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SCSL-04-14-T
(18765-18796)

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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

Before:	Hon. Justice Bankole Thompson, Presiding Hon. Justice Pierre Boutet Hon. Justice Benjamin Mutanga Itoe
Registrar:	Mr. Lovemore G. Munlo SC
Date filed:	7 July 2006

THE PROSECUTOR **Against** **Samuel Hinga Norman**
Moinina Fofana
Allieu Kondewa

Case No. SCSL-04-14-T

PUBLIC

PROSECUTION RESPONSE TO FOFANA APPLICATION FOR LEAVE TO CALL ADDITIONAL WITNESS

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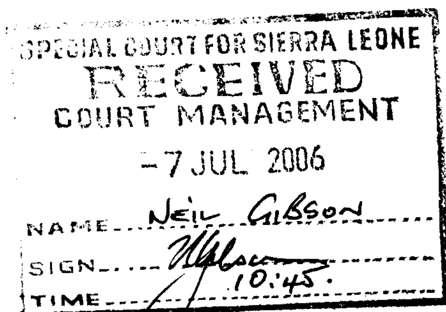

I. INTRODUCTION

1. The Prosecution files this Response to the motion entitled "Fofana Application for Leave to Call Additional Witnesses", filed on 27 June 2006 ("**Motion**").[1]

2. In the Motion, the defence for Moinina Fofana ("**Defence**") seeks leave to call an additional seven factual witnesses and one additional expert witness. For the reasons given below, the Prosecution submits that the Defence has not established good cause for the addition of these witnesses.

II. BACKGROUND

3. On 28 November 2005, the Trial Chