expenses for a second year of the Court's operation.

In order to assist the Court on questions of funding and administration, it is suggested that the arrangements between the Government of Sierra Leone and the United Nations provide for a management or oversight committee which could include representatives of Sierra Leone, the Secretary-General of the United Nations, the Court and interested voluntary contributors. The management committee would assist the court in obtaining adequate funding, provide advice on matters of Court administration and be available as appropriate to consult on other non-judicial matters.

3. *Court size.* The members of the Security Council do not believe the creation of two Trial Chambers and the use of alternate judges as proposed in your report is necessary, at least not from the very outset. The Special Court should begin its work with a single Trial Chamber, with the possibility of adding a second Chamber should the developing caseload warrant its creation. Council members also question the provision in the draft Agreement and Statute calling for alternate judges. It should be noted in this connection that neither the International Tribunal for the Former Yugoslavia nor the International Criminal Tribunal for Rwanda employs alternate judges.

The members suggest the following further adjustments of a technical or drafting nature to the Agreement: Add an express provision to article 13 as a new subparagraph (d) under paragraph 2, concerning immigration restrictions; to article 14 concerning witnesses and experts; and to article 4 (c) of the Statute of the Court, modifying it so as to conform it to the statement of the law existing in 1996 and as currently accepted by the international community.

The members of the Security Council express their hope that you will concur with the proposals outlined above and adjust the draft Agreement between the United Nations and the Government of Sierra Leone and the Statute of the Court as expeditiously as possible, along the above lines and as indicated in the attached annex.

(*Signed*) Sergey **Lavrov**
President of the Security Council

Annex

In consequence of the comments contained in the letter, it is suggested that consideration be given to adjustment of the "Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone" and the "Statute of the Special Court for Sierra Leone".

Agreement

Preamble

No change.

Article 1
Establishment of the Special Court

1. There is hereby established a Special Court for Sierra Leone to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.

2. The Special Court shall function in accordance with the Statute of the Special Court for Sierra Leone. The Statute is annexed to this Agreement and forms an integral part thereof.

Article 2
Composition of the Special Court and appointment of judges

1. The Special Court shall be composed of a Trial Chamber and an Appeals Chamber with a second Trial Chamber to be created if, after the passage of at least six (6) months from the commencement of the functioning of the Special Court the Secretary-General, the Prosecutor or the President of the Special Court so request. Up to two alternate judges shall similarly be appointed after six months if the President of the Special Court so determines.

2. The Chambers shall be composed of no fewer than eight (8) independent judges and no more than eleven (11) such judges who shall serve as follows:

(a) Three judges shall serve in the Trial Chamber where one shall be appointed by the Government of Sierra Leone and two judges appointed by the Secretary-General, upon nominations forwarded by States and in particular the Member States ...

(b) In the event of the creation of a second Trial Chamber, that Chamber shall be likewise composed in the manner contained in subparagraph (a) above;

(c) Former paragraph 2 (b).

3. *No change.*

4. *No change.*

5. If an alternate judge or judges have been appointed, in addition ...

Article 3

No change.

Articles 4 and 5

No change.

Article 6
Expenses of the Special Court

The expenses of the Court shall be borne by voluntary contributions from the international community. It is understood that the Secretary-General will commence the process of establishing the Court when he has sufficient contributions in hand to finance the establishment of the Court and 12 months of its operations plus pledges equal to the anticipated expenses of the second 12 months of the Court's operation. It is further understood that the Secretary-General will continue to seek contributions equal to the anticipated expenses of the Court beyond its first 24 months of operation. Should voluntary contributions be insufficient for the Court to implement its mandate, the Secretary-General and the Security Council shall explore alternate means of financing the Court.

Articles 7 to 12

No change.

Article 13

New paragraph 2 (d)

Immunity from any immigration restrictions during his or her stay as well as during his/her journey to the Court and back.

Article 14

... The provisions of article 13, paragraph 2 (a) and (d), shall apply to them.

Articles 15 to 20

No change.

Statute

Preamble

No change.

Article 1
Competence of the Special Court

(a) The Special Court shall, except as provided in subparagraph (b), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who,

in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.

(b) Any transgressions by peacekeepers and related personnel present in Sierra Leone pursuant to the Status of Mission Agreement in force between the United Nations and the Government of Sierra Leone or agreements between Sierra Leone and other Governments or regional organizations, or, in the absence of such agreement, provided that the peacekeeping operations were undertaken with the consent of the Government of Sierra Leone, shall be within the primary jurisdiction of the sending State.

(c) In the event the sending State is unwilling or unable genuinely to carry out an investigation or prosecution, the Court may, if authorized by the Security Council on the proposal of any State, exercise jurisdiction over such persons.

Articles 2 and 3

No change.

Article 4

... *(as is)*

(c) Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.

Articles 5 and 6

No change.

Article 7

Should any person who was at the time of the alleged commission of the crime below 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.

Articles 8 to 10

No change.

Article 11

(a) The Chamber, comprising one or more Trial Chambers and an Appeals Chamber;

Article 12

1. The Chamber shall be composed of not less than eight (8) or more than eleven (11) independent judges, who shall serve as follows:

[*consequential changes in paras. 1 (a) and 4*]

ANNEX 3

See Prosecutor v. Delalic et al. (Celebici case), Judgement, Case No. IT-96-21-T, Trial Chamber, 16 November 1998, para. 179;

IN THE TRIAL CHAMBER

Before:
Judge Adolphus G. Karibi-Whyte, Presiding
Judge Elizabeth Odio Benito
Judge Saad Saood Jan

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Judgement of: 16 November 1998

PROSECUTOR

v.

ZEJNIL DELALIC
ZDRAVKO MUCIC also known as "PAVO"
HAZIM DELIC
ESAD LANDZO also known as "ZENGA"

JUDGEMENT

The Office of the Prosecutor:
Mr. Grant Niemann
Ms. Teresa McHenry

Counsel for the Accused:
Ms. Edina Residovic, Mr. Eugene O'Sullivan, for Zejnil Delalic
Ms. Nihada Buturovic, Mr. Howard Morrison, for Zdravko Mucic
Mr. Salih Karabdic, Mr. Thomas Moran, for Hazim Delic
Ms. Cynthia McMurrey, Ms. Nancy Boler, for Esad Landzo

I.Introduction

The trial of Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo (hereafter "accused"), before this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereafter "International Tribunal" or "Tribunal"), commenced on 10 March 1997 and came to a close on 15 October 1998.

Having considered all of the evidence presented to it during the course of this trial, along with the written and oral submissions of the Office of the Prosecutor (hereafter "Prosecution") and the Defence for each of the accused (hereafter, collectively, "Defence"), the Trial Chamber,

C. General Requirements for the Application of Articles 2 and 3 of the Statute

1. Provisions of Article

173. The terms of Article 1 provide the starting point for any discussion of the jurisdiction of the International Tribunal and constitute the basis for the more detailed provisions of the articles on jurisdiction which follow. The Tribunal is hereby confined to concerning itself with "serious violations of international humanitarian law" committed within a specific location and time-period. It is within this frame of reference that the Trial Chamber must consider the acts alleged in the Indictment and the applicability of Articles 2 and 3 of the Statute.

174. There is no question that the temporal and geographical requirements of Article 1 have been met in the present case. In their closing written submissions, however, each of the accused, with the exception of Mr. Mucic, challenge the jurisdiction of the Tribunal on the basis that the crimes charged in the Indictment cannot be regarded as "serious" violations of international humanitarian law[214]. This argument was first raised by the Defence in their Motion to Dismiss, although it is unclear in that document whether it is being asserted by all of the accused (excluding Mr. Mucic, who filed a separate motion) or only by the Defence for Mr. Landzo.

175. The Defence[215] asserts that the International Tribunal was established by the United Nations Security Council to prosecute and punish only the most serious violators of international humanitarian law, that is, those persons in positions of political or military authority, responsible for the most heinous atrocities. The Defence states that the International Tribunal should not "become bogged down in trying lesser violators for lesser violations" as such persons are more appropriately the subjects of prosecution by national courts[216]. In addition, it is argued on behalf of Mr. Landzo that he is but one of thousands of individuals who might be prosecuted for similar offences committed in the former Yugoslavia and this places him in the unfair position of being made into a kind of representative of all these other persons, who are not the subject of proceedings before the International Tribunal.

176. The provisions of Articles 2, 3, 4 and 5 of the Statute set out in some detail the offences over which the International Tribunal has jurisdiction and clearly all of these crimes were regarded by the Security Council as "serious violations of international humanitarian law". Article 7 further establishes that individual criminal responsibility attaches to the perpetrators of such offences and those who plan, instigate, order, or aid and abet the planning, preparation or execution of such offences, as well as, in certain situations, their superiors. It is clear from this latter article that the Tribunal was not intended to concern itself only with persons in positions of military or political authority. This was recognised previously by Trial Chamber I in its "Sentencing Judgement" in the case of *Prosecutor v. Drazen Erdemovic,* when it stated that "[t]he Trial Chamber considers that individual responsibility is based on Articles 1 and 7(1) of the Statute which grant the International Tribunal full jurisdiction not only over "great criminals" like in Nürnberg - as counsel for the accused maintains – but also over executors." [217]

177. Article 9 of the Statute enunciates the principle that the International Tribunal has concurrent jurisdiction with national courts for the prosecution of the crimes over which it has jurisdiction. This article also states that the International Tribunal has primacy over such national courts and thus several of the Rules are concerned with the matter of deferral of national prosecutions to the Tribunal. States are, indeed, obliged to comply with formal requests for deferral to the International Tribunal and, therefore, there can be no doubt that the question of forum is one solely to be decided first by the Prosecutor and then by the Judges of the Tribunal.[218]

178. A mere cursory glance over the Indictment at issue in the present case provides a lasting impression of a catalogue of horrific events which are variously classified as crimes such as wilful killing, torture, inhuman acts, cruel treatment and plunder. To argue that these are not crimes of the most serious nature strains the bounds of credibility[219]. While the fact that these acts are not alleged to have occurred on a widespread and systematic scale in this particular situation may have been of relevance had they been charged as crimes against humanity under Article 5 of the Statute, there is no such requirement incorporated in Articles 2 and 3, with which the Trial Chamber is here concerned.

179. The final argument of Mr. Landzo, that he is somehow being presented as a representative of countless others who are not in the custody of the Tribunal or named in any indictment, is also completely without merit. First, this contention is simply incorrect. The Prosecutor has at this time issued 20 public indictments against 58 individuals of various rank and position and several of these individuals have been, are currently being, or are soon to be, tried. There are many and varied reasons why the other indictees are not in the custody of the Tribunal and are, therefore, not subject also to its judicial process, but this is not an issue for the concern of this Trial Chamber in the current context.

180. In addition, it is preposterous to suggest that unless all potential indictees who are similarly situated are brought to justice, there should be no justice done in relation to a person who has been indicted and brought to trial. Furthermore, the decision of whom to indict is that of the Prosecutor alone and, once such an indictment has been confirmed, it is incumbent upon the Trial Chambers to perform their judicial function when such accused persons are brought before them.

181. In sum, the interpretation of Article 1 put forward by the Defence does not bear close scrutiny and is, therefore, dismissed. Accordingly, the Trial Chamber must turn its attention to the substance of Articles 2 and 3 and the requirements for their applicability.

ANNEX 4

Prosecutor v. Furundzija, Decision on the Defendant's Motion to Dismiss Counts 13 and 14 of the Indictment (Lack of Subject Matter Jurisdiction), Case No. IT-95-17/1-PT, Trial Chamber, 29 May 1998, para. 16

IN THE TRIAL CHAMBER

Before: Judge Florence Ndepele Mwachande Mumba, Presiding

Judge Antonio Cassese

Judge Richard May

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Order of: 29 May 1998

PROSECUTOR

v.

ANTO FURUNDZIJA

DECISION ON THE DEFENDANT'S MOTION TO DISMISS COUNTS 13 AND 14 OF THE INDICTMENT (LACK OF SUBJECT MATTER JURISDICTION)

The Office of the Prosecutor:

Mrs. Patricia Viseur-Sellers

Mr. Michael Blaxill

Mr. Rodney Dixon

Counsel for the Accused:

Mr. Luka Misetic

I. INTRODUCTION

1. Pending before this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("International Tribunal") is the Defendant's Motion to Dismiss Counts 13 and 14 of the Indictment (Lack of Subject Matter Jurisdiction) filed on 21 May 1998 ("Defence Motion") (Official Record at Registry Page ("RP") D770 - D777) and the Prosecution's Response to the Defence Motion filed on 27 May 1998 ("Prosecution's Response") (RP D813 - D819);

2. The accused, Anto Furundzija, was charged in the Indictment dated 2 November 1995 (RP D36 - D41, D50) ("Indictment") with violations of Article 2 of the Statute of the International Tribunal ("Statute") for allegedly committing acts amounting to grave breaches of the Geneva Conventions of 1949 and under Article 3 of the Statute with alleged violations of the laws or customs of war. On 13 March 1998, this Trial Chamber gave the Prosecution leave to withdraw the charges alleging violation of Article 2 of the Statute, namely those contained in Count 12 of the Indictment.

3. The trial of Anto Furundzija is scheduled to commence on 8 June 1998, on counts 13 and 14 only, both alleging violations of Article 3 of the Statute. His actions are said to amount to involvement in torture and outrages upon personal dignity including rape, triggering individual criminal responsibility under Article 7(1) of the Statute.

4. The Trial Chamber finds that the matters raised in the Defence Motion and the Prosecution's Response are suitable for determination in the absence of oral argument in accordance with the Order for Filing of Motions issued by the Trial Chamber on 19 December 1997 (RP D21-D22).

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions of the parties,

HEREBY ISSUES ITS WRITTEN DECISION.

II. SUBMISSIONS OF THE DEFENCE

5. In challenging the Trial Chamber's jurisdiction over torture and outrages upon personal dignity including rape, the Defence Motion follows several lines of argument.

(a) It is initially argued that "torture and outrages upon personal dignity including rape are not covered by Article 3 of the Statute". These acts are covered instead by Article 2 of the Statute. At a later stage in the Defence Motion, this position is modified to "[t]he crimes of rape and torture can be prosecuted under Article 3 only if the crime occurred in an internal armed conflict".

This reasoning is based on the Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction issued by the Appeals Chamber of the International Tribunal in the case of *Prosecutor v. Dusko Tadic* on 2 October 1995 (RP D6413 - D6491) ("Appeals Chamber Decision") and the finding that Common Article 3 of the Geneva Conventions 1949 ("Common Article 3") had been incorporated into Article 3 of the Statute. Common Article 3 specifically prohibits, *inter alia*, violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture, and also prohibits outrages upon personal dignity, in particular humiliating and degrading treatment. Common Article 3 is expressed in the Geneva Conventions as being applicable in the case of "armed conflict not of an international character", that is, internal armed conflicts only. Therefore, Defence Counsel argues, the Prosecution, who continues to insist the conflict was international, cannot rely on Common Article 3 and therefore Article 3 of the Statute.

(b) The Defence argues (without committing itself) that the alleged acts fall within Article 2, the grave breaches regime. With respect to torture, the Defence acknowledges that the position is quite clear: torture is one of the specifically prohibited acts under Article 2(b). The Defence does not take a stand on whether rape is a grave breach.

It is argued that rape and torture in an international armed conflict can only be prosecuted under Article

2 of the Statute, that is, they are grave breaches or nothing at all in an international armed conflict. Applying the Appeals Chamber Decision, torture can only be prosecuted under Article 2 as a grave breach. If rape is a grave breach of the Geneva Conventions (it is not specifically mentioned), then under this decision it cannot be prosecuted under Article 3 because grave breaches can be prosecuted only under Article 2.

(c) According to the Defence, proper application of the Appeals Chamber Decision must mean that crimes listed in Article 2 of the Statute cannot be brought under Article 3. Several extracts of the Appeals Chamber Decision dealing with Article 3 are quoted in support of this interpretation.

III. SUBMISSIONS OF THE PROSECUTION

6. In the Prosecution Response, the arguments of the Defence are countered as follows:

(a) The offences charged in Counts 13 and 14 of the Indictment constitute violations of the laws or customs of war, as recognised by Article 3 of the Statute. Torture and outrages upon personal dignity, including rape, are prohibited under international humanitarian law as distinct offences for all armed conflicts, whether internal or international. These offences are properly charged under Article 3 of the Statute.

(b) The Appeals Chamber in the *Tadic* case held that the prohibitions contained in Common Article 3, which include torture and outrages against personal dignity, including rape, are applicable to all conflicts whether international or internal. Violations of Common Article 3 may properly be prosecuted under Article 3 of the Statute. The test for determining the applicability of Article 3 of the Statute is that set out in the Appeals Chamber Decision:

> (i) the violation must constitute an infringement of a rule of international humanitarian law;
>
> (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;
>
> (iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim;
>
> (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

In that case, the Prosecution argues, it was confirmed that violations of Common Article 3 satisfied the conditions for prosecution under Article 3 of the Statute.

(c) Rape is prohibited in international armed conflicts, as demonstrated by Article 27 of Geneva Convention IV and Article 76 of Additional Protocol II. Article 4 of Additional Protocol II, which elaborates upon the offences contained in Common Article 3, prohibits rape in internal armed conflict. These prohibitions were recognised in the Appeals Chamber Decision as being part of customary

international law and are applicable in international and internal armed conflicts. They are therefore validly charged under Article 3.

(d) By describing Article 3 as a "residual" clause, the Appeals Chamber in *Tadic* did not preclude charging violations of torture and outrages upon personal dignity, including rape, thereunder. In the present case, these actions have been charged under Article 3 of the Statute as violations of Common Article 3 and other rules of humanitarian law, and are separate substantive offences with separate elements to the grave breaches offences and crimes against humanity. The ruling of this Trial Chamber in the case of *Prosecutor v. Kupreskic et al* in its Decision on Defence Challenges to Form of Indictment issued on 15 May 1998 (RP D1074 - D1076) is cited in support of this proposition.

(e) The effect of the Appeals Chamber's ruling (that Article 3 of the Statute is a general clause covering all serious violations of international humanitarian law not falling under Article 2 or covered by Article 4 or 5) is that Article 3 cannot be relied upon to prosecute grave breaches, crimes against humanity or genocide. It does however, permit the charging of torture and outrages upon personal dignity, including rape.

IV. DISCUSSION

7. Both parties have relied on Articles 2 and 3 of the Statute, which provide as follows:

Article 2

Grave breaches of the Geneva Conventions of 1949

> The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
>
> (a) wilful killing;
>
> (b) torture or inhuman treatment, including biological experiments;
>
> (c) wilfully causing great suffering or serious injury to body or health;
>
> (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
>
> (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
>
> (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
>
> (g) unlawful deportation or transfer or unlawful confinement of a civilian;
>
> (h) taking civilians as hostages.

Article 3

Violations of the laws or customs of war

> The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:
>
> (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
>
> (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
>
> (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
>
> (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
>
> (e) plunder of public or private property.

8. Common Article 3 is also highly relevant to the issue at hand:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria .
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above mentioned persons:
>
> > (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> >
> > (b) taking of hostages;
> >
> > (c) outrages upon personal dignity, in particular humiliation and degrading treatment;
> >
> > (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by

civilized people.

(2) The wounded and sick shall be collected and cared for.

. . . .

9. Much reliance has also been placed upon the Appeals Chamber Decision, relevant extracts of which are quoted below:

> Paragraph 87: "....***Considering this list in the general context of the Secretary-General's discussion of the Hague Regulations and international humanitarian law, we conclude that this list may be construed to include other infringements of international humanitarian law. The only limitation is that such infringements must not be already covered by Article 2 (lest this latter provision should become superfluous).*** Article 3 may be taken to cover all violations of international humanitarian law other than the "grave breaches" of the four Geneva Conventions falling under Article 2 (or, for that matter, the violations covered by Articles 4 and 5, to the extent that Articles 3, 4 and 5 overlap)."
>
> [Extracts quoted by the Defence are in bold].
>
> Paragraph 89: "In light of the above remarks, it can be held that Article 3 is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5, more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as "grave breaches" by those Conventions; (iii) violations of common Article 3 and other customary rules on internal conflicts; (iv) violations of agreements binding upon the parties to the conflict, considered *qua* treaty law, i.e., agreements which have not turned into customary international law....".
>
> Paragraph 91: "***Article 3 thus confers on the International Tribunal jurisdiction over any serious offence against international humanitarian law*** not covered by Article 2, 4 or 5. Article 3 is a fundamental provision laying down that any "serious violation of international humanitarian law" must be prosecuted by the International Tribunal. In other words, ***Article 3 functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal. Article 3 aims to make such jurisdiction watertight and inescapable.***".
>
> [Extracts quoted by the Defence are in bold].

10. The Appeals Chamber Decision

The Appeals Chamber's interpretation of the International Tribunal's subject matter jurisdiction is based on a study of the norms prohibiting certain conduct in armed conflict and where they fall in the Statute. The norms prohibiting conduct such as rape and torture of protected persons which are incorporated into Article 2 of the Statute, are of a specialised nature and only apply upon satisfaction of the criteria set out in the Geneva Conventions 1949. The norms prohibiting such conduct in armed conflict, irrelevant of whether international or internal, are encompassed in Article 3. Article 3 contains the prohibitions of those serious violations of international humanitarian law which do not fall within the specialised

provisions contained in Articles 2, 4 or 5.

The Trial Chamber emphasises that the International Tribunal has jurisdiction over all serious violations of international humanitarian law in accordance with its Statute, and that Article 3 is designed to ensure that the mandate of the International Tribunal can be achieved and that all such acts are indeed prosecuted.

11. The Appeals Chamber viewed the International Tribunal's subject matter jurisdiction as encompassing all serious violations of international humanitarian law committed in the former Yugoslavia since 1991. These norms fall into different categories: (i) acts committed in circumstances amounting to grave breaches under Article 2, (ii) acts amounting to genocide under Article 4 and (iii) acts meeting the criteria for crimes against humanity under Article 5. There are also acts amounting to serious violations of international humanitarian law which do not fall into the specialised categories: these are the violations of the laws or customs of war under Article 3. The relationship between Article 2 and 3 can be described as one of concentric circles: grave breaches are a species of violation of the laws or customs of war. The Appeals Chamber held that when an act meets the criteria of a grave breach under Article 2 and therefore also Article 3, it falls within the subject matter jurisdiction of the more specific clause, namely Article 2. This finding is vital to the Defence challenge to the Trial Chamber's jurisdiction over torture and outrages upon personal dignity including rape under Article 3.

12. The application of the Appeals Chamber's finding by the Defence is flawed. All grave breaches are violations of the laws and customs of war. Theoretically, they can be charged as both if the criteria are satisfied. However, there is a general principle of international law (the doctrine of speciality/*lex specialis derogat generali*) which provides that in a choice between two provisions where one has a broader scope and completely encompasses the other, the more specific charge should be chosen. Nevertheless, the situation at hand is not one where the Trial Chamber is faced with different charges under separate articles of the Statute. The Prosecution has already made a choice and has withdrawn the specific charge alleging grave breaches of the Geneva Conventions. It is the finding of the Trial Chamber that the Prosecution is justified in relying on the residual clause to ensure that no serious violation of international humanitarian law escapes the jurisdiction of the International Tribunal. This is fully in line with the reasoning of the Appeals Chamber Decision.

13. The submission of the Defence that torture and outrages upon personal dignity including rape are not covered by Article 3 of the Statute

The argument that "torture and outrages upon personal dignity including rape are not covered by Article 3 of the Statute" is a misinterpretation of the Statute. Such acts are prohibited under customary international law at all times. As the Prosecution points out, in times of armed conflict, they also amount to violations of the laws or customs of war, which include the prohibitions in the Hague Conventions of 1907 and Common Article 3.

14. The Defence's later qualification of this incorrect statement is also mistaken: "[t]he crimes of rape and torture can be prosecuted under Article 3 only if the crime occurred in an internal armed conflict". The Appeals Chamber Decision held that the nature of the armed conflict is irrelevant when acts are committed in violation of the minimum rules in Common Article 3. It was also held that Article 3 of the Statute implicitly refers, *inter alia,* to the customary rules arising from Common Article 3. Common Article 3 specifically prohibits, *inter alia*, violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture, and also prohibits outrages upon personal dignity, in particular humiliating and degrading treatment.

Common Article 3 is expressed in the Geneva Conventions as being applicable in the case of "armed conflict not of an international character", that is, internal armed conflicts. However, the Appeals Chamber found that in customary international law, the norms reflected in Common Article 3 applied in all situations of armed conflict. It cited the dicta in the *Case of Paramilitary Activities In and Around Nicaragua*, whereby the International Court of Justice opined that the rules contained in Common Article 3 reflected "elementary considerations of humanity" applicable under customary international law to any armed conflict, whether it is of internal or international character. The Prosecution, which continues to insist the conflict was international, can rely on the rules of customary international law emerging from Common Article 3 and is therefore entitled to charge Anto Furundzija with violating Article 3 of the Statute.

15. The Defence submission that torture and rape in an international armed conflict can only be prosecuted under Article 2 of the Statute

The Defence assertion that torture and rape in an international armed conflict can only be prosecuted under Article 2 of the Statute, that is, they are grave breaches or nothing at all in an international armed conflict, is wrong. Rape and torture committed in circumstances which do not amount to grave breaches under Article 2 may fall under Article 3. This demonstrates the meaning of the Appeals Chamber when it described Article 3 as a residual clause intended to confer jurisdiction over all serious violations of international humanitarian law which would otherwise evade the International Tribunal's jurisdiction.

16. Equally inappropriate is the Defence argument that using the Appeals Chamber's reasoning, torture (specifically identified in Article 2(b)) can only be prosecuted under Article 2 as a grave breach. If rape is a grave breach of the Geneva Conventions, then, the Defence argues, under the Appeals Chamber Decision, it cannot be prosecuted under Article 3 of the Statute because grave breaches can be prosecuted only under Article 2.

In the case at hand, grave breaches are no longer charged. The Prosecution, having dropped Count 12 of the Indictment, is proceeding to go to trial on the basis of Article 3 charges, on which a *prima facie* case has already been demonstrated in the course of the Confirmation proceedings. The Appeals Chamber was speaking of norms and not of actual charges. Whilst it is theoretically possible that the offences in this case may have been committed in circumstances such as to amount to grave breaches, the Prosecution has chosen to go to trial on the Article 3 charges. That choice between two provisions having been made, it is not the role of the Trial Chamber to intrude upon the Prosecution's discretion. This is reinforced by the findings in paragraphs 12 and 14 above that, in law, the Prosecutor is indeed entitled to bring charges under Article 3 in respect of the conduct alleged.

17. Test for the applicability of Article 3

The Trial Chamber endorses the submission of the Prosecution that the test to apply in determining the applicability of Article 3 of the Statute is that set out by the Appeals Chamber in the *Tadic* Decision. It also approves the submission of the Prosecution that the acts prohibited by Common Article 3 satisfy the test of the Appeals Chamber Decision.

18. Finding

In sum, the Trial Chamber finds that the Defence is suggesting that allegations of serious violations of international humanitarian law should escape the jurisdiction of the International Tribunal. The arguments raised in support of this do not stand up to close scrutiny and the conclusion that is reached runs contrary to the reasoning of the Appeals Chamber Decision and its very purpose. In consideration

of all the foregoing conclusions, the Trial Chamber holds that Article 3 of the Statute covers torture and outrages upon personal dignity including rape, and that the Trial Chamber has jurisdiction to try Anto Furundzija for alleged violations of Article 3 of the Statute.

V. DISPOSITION

For the foregoing reasons

PURSUANT TO RULE 72

THE TRIAL CHAMBER DENIES the Defendant's Motion to Dismiss Counts 13 and 14 of the Indictment (Lack of Subject Matter Jurisdiction) filed on 21 May 1998.

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

____

Florence Ndepele Mwachande Mumba

Presiding Judge

Dated this twenty-ninth day of May 1998

At The Hague,

The Netherlands.

[Seal of the Tribunal]

ANNEX 5

Prosecutor v. Barayagwiza, Decision on the Extremely Urgent Motion by the Defence for Orders to Review and/or Nullify the Arrest and Provisional Detention of the Suspect, Case No. ICTR-97-19-I, Trial Chamber II, 17 November 1998, p. 6;

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER II

OR:Eng.

Before: Judge William H. Sekule, Presiding
Judge Yakov A. Ostrovsky
Judge Tafazzal Hossain Khan

Registry: Mr. John M. Kiyeyeu

THE PROSECUTOR
versus
JEAN-BOSCO BARAYAGWIZA

Case No. ICTR-97-19-I

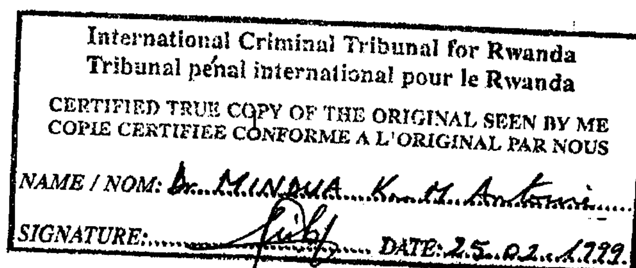
DECISION ON THE EXTREMELY URGENT MOTION BY THE DEFENCE FOR ORDERS TO REVIEW AND/OR NULLIFY THE ARREST AND PROVISIONAL DETENTION OF THE SUSPECT

The Office of the Prosecutor:

Mr. William T. Egbe, Trial Attorney
Mr. Mathias Marcussen, Legal Advisor

Counsel for the Accused:

Mr. Justry P.L. Nyaberi, Lead Counsel


International Criminal Tribunal for Rwanda
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NAME / NOM: Dr. MINDUA K. M. Antoine
SIGNATURE: .... DATE: 25.02.1999

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("the Tribunal"),

SITTING AS Trial Chamber II, composed of Judge William H. Sekule, Presiding, Judge Yakov A. Ostrovsky and Judge Tafazzal H. Khan (the "Trial Chamber");

CONSIDERING the indictment filed on 22 October 1997 by the Prosecutor against Jean-Bosco Barayagwiza pursuant to Article 17 of the Statute of the Tribunal ("the Statute") and rule 47 of the Rules of Procedure and Evidence of the Tribunal ("the Rules"), which was confirmed by Judge Lennart Aspegren on 23 October 1997;

CONSIDERING THAT the initial appearance of Jean-Bosco Barayagwiza took place on 23 February 1998;

BEING NOW SEIZED OF a motion filed by the Defence Counsel on 19 February 1998, entitled Extremely Urgent Motion by the Defence for Orders for Review and/or Nullify the Arrest and Provisional Detention of the Suspect (hereinafter the "Motion");

HAVING HEARD the arguments of the parties on 11 September 1998.

PLEADINGS BY PARTIES

Defence Submissions

In the Motion, the Defence submit;

1. That the accused rights, liberties and freedoms under article 20 of the Statute have been violated because: the provisional detention was a miscarriage of justice under rule 5 (Non-conplience with Rules); the Prosecutor's request for provisional detention was unprocedural and unwarranted; rule 40*(bis)* (Transfer and Provisional Detention of Suspects) was not satisfied regarding the provisional detention; and there was no justification for the arrest or provisional detention.

2. Rule 40 *(bis)* breaches the provisions of articles 17, 18 and 19 of the Statute.

3. The provisional charges were illegal.

The Defence requests the Trial Chamber to declare;

1. The arrest and provisional detention unlawful, null and void.
2. The entire proceedings are a nullity.
3. The accused be set free.
4. In the alternative, that the accused be released on bail pending further hearing.

Prosecutor's Response

1. Even if there was a defect in the procedure, then that defect is now cured and the accused is

before this Tribunal on a proper legal basis.

2. There is nothing in the Statute or Rules that allows the relief sought.

3. The Defence submission is based upon a faulty procedural analysis.

4. Rule 40 *(bis)* is valid legislation.

5. The Defence has failed to show exceptional circumstances to justify release under rule 65.

Chronology of Events:

Because much of the dispute between the parties is based on the chronology of events since the arrest of the accused, and the authority under which the accused was subject at particular stages of his detention, the Trial Chamber provides an outline below.

In relation to the events the Defence contend:

On 15 April 1996, the accused was detained in Cameroon *at the behest of the Prosecutor*.
On 15 October 1996, the Prosecutor withdrew her case against accused.
On 23 January 1997, other suspects detained with accused were transferred (according to the Defence, this shows discrimination by the Prosecutor).
On 21 February 1997, the accused is released by Cameroonian court. The accused is re-arrested at the behest of the Prosecutor who referred to rule 40 (provisional detention).
On 6 May 1997, the accused first received reasons for detention from Prosecution.
On 22 October 1997, an indictment is submitted to ICTR Judge.
On 23 October 1997, the indictment is confirmed.

Therefore, the defence contends the accused was detained at the behest of the Prosecutor for 20 months prior to transfer with no formal indictment.

In relation to the events the Prosecution contend:

On 15 April 1996, the accused is detained *at the behest of the Rwandan and Belgian governments.*
On 21 February 1997, the accused released by Cameroonian court after rejecting request for extradition by the Rwandan government. The decision did not mention the ICTR as a party.
On March 3 1997, the Prosecutor, pursuant to rule 40 *(bis)*, requests the transfer of accused to Arusha.
On 22 October 1997, the indictment is submitted to ICTR Judge.
On 23 October 1997, the indictment is confirmed.
On 19 November 1997, the accused is transferred to Arusha.
On 23 February 1998, the accused has his initial appearance.

Although the Cameroonian authorities were very slow to respond to the transfer request however, this was out of the Prosecutor's control.

DELIBERATIONS

In their entirety, the Defence and Prosecution submissions raise a number of questions relating to the interpretation of the Statute and Rules and the Trial Chamber's power to grant certain relief. However, if the Trial Chamber finds that the Defence has failed to prove violation of the accused rights, then the Trial Chamber need not address the jurisprudential questions which flow from such a violation.

Chronology of Events:
The Trial Chamber considers that there are two fundamental stages during which the Defence must show a violation of the accused rights under the jurisdiction of the Tribunal:

1. *The period between the arrest on 15 April 1996 and the transfer request on 3 March 1997.*

The Defence claims that the accused was initially arrested at the request of the Prosecution. The Prosecution claims that the accused was initially detained at the behest of the Rwandan and Belgian governments. The Defence has provided no evidence to support its version. Conversely, a letter dated 15 October 1996 from the Prosecutor to the accused indicates that the Prosecution version is correct in stating that "Cameroonian authorities arrested 12 individuals from Rwanda on the basis of international warrants of arrest issued by the Public Prosecutor's Offices in Kigali and Belgium." (Defence exhibit at p. 8). The Defence did not challenge the accuracy of this document in its written motion and failed to substantiate its objection to this factual assertion during the hearing. The Defence objected during the Prosecution submission which relied upon this document. However, despite being invited to address the matter in reply, it failed to do so (Transcript at p. 60). In the absence of any other evidence, the Trial Chamber accepts that the accused was arrested at the behest of the Rwandan and Belgian governments.

The Defence has provided no evidence to support its contention that the accused *remained* in detention due to a request by the Prosecutor while he was in Cameroon prior to 21 February 1997. Although it is clear that for a certain period the Prosecutor was interested in investigating the accused. On the 17 April 1996 she requested that provisional measures under rule 40 be taken in relation the accused along with thirteen others, but, on the 16 May 1996 the Prosecutor informed Cameroon that she only wished to pursue the case against four of the detainees. The accused was not one of the four. This period is not undue delay, particularly considering that, in any event, the accused was being held at the request of the Rwandan and Belgian governments. On 21 February 1997, the Prosecution made a request under rule 40 for the provisional detention of the accused. (Defence exhibit, letter dated 16 May 1997 from James Stewart of Prosecution to President Kama). For these reasons the Trial Chamber finds that the Defence failed to show that the accused was kept in custody because of the Prosecutor, on the basis of a rule 40 request or for any other reason, before 21 February 1997.

It is the view of the Trial Chamber that detention under rule 40 for a period between 21 February 1997 and 3 March 1997, when the Tribunal made a rule 40 *(bis)* request, does not violate the rights of the accused under rule 40.

2. *The period between 3 March 1997 and the actual transfer of the accused on 19 November 1997.*

The Tribunal issued a request under rule 40 *(bis)* on 3 March 1997 requesting the Cameroonian authorities to proceed with the transfer of the accused to the Tribunal's Detention Facilities. (Decision Confirming the Indictment dated 23 October 1997, Defence exhibit at p. 46). The maximum time periods for provisional detention provided for under rule 40 *(bis)* take effect from *the day after the accused is transferred.* At the end of the maximum time periods provided for under rule 40 *(bis)*, if the indictment has not been confirmed and an arrest warrant signed, the suspect shall be released or delivered to the authorities of the State to which the request was initially made. In the instant case the indictment of the accused was confirmed before the accused was even transferred. Accordingly, in relation to the time periods for provisional detention, there has been no violation of the defendant's rights under rule 40 *(bis)*.

What the Prosecution did, if anything, after the rule 40 *(bis)* request was made in order to ensure that the accused was transferred is unclear. No credible evidence has been adduced. In any event, once the transfer request has been made the matter rests with the State authority to comply. In the instant case the Cameroonian government did not transfer the accused until November 1997. This cannot amount to a breach of the Rules by the Prosecution. Furthermore, as accepted by the Defence, there are no Rules which provide a remedy for a provisionally detained person before the host country has transferred him prior to the indictment and the warrant for arrest (Motion at p. 4).

It is regrettable that the Prosecution did not submit an indictment until 22 October 1997. However, the indictment has now been confirmed and the accused is legally before the Tribunal. In any event, under rule 40 *(bis)* the time in which the indictment must be submitted does not start to run until the day after the accused is transferred. Again, in the instant case the indictment of the accused was confirmed before the accused was even transferred.

For the above reasons, the Trial Chamber finds that the Defence has not shown that the Prosecution violated the rights of the accused due to the length of detention or delay in transferring the accused.

Other Legal Issues

1. *Was provisional detention justified?*

The Defence suggests that the provisional charges of conspiracy to commit genocide, direct and public incitement to commit genocide, and crimes against humanity, were totally different in form and nature from the confirmed indictment and, therefore, the provisional charges were unnecessary and illegal. This position is without merit. The Defence is wrong to claim that the provisional charges were *totally different in form and nature.* The fact that the indictment contained different information merely reflects the process of investigation and Prosecutorial discretion. Evidently, the Prosecution satisfied Honourable Judge Aspegren that there was a reliable and consistent body of material which tends to show that the suspect may have committed a crime over which the Tribunal has jurisdiction. Accordingly, the Defence has not shown that the provisional charges submitted by the Prosecution were merely aimed at keeping the suspect in custody indefinitely.

2. *Did the Prosecution discriminate against the accused?*

The Defence assert that the accused was intentionally discriminated against because the Prosecution transferred some accused from Cameroon but left others there. This position is without merit. The Prosecutor may exercise her valid discretion regarding persons against whom she wishes to proceed. The Defence has adduced no evidence which illustrates an act of the Prosecution which could be considered outside the realms of Prosecutorial discretion.

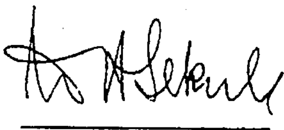
3. *Is rule 40 (bis) valid?*

Rule 40 *(bis)* is valid; it does not contradict articles 17-20 but compliments them. Nowhere in articles 17-20 is it mandated that an indictment must be confirmed before a suspect can be provisionally detained. Rule 40 *(bis)* was properly created during a plenary session as provided under article 14 of the Statute and rule 6 of the Rules. Further, although rule 40 *(bis)* is a complex and flexible rule, the Defence did not pinpoint which sections of rule 40 *(bis)* it considers to be *ultra vires*, or which parts of articles 17-20 are violated by rule 40 *(bis)*.

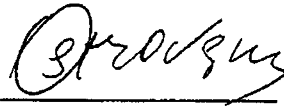
FOR ALL THE ABOVE REASONS, THIS TRIAL CHAMBER

DISMISSES the Defence motion.

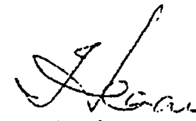
Arusha, _____ November 1998



William H. Sekule
Presiding Judge



Yakov A. Ostrovsky
Judge



Tafazzal H. Khan
Judge

Seal of the Tribunal

ANNEX 6

Prosecutor v. Ntuyahaga, Decision on the Prosecutor's Motion to Withdraw the Indictment, Case No. ICTR-98-40-T, Trial Chamber, 18 March 1999, p. 6.

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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

TRIAL CHAMBER I

OR:FR

Before: Judge Navanethem Pillay, Presiding
Judge Lennart Aspegren
Judge Laïty Kama

Registry: Ms Prisca Nyambe

Decision of: 18 March 1999

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THE PROSECUTOR
versus
BERNARD NTUYAHAGA

Case No. ICTR-98-40-T

DECISION ON THE PROSECUTOR'S MOTION TO WITHDRAW THE INDICTMENT

Office of the Prosecutor:

Mr. Mohamed Othman
Mr. James Stewart

Counsel for the Defence:

Mr. Georges Komlavi Amegadjie

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: Dr. Mindua K. M. Antoine
SIGNATURE: .... DATE: 18.03.1999

Amicus Curiae:

The Government of the Kingdom of Belgium, represented by Mr. Éric David

Case No. ICTR 98-40-T

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("THE TRIBUNAL"),

SITTING as Trial Chamber I of the Tribunal, composed of Judge Navanethem Pillay, presiding, Judge Lennart Aspegren and Judge Laïty Kama;

CONSIDERING a motion dated 23 February 1999, whereby the Prosecutor, acting pursuant to Rule 51 of the Rules of Procedure and Evidence ("the Rules"), sought leave to withdraw the indictment against the accused Bernard Ntuyahaga ("the accused");

CONSIDERING the addendum to said motion, filed on 10 March 1999, whereby the Prosecutor additionally requested that the Chamber order the release of the accused Bernard Ntuyahaga from the Tribunal's custody to the authorities of the United Republic of Tanzania;

CONSIDERING the indictment dated 26 September 1998 submitted by the Prosecutor in accordance with Rule 47 of the Rules and considering the Decision on the review of said indictment rendered by Judge Yakov A. Ostrovsky on 29 September 1998 and the subsequent corrigenda filed thereon on 30 September 1998 and 2 October 1998;

CONSIDERING that by the aforementioned Decision, Judge Ostrovsky dismissed counts 1, 2 and 4 of the indictment, ordered the Prosecutor to join counts 3 and 5 and confirmed count 3;

CONSIDERING that the indictment as confirmed by Judge Ostrovsky thus comprises a single count of crime against humanity (murder), as stipulated in Article 3(a) of the Statute of the Tribunal ("the Statute"), and that it alleges that the accused is criminally responsible for the murder of Mrs. Agathe Uwilingiyimana, then Prime Minister of Rwanda, and ten Belgian soldiers United Nations Assistance Mission for Rwanda ("UNAMIR"), which murders were allegedly committed as part of a widespread or systematic attack against a civilian population on national or political grounds;

CONSIDERING that the accused pleaded not guilty to the said count during his initial appearance before this Chamber on 13 November 1998;

CONSIDERING the Defence Brief in reply and counter claims dated 12 march 1999, whereby it is argued, *inter alia*, that the motion of the Prosecutor for withdrawal of the indictment is inadmissible, that the motion is not well founded, and that the Chamber should dismiss it; further the Defence claimed that a finding should be made on the innocence of the accused, and that he should therefore be acquitted and released;

CONSIDERING that the Government of the Kingdom of Belgium requested leave of the Chamber to appear as an Amicus Curiae ("the Belgian Government") so as to make submissions on the motion of the Prosecutor to withdraw the indictment, and that by Decision of 8 March 1999, taken pursuant to Rule 74 of the Rules, the Government of the Kingdom of Belgium was granted leave to appear;

HAVING HEARD the representatives of the Prosecutor, the Defence and the Belgian Government during the public hearing held on 16 March 1999;

WHEREAS, at the commencement of the said hearing, the representative of the Prosecutor presented *in limine litis* an oral motion, on the basis of Rule 73 of the Rules, requesting the Tribunal to dismiss the Advisory brief on the motion of the Prosecutor for withdrawal of the indictment, filed by the Registrar for the attention of the Judges on 15 March 1999, on the grounds that the Registrar is not party to the proceedings and therefore cannot legally present such a brief;

WHEREAS during the said hearing the Chamber ruled that the Registrar had no *locus standi* in the present matter and the Judges therefore had not considered the Registrar's Advisory brief;

AFTER HAVING DELIBERATED,

WHEREAS the Chamber considers it appropriate to examine the question of the withdrawal of the indictment, the counter claims of the Defence, and the eventual implications of the withdrawal of an indictment;

1. On the withdrawal of the indictment:

WHEREAS in support of her motion for leave to withdraw the said indictment, the Prosecutor argued in the main as follows:

(i) withdrawal of the indictment would promote the exercise of concurrent jurisdiction as provided for under Article 8(1) of the Statute by allowing national courts to prosecute the accused;

(ii) the judicial proceedings instituted by the Prosecutor should be within the framework of a global policy aimed at shedding light on the events that occurred in Rwanda in 1994 and highlighting the complete landscape of the criminal acts perpetrated at the time, and that such objective would not be achieved through the prosecution of a single count indictment the factual elements of which relate solely to the murders of the former Prime Minister and ten UNAMIR Belgian soldiers;

(iii) the Decision on review of the indictment has narrowed the scope of prosecution and deprived the Prosecutor of the opportunity to execute her strategy of prosecuting the accused for the totality of his criminal involvement;

(iv) The Kingdom of Belgium has instituted proceedings against the persons implicated in the murder of the ten UNAMIR Belgian soldiers;

Concerning, firstly, the submission of the Prosecutor that withdrawal of the indictment would promote the exercise of concurrent jurisdiction as provided for under Article 8(1) of the Statute by allowing national courts to prosecute the accused;

WHEREAS the Chamber notes that this submission of the Prosecutor is supported by the Belgian Government, who consider that the activities of the Tribunal and national jurisdictions are complementary and that the need to criminally punish for the atrocities perpetrated in Rwanda in 1994 implies that the Tribunal cooperates with States in proceedings against those responsible for the atrocities;

WHEREAS, according to the Belgian Government, the cooperation provided for by the Security Council of the United Nations in the Statute, whereby all States must fully cooperate with the Tribunal, implies necessarily a reciprocal cooperation of the Tribunal with States, although this is not expressly provided for in the Statute or the Rules, the Tribunal can co-operate with States and thus facilitate the due process of Justice;

WHEREAS the Chamber, although it accepts the submissions of the Prosecutor and the Belgian Government inasmuch as the Tribunal does not have exclusive jurisdiction over crimes included in its mandate and that its criminal proceedings are complementary to those of national jurisdictions, it wishes to underscore that, in its opinion, and as submitted by the Defence, the principle of concurrent jurisdiction as provided in paragraph (1) of Article 8 of the Statute, which recognizes the complementary nature of the judicial work performed by the Tribunal and national courts, must be read together with the provisions of paragraph 2 of said Article 8, which confers upon the Tribunal primacy over the national courts of all States;

WHEREAS the primacy of the Tribunal is also recognized under Article 9 of the Statute which, in accordance with the *non bis in idem* principle, provides that no person shall be tried by a national court for acts for which he has already been tried by the Tribunal, even if in the circumstances provided for under paragraph 2 of Article 9, a person who has been tried before a national court may be subsequently tried by the Tribunal;

WHEREAS, consequently, once proceedings are instituted before the Tribunal against a person, the Tribunal has primacy over any other national court;

WHEREAS, in support of its submissions, the Belgian Government quoted the provisions of Rule 11*bis* of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (the "ICTY");

WHEREAS, on this matter, the Chamber notes, on the one hand, that such provisions do not exist in the Tribunal's Rules;

WHEREAS the Chamber notes, on the other hand, that the scope of cooperation that the ICTY can give to national autorities, pursuant to said Rule 11*bis* of the ICTY Rules, is limited twofold, firstly by the fact that the ICTY only cooperates with the State in which the accused was arrested, and secondly, by the fact that sub-rule (C) of said Rule provides that:

> "At any time after the making of an order under this Rule and before the accused is convicted or acquitted by a national court, the Trial Chamber may, upon the Prosecutor's application and after affording an opportunity to the authorities of the State concerned to be heard, rescind the order and issue a formal request for deferral under Rule 10";

WHEREAS, in any case, and without making a finding on the submission of the Belgian Government that the Tribunal's Rules be modified, the Chamber holds that, even if the Rules of the Tribunal contained provisions akin to those of Rule 11*bis* of the Rules of Procedure and Evidence of the ICTY, these provisions would not be applicable in the present matter, as the Tribunal is not aware that the authorities of the United Republic of Tanzania, which arrested Bernard Ntuyahaga, would be willing to continue the proceedings within their own jurisdiction for crimes alleged in the indictment;

WHEREAS, finally, the Chamber is of the opinion that the primacy recognized by the Statute is clear inasmuch as the Tribunal may request any national jurisdiction to defer investigations or ongoing proceedings, whereas the reverse, namely the deferral of investgations and proceedings by the Tribunal to any national jurisdiction, is not provided for;

WHEREAS, in the present matter, an indictment having been confirmed and the initial appearance of the accused having taken place, the Chamber concludes that the question of concurrent jurisdiction cannot be invoked by the Prosecutor in support of a request for withdrawal of an indictment;

WHEREAS, that said, the Tribunal wishes to emphasize, in line with the General Assembly and the Security Council of the United Nations, that it encourages all States, in application of the principle of universal jurisdiction, to prosecute and judge those responsible for serious crimes such as genocide, crimes against humanity and other grave violations of international humanitarian law;

WHEREAS thereupon, the Tribunal wishes particularly to thank the Kingdom of Belgium for the interest it has shown in the activities of the Tribunal and the support it has always given;

WHEREAS the Tribunal understands and empathises with the citizens of the Kingdom of Belgium, in particular the families of the ten UNAMIR Belgian soldiers, to see justice done;

As to the argument whereby the withdrawal of the indictment would be justified because the objective of the Prosecutor is to shed light on the events that occurred in Rwanda in 1994 and highlighting the complete landscape of the criminal acts perpetrated at the time, and that such objective would not be achieved through the prosecution of a single count indictment the factual elements of which relate solely to the murders of the former Prime Minister and ten UNAMIR Belgian soldiers;

WHEREAS the Chamber recalls that, although under Articles 17 and 18 of the Statute it is incumbent upon the Prosecutor to prepare an indictment, the reviewing Judge has unfettered discretion, and decides, on the basis of the evidence, whether to confirm or dismiss each count;

WHEREAS, furthermore, under Rule 47 (I) of the Rules, the dismissal of a count shall not preclude the Prosecutor from subsequently bringing an amended indictment based on the acts underlying the dismissed count if supported by additional evidence;

WHEREAS, in any case, the Chamber stresses that it is the sole duty of the Prosecutor to devise the prosecution strategy and therefore to decide, even before instituting any proceedings, whether such action serves the interests of her mandate as Prosecutor;

WHEREAS, moreover, the Chamber is of the opinion that it is not within its purview to consider the question as to whether or not the prosecution of a person on a single count relating to the murders of the former Prime Minister and ten Belgian soldiers enables the Prosecutor to "shed light on the events that occurred in Rwanda in 1994";

WHEREAS, before the Chamber, all accused persons are presumed innocent and are equal before the law, and no distinction or ranking may be made among them on the basis of the number of counts with which they are charged;

In fine, as to the motion of the Prosecutor

WHEREAS the Chamber recalls that the Prosecutor has sole responsibility for prosecutions and thus the decision on whether or not to proceed in any given matter rests with the Prosecutor, and that she has the right, at any stage of the proceedings, to apply for leave to withdraw an indictment in accordance with the provisions of Rule 51 (A) of the Rules, which reads as follows:

> " The Prosecutor may withdraw an indictment, without prior leave, at any time before its confirmation, but thereafter, until the initial appearance of the accused before a Trial Chamber pursuant to Rule 62, only with leave of the Judge who confirmed it but, in exceptional circumstances, by leave of a Judge assigned by the President. At or after such initial appearance an indictment may only be withdrawn by leave granted by that Trial Chamber pursuant to Rule 73";

WHEREAS the Chamber, contrary to the submissions of the Defence, finds that the Prosecutor's motion is well founded;

2. On the requests of the Defence

WHEREAS the Defence Councel submitted in the Brief in reply, dated 12 March 1999, that the Prosecutor has not respected her obligation to disclose evidentiary materials pursuant to Rule 66 of the Rules and that, according to the Defence, it is therefore obvious that the Prosecutor does not to this day have any evidence to sustain her allegations against the accused;

WHEREAS consequently, according to the Defence Counsel, it is incumbent on the Chamber to find the motion of the Prosecutor inadmissible and not well founded, and for the accused to be declared innocent, to be acquitted and released;

WHEREAS during the hearing, the Prosecutor, in answer to the Defence, replied that to present a motion to be granted leave to withdraw the indictment does not in any way signify the absence

of charges against the accused, which would lead to his acquittal;

WHEREAS, furthermore, if the need arose, the Prosecutor is ready to continue the proceedings;

WHEREAS, in any case, the Chamber reminds the Defence that, in accordance with Rule 98*bis* of the Rules, an acquittal can only be considered at the stage where the Prosecutor has presented all her evidence, and the Chamber finds that the evidence is insufficient to sustain a conviction on any one count;

The Chamber therefore finds the Defence request is premature and dismisses it;

3. As to the implications of the withdrawal of an indictment:

WHEREAS the Chamber holds that the withdrawal of an indictment is tantamount to a termination of proceedings and, consequently, entails the immediate and unconditional release of the accused;

WHEREAS thereupon, pursuant to the general principles of law, a person who is no longer under indictment may not be deprived of his or her freedom and must therefore be released immediately if he or she is not held for any other cause;

WHEREAS, however, the Prosecutor has requested the Chamber, were it to authorise the withdrawal of the indictment, to order the release of the accused Bernard Ntuyahaga from the Tribunal's custody to the authorities of the United Republic of Tanzania;

WHEREAS the said request is supported by the Belgian Government;

WHEREAS the Prosecutor argued that the Chamber has the competence to make such an order on the basis of the provisions of Rules 40*bis* and 65 of the Rules;

WHEREAS, as submitted by the Defence, the Chamber is of the opinion that the Prosecutor errs in law when she argues that the Chamber can avail itself in this matter of the provisions of Rule 40*bis* and 65 of the Rules;

WHEREAS Rule 65 of the Rules deals with provisional release, being applicable only when a person is still an accused before the Tribunal and who, consequently, will be called to appear before it, a procedure which is fundamentally different from the release of an individual who is no longer under indictment;

WHEREAS the provisions of Rule 40*bis* (H) of the Rules are not applicable in the present matter as they pertain to the release of suspects provisionally detained by the Tribunal;

WHEREAS, in any case, the Chamber is of the opinion that, pursuant to the provisions of the Statute and the Rules, it does not have jurisdiction to order the release of a person who is no longer under indictment into the custody of any given State, including the Host State, the United Republic of Tanzania;

FOR THESE REASONS,

THE TRIBUNAL

GRANTS the Prosecutor leave to withdraw the indictment against Bernard Ntuyahaga;

ORDERS in the absence of any other charge against him, the immediate release of Bernard Ntuyahaga from the Tribunal's Detention Facilities;

INSTRUCTS the Registrar to take all the necessary measures to execute the present Decision, if need be with the cooperation of the authorities of the Host State, the United Republic of Tanzania.

Arusha, 18 March 1999.

Navanethem Pillay
Presiding Judge

Lennart Aspegren
Judge

Laity Kama
Judge

(Seal of the Tribunal)

ANNEX 7

Prosecutor v. Delalic et al. (Celebici case), Judgement, Case No. IT-96-21-A, Appeals Chamber, 20 February 2001, paras. 602-604.

IN THE APPEALS CHAMBER

2903

Before:
Judge David Hunt, Presiding
Judge Fouad Riad
Judge Rafael Nieto-Navia
Judge Mohamed Bennouna
Judge Fausto Pocar

Registrar:
Mr Hans Holthuis

Judgement of: 20 February 2001

PROSECUTOR

V.

Zejnil DELALIC,
Zdravko MUCIC (aka "PAVO"),
Hazim DELIC and Esad LANDŽO (aka "ZENGA")

("*CELEBICI* Case")

JUDGEMENT

Counsel for the Accused:

Mr John Ackerman and Ms Edina Rešidovic for Zejnil Delalic
Mr Tomislav Kuzmanovic and Mr Howard Morrison for Zdravko Mucic
Mr Salih Karabdic and Mr Tom Moran for Hazim Delic
Ms Cynthia Sinatra and Mr Peter Murphy for Esad Landžo

The Office of the Prosecutor:

Mr Upawansa Yapa
Mr William Fenrick
Mr Christopher Staker
Mr Norman Farrell
Ms Sonja Boelaert-Suominen
Mr Roeland Bos

The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former

X. SELECTIVE PROSECUTION

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596. Landzo alleges that he was the subject of a selective prosecution policy conducted by the Prosecution.[1005] He defines a selective prosecution as one "in which the criteria for selecting persons for prosecution are based, not on considerations of apparent criminal responsibility alone, but on extraneous policy reasons, such as ethnicity, gender, or administrative convenience."[1006] Specifically, he alleges that he, a young Muslim camp guard, was selected for prosecution, while indictments "against all other Defendants without military rank", who were all " non-Muslims of Serbian ethnicity", were withdrawn by the Prosecution on the ground of changed prosecutorial strategies.[1007]

597. The factual background to this contention is that the Prosecutor decided in 1998 to seek the withdrawal of the indictments against fourteen accused who at that stage had neither been arrested nor surrendered to the Tribunal. This application was granted by Judges of the Tribunal in early May 1998. At that stage, the trial in the present proceedings had been underway for a period of over twelve months. The Prosecutor's decision and the grant of leave to withdraw the indictment was announced in a Press Release, which explained the motivation for the decision in the following terms:

> Over recent months there has been a steady increase in the number of accused who have either been arrested or who have surrendered voluntarily to the jurisdiction of the Tribunal. [...].
>
> The arrest and surrender process has been unavoidably piecemeal and sporadic and it appears that this is likely to continue. One result of this situation is that accused, who have been jointly indicted, must be tried separately, thereby committing the Tribunal to a much larger than anticipated number of trials.
>
> In light of that situation, I have re-evaluated all outstanding indictments *vis -à-vis* the overall investigative and prosecutorial strategies of my Office. Consistent with those strategies, which involve maintaining an investigative focus on persons holding higher levels of responsibility, or on those who have been personally responsible for the [*sic*] exceptionally brutal or otherwise extremely serious offences, I decided that it was appropriate to withdraw the charges against a number of accused in what have become known as the Omarska and Keraterm indictments, which were confirmed in February 1995 and July 1995 respectively.[1008]

Although counsel for Landzo submitted that the Prosecution sought and obtained the withdrawal of indictments against *sixteen* accused, "some of whom were already in custody" of the Tribunal at the relevant time,[1009] this was not the case. Although three people[1010] were released from the custody of the Tribunal on 19 December 1997 pursuant to a decision granting the Prosecutor's request to withdraw their indictment,[1011] the withdrawal of those indictments was based on the quite different consideration of insufficiency of evidence. Landzo does not appear to have intended to refer to the withdrawal of any indictments other than those referred to in the Press Release , and the submissions proceeded upon that basis.

598. Landzo accordingly submitted, first at trial and now on appeal, that, because the indictment against him was not also withdrawn, he was singled out for prosecution for an impermissible motive and that this selective prosecution contravened his right to a fair trial as guaranteed by

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Article 21 of the Statute. Citing a decision of the United States of America's Supreme Court in *Yick Wo v Hopkins*,[1012] and Article 21(3) of the Rome Statute of the International Criminal Court, Landzo submits that the guarantee of a fair trial under Article 21(1) of the Statute incorporates the principle of equality and that prohibition of selective prosecution is a general principle of customary international criminal law.[1013]

599. The Trial Chamber, in its sentencing considerations, referred to Landzo's argument that, because he was an ordinary soldier rather than a person of authority, he should not be subject to the Tribunal's jurisdiction, and then stated:

> [The Trial Chamber] does, however, note that the statement issued in May this year (1998) by the Tribunal Prosecutor concerning the withdrawal of charges against several indicted persons, quoted by the Defence, indicates that an exception to the new policy of maintaining the investigation and indictment only of persons in positions of some military or political authority, is made for those responsible for exceptionally brutal or otherwise extremely serious offences. From the facts established and the findings of guilt made in the present case, the conduct of Esad Landzo would appear to fall within this exception.[1014]

600. The Prosecution argues that the Prosecutor has a broad discretion in deciding which cases should be investigated and which persons should be indicted.[1015] In exercising this discretion, the Prosecutor may have regard to a wide range of criteria. It is impossible, it is said, to prosecute all persons placed in the same position and, because of this, the jurisdiction of the International Tribunal is made concurrent with the jurisdiction of national courts by Article 9 of the Statute.[1016]

601. Article 16 of the Statute entrusts the responsibility for the conduct of investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991 to the Prosecutor. Once a decision has been made to prosecute, subject to the requirement that the Prosecutor be satisfied that a prima facie case exists, Article 18 and 19 of the Statute require that an indictment be prepared and transmitted to a Judge of a Trial Chamber for review and confirmation if satisfied that a prima facie case has been established by the Prosecutor. Once an indictment is confirmed, the Prosecutor can withdraw it prior to the initial appearance of the accused only with the leave of the Judge who confirmed it, and after the initial appearance only with the leave of the Trial Chamber.[1017]

602. In the present context, indeed in many criminal justice systems, the entity responsible for prosecutions has finite financial and human resources and cannot realistically be expected to prosecute every offender which may fall within the strict terms of its jurisdiction. It must of necessity make decisions as to the nature of the crimes and the offenders to be prosecuted. It is beyond question that the Prosecutor has a broad discretion in relation to the initiation of investigations and in the preparation of indictments. This is acknowledged in Article 18(1) of the Statute, which provides:

> The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and *decide whether there is sufficient basis to proceed.*

It is also clear that a discretion of this nature is not unlimited. A number of limitations on the discretion entrusted to the Prosecutor are evident in the Tribunal's Statute and Rules of Procedure and Evidence.

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603. The Prosecutor is required by Article 16(2) of the Statute to "act independently as a separate organ of the International Tribunal", and is prevented from seeking or receiving instructions from any government or any other source. Prosecutorial discretion must therefore be exercised entirely independently, within the limitations imposed by the Tribunal's Statute and Rules. Rule 37(A) provides that the Prosecutor "shall perform all the functions provided by the Statute in accordance with the Rules and such Regulations, consistent with the Statute and the Rules, as may be framed by the Prosecutor."

604. The discretion of the Prosecutor at all times is circumscribed in a more general way by the nature of her position as an official vested with specific duties imposed by the Statute of the Tribunal. The Prosecutor is committed to discharge those duties with full respect of the law. In this regard, the Secretary-General's Report stressed that the Tribunal, which encompasses all of its organs, including the Office of the Prosecutor, must abide by the recognised principles of human rights.[1018]

605. One such principle is explicitly referred to in Article 21(1) of the Statute , which provides:

> All persons shall be equal before the International Tribunal.

This provision reflects the corresponding guarantee of equality before the law found in many international instruments, including the 1948 Universal Declaration of Human Rights,[1019] the 1966 International Covenant on Civil and Political Rights,[1020] the Additional Protocol I to the Geneva Conventions,[1021] and the Rome Statute of the International Criminal Court.[1022] All these instruments provide for a right to equality before the law, which is central to the principle of the due process of law. The provisions reflect a firmly established principle of international law of equality before the law, which encompasses the requirement that there should be no discrimination in the enforcement or application of the law. Thus Article 21 and the principle it embodies prohibits discrimination in the application of the law based on impermissible motives such as, *inter alia* , race, colour, religion, opinion, national or ethnic origin. The Prosecutor , in exercising her discretion under the Statute in the investigation and indictment of accused before the Tribunal, is subject to the principle of equality before the law and to this requirement of non-discrimination.

606. This reflects principles which apply to prosecutorial discretion in certain national systems. In the United Kingdom, the limits on prosecutorial discretion arise from the more general principle, applying to the exercise of administrative discretion generally, that the discretion is to be exercised in good faith for the purpose for which it was conferred and not for some ulterior, extraneous or improper purpose.[1023] In the United States , where the guarantee of equal protection under the law is a constitutional one, the court may intervene where the accused demonstrates that the administration of a criminal law is "directed so exclusively against a particular class of persons [...] with a mind so unequal and oppressive" that the prosecutorial system amounts to "a practical denial" of the equal protection of the law.[1024]

607. The burden of the proof rests on Landzo, as an appellant alleging that the Prosecutor has improperly exercised prosecutorial discretion, to demonstrate that the discretion was improperly

exercised in relation to him. Landzo must therefore demonstrate that the decision to prosecute him or to continue his prosecution was based on impermissible motives, such as race or religion, and that the Prosecution failed to prosecute similarly situated defendants.

608. The Prosecution submits that, in order to demonstrate a selective prosecution , Landzo must show that he had been singled out for an impermissible motive, so that the mere existence of similar unprosecuted acts is not enough to meet the required threshold.[1025]

609. Landzo submits that a test drawn from United States case-law, and in particular the case *United States of America v Armstrong,*[1026] provides the required threshold for selective prosecution claims. Pursuant to this test, the complainant must prove first that he was singled out for prosecution for an improper motive, and secondly, that the Prosecutor elected not to prosecute other similarly situated defendants. There is therefore no significant difference between the applicable standards identified by Landzo and by the Prosecution.

610. As observed by the Prosecution, the test relied on by Landzo in *United States of America v Armstrong,* puts a heavy burden on an appellant.[1027] To satisfy this test, Landzo must demonstrate clear evidence of the intent of the Prosecutor to discriminate on improper motives, and that other similarly situated persons were not prosecuted. Other jurisdictions which recognise an ability for judicial review of a prosecutorial discretion also indicate that the threshhold is a very high one.[1028]

611. It is unnecessary to select between such domestic standards, as it is not appropriate for the Appeals Chamber simply to rely on the jurisprudence of any one jurisdiction in determining the applicable legal principles. The provisions of the Statute referred to above and the relevant principles of international law provide adequate guidance in the present case. The breadth of the discretion of the Prosecutor, and the fact of her statutory independence, imply a presumption that the prosecutorial functions under the Statute are exercised regularly. This presumption may be rebutted by an appellant who can bring evidence to establish that the discretion has in fact not been exercised in accordance with the Statute; here, for example, in contravention of the principle of equality before the law in Article 21. This would require evidence from which a clear inference can be drawn that the Prosecutor was motivated in that case by a factor inconsistent with that principle. Because the principle is one of *equality* of persons before the law, it involves a comparison with the legal treatment of other persons who must be similarly situated for such a comparison to be a meaningful one. This essentially reflects the two-pronged test advocated by Landzo and by the Prosecution of (i) establishing an unlawful or improper (including discriminatory) motive for the prosecution and (ii) establishing that other similarly situated persons were not prosecuted.

612. Landzo argues that he was the only Bosnian Muslim accused without military rank or command responsibility held by the Tribunal, and he contends that he was singled out for prosecution "simply because he was the only person the Prosecutor's office could find to 'represent' the Bosnian Muslims". He was, it is said, prosecuted to give an appearance of "evenhandedness" to the Prosecutor's policy.[1029] Landzo alleges that the Prosecutor's decision to seek the withdrawal of indictments against the accused identified in the Press Release, without seeking the discontinuation of the proceedings against Landzo, was evidence of a discriminatory purpose. Landzo rejects the justification given by the Prosecutor in the Press Release of a revaluation of indictments according to changed strategies "in light of the decision to except the one Muslim defendant without military rank or command responsibility from the otherwise complete dismissal

of charges against Defendants having that status."[1030]

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613. The Prosecution argues that a change of prosecutorial tactics, in view of the need to reassign available resources of the Prosecution, cannot be considered as being significative of discriminatory intent. Furthermore, the evidence of discriminatory intent must be coupled with the evidence that the Prosecutor's policy had a discriminatory effect, so that other *similarly situated* individuals of other ethnic or religious backgrounds were not prosecuted. The Prosecution observes that those against whom charges were withdrawn had not yet been arrested or surrendered to the Tribunal, whereas Landzo was in custody and his case already mid-trial.[1031] The Prosecution adds that even if it was to be considered that the continuation of Landzo's trial resulted in him being singled out, it was in any event for the commission of exceptionally brutal or otherwise serious offences.[1032]

614. The crimes of which Landzo was convicted are described both in the Trial Judgement and in the present judgement at paragraphs 565-570. The Appeals Chamber considers that, in light of the unquestionably violent and extreme nature of these crimes, it is quite clear that the decision to continue the trial against Landzo was consistent with the stated policy of the Prosecutor to "focus on persons holding higher levels of responsibility, or on those who have been *personally responsible for the exceptionally brutal or otherwise extremely serious offences*."[1033] A decision, made in the context of a need to concentrate prosecutorial resources , to identify a person for prosecution on the basis that they are believed to have committed *exceptionally* brutal offences can in no way be described as a discriminatory or otherwise impermissible motive.

615. Given the failure of Landzo to adduce any evidence to establish that the Prosecution had a discriminatory or otherwise unlawful or improper motive in indicting or continuing to prosecute him, it is not strictly necessary to have reference to the additional question of whether there were other similarly situated persons who were not prosecuted or against whom prosecutions were discontinued. However, the facts in relation to this question support the conclusion already drawn that Landzo was not the subject of a discriminatory selective prosecution.

616. All of the fourteen accused against whom charges were withdrawn pursuant to the Prosecutor's change of policy, unlike Landzo, had not been arrested and were not in the custody of the Tribunal. None of the fourteen persons identified in the Press Release as the subject of the withdrawn indictments had been arrested or surrendered to the Tribunal so were not in the Tribunal's custody.

617. At the time at which the decision was taken to withdraw the indictments on the basis of changed prosecutorial strategy, the trial of Landzo and his co-accused had been underway for over twelve months. None of the persons in respect of whom the indictments were withdrawn were facing trial at the time. These practical considerations alone, which demonstrate an important difference in the situation of Landzo and the persons against whom indictments were withdrawn, also provide the rational justification for the Prosecutor's decisions at the time. The Appeals Chamber notes that the Prosecutor explicitly stated that accused against whom charges were withdrawn could still be tried at a later stage by the Tribunal or by national courts by virtue of the principle of concurrent jurisdiction.[1034] Had Landzo been released with the leave of the Trial Chamber, he would have been subject to trial upon the same or similar charges in Bosnia and Herzegovina.

618. Finally, even if in the hypothetical case that those against whom the indictments were withdrawn were identically situated to Landzo, the Appeals Chamber cannot accept that the appropriate

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remedy would be to reverse the convictions of Landzo for the serious offences with which he had been found guilty. Such a remedy would be an entirely disproportionate response to such a procedural breach. As noted by the Trial Chamber, it cannot be accepted that "unless all potential indictees who are similarly situated are brought to justice, there should be no justice done in relation to a person who has been indicted and brought to trial".[1035]

619. This ground of appeal is therefore dismissed.

ANNEX 8

Prosecutor v. Ntakirutimana, Judgement and Sentence, Cases No. ICTR-96-10 & ICTR-96-17-T, Trial Chamber, 21 February 2003, para. 871.

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Or. : Eng.

TRIAL CHAMBER I

Before Judges:
Erik Møse, Presiding
Navanethem Pillay
Andrésia Vaz

Registrar: Adama Dieng

Judgement of: 21 February 2003

THE PROSECUTOR
V.
ELIZAPHAN and GÉRARD NTAKIRUTIMANA

Cases No. ICTR-96-10 & ICTR-96-17-T

JUDGEMENT AND SENTENCE

Counsel for the Defence:
Ramsey Clark
David Jacobs

Counsel for the Prosecution:
Charles Adeogun-Phillips
Wallace Kapaya
Boi-Tia Stevens

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CHAPTER I: INTRODUCTION
1. The International Criminal Tribunal for Rwanda
2. Jurisdiction of the Tribunal
3. The Indictments

Legal Issues Raised By the Defence

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865. Section V of the Defence Closing Brief is entitled "The Defence Renews its Motion to Dismiss the Indictment".[1163] The reference is to a motion filed on 26 February 2001,[1164] which was heard and dismissed by oral decision on 2 April 2001.[1165] Section V of the Brief reproduces all but one of the seven subheadings of the earlier motion. It asks the Chamber to reconsider its decision in light of "new evidence and experiences". The Chamber considers Section V to be not a separate motion appended to the Brief but a set of arguments for acquittal forming part of the Brief. Neither Party specifically referred to Section V in its oral closing arguments.

866. Under the subheading "A trial under existing circumstances will violate the fundamental rights of the accused to present their defence and confront witnesses against them", the Defence maintains that it faced "enormous difficulty" finding witnesses and was unable to obtain a single witness from within Rwanda. The Chamber would have given this argument serious consideration had the Defence supplied any evidence that witnesses it had located were intimidated by the Rwandan authorities or otherwise improperly prevented from coming to Arusha to testify for the Defence. No such evidence was put before the Chamber. Instead, Section V states that:

> Pastor Ntakirutimana and Dr. Gerard insisted that no one be placed in jeopardy because they were contacted, or testified for the defence. Some alibi witnesses were in prison and the risk to them if called to testify was too great. Others were in Mugonero, but the danger of even approaching them directly was too great ... Others were in Kigali, Gisovu, Gishyita, Kibuye Ville, but again no direct approach could be safely made. The defence had a right to the testimony of such witnesses which was violated by the Government of Rwanda.[1166]

867. The above remarks assume that potential Defence witnesses who are so much as contacted by the Defence are immediately put in danger. If there is a factual basis to this assumption it is not stated in Section V. The Defence nevertheless concedes that it did make contact through intermediaries with two "very important" potential witnesses who "agreed to testify in Arusha if conditions for their security [in Rwanda] could be arranged".[1167] The Tribunal has a specialized witness-protection program for Defence witnesses. Section V provides no evidence that the Defence attempted to utilize this program to arrange for the on-going safety of these two potential witnesses.

868. Section V also complains about the unavailability of certain Defence witnesses from outside Rwanda, such as Dr Giordano who, according to the Defence, was unable to travel out of Madagascar because of the political crisis there. The Chamber observes that both Prosecution and Defence will not always succeed in securing the attendance of witnesses from all parts of the world. In the present case, the Defence was able to have admitted as exhibits three affidavits from witnesses who for various reasons were unable to travel to Arusha.[1168]

869. The final argument of the Defence under the first subheading is that it was "deprived of the right" to obtain evidence from within Rwanda to prove that the Rwandan Patriotic Front, the Rwandan victims' organisation IBUKA, the human rights organisation African Rights, and others, "framed a political case" against the two Accused.[1169] As the Defence does not claim that it even attempted to obtain the evidence it alludes to from the aforementioned sources, the Chamber finds no merit in the argument.

870. Under the second subheading the Defence alleges that the Tribunal has not indicted a single official of the Rwandan Patriotic Front, the Rwandan Patriotic Army, the present government of

Rwanda, or a person of Tutsi ethnicity. This supposedly shows the Tribunal's "discriminatory purpose" which is to "inflict victors justice" on the surviving leadership and military of the former government of Rwanda.[1170] The Chamber understands the argument of the Defence, which is very sketchy, to be a complaint about selective prosecution. This topic has been dealt with by the Appeals Chamber of the ICTY in its Judgement in the *Delalic* Case.[1171]

871. Article 15(2) of the Statute requires the Prosecutor to act independently and prevents her from seeking or receiving instructions from a government or any other source. According to the standard articulated by the ICTY Appeals Chamber in *Delalic*, where an appellant alleges selective prosecution he or she must demonstrate that the Prosecutor improperly exercised her prosecutorial discretion in relation to the appellant himself or herself.[1172] It follows that the Accused in the present case must show that the Prosecutor's decision to prosecute them or to continue their prosecution was based on impermissible motives, such as ethnicity or political affiliation, and that she failed to prosecute similarly situated suspects of different ethnicity or political affiliation. In view of the failure of the Defence to adduce any evidence to establish that the Prosecutor had a discriminatory or otherwise unlawful or improper motive in indicting or continuing to prosecute the Accused, the Chamber does not find it necessary to consider the additional question of whether there were other similarly situated persons who were not prosecuted or against whom prosecutions were discontinued.

872. The third subheading relates mainly to the administration of the Tribunal. Allegations having to do with bureaucratic impediments, late payment of fees, and mismanagement of protected witnesses should have been referred to the Registrar, if anyone. They do not demonstrate any resulting disadvantage or unfairness in the presentation of the Defence case. The Chamber will briefly address two other issues under this subheading.

873. The first concerns Mr. Ephrem Gasasira, who was Elizaphan Ntakirutimana's preferred candidate for co-counsel. Mr. Gasasira was not appointed to the post, because the Defence was unable to provide the Registrar with adequate proof that the candidate "had acted as visiting professor at a certain level and with sufficient regularity" over a minimum period of ten years at academic institutions, which according to the Chamber would have satisfied the relevant condition of appointment in Rule 45 of the Rules then in force.[1173] The Defence disparages the "acceptance of patently false information from the Justice Minister of Rwanda concerning the teaching record of Judge Gasasira at the National University and Judges' College [in Rwanda]", yet provides no evidence that the information was inaccurate, let alone falsified.[1174]

874. The Defence questions the quality of translations at the Tribunal. In particular, "[c]ourtroom translation was a constant concern and frequent problem in this case, assuming the best efforts and intentions of all. All too frequently, difficulty with translation caused uncertainty as to what a witness said, or meant."[1175] The Chamber observes that simultaneous interpretation from Kinyarwanda through French into English, though inherently difficult, generally proceeds smoothly. The Defence multilingual assistant, who switched between the channels, periodically intervened through his Counsel to propose corrections to the interpretation. In the interests of an accurate record the Chamber always gave consideration to those interventions. The Kinyarwanda channel is recorded and the soundtrack is available to the Parties. The concern of the Defence about occasions on which undetected errors "may have been made" which gave a wrong, or misleading meaning to the witnesses' actual words, does not establish that the record of the proceedings contains any significant error.[1176]

875. The last subheading of Section V of the Defence Closing Brief, entitled "The Charter of the United Nations Does Not Empower the Security Council to Establish any Criminal Court", revisits the

issue of the Tribunal's legality, already dealt with in the Chamber's decision of 2 April 2001.[177] The Chamber is not persuaded that the additional remarks of the Defence on the subject require it to reconsider its decision.

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876. In conclusion, the arguments given by the Defence in its "renewal of its motion to dismiss the indictment", viewed whether individually or collectively, fail to demonstrate any unfairness justifying the relief sought by the Defence, or any relief.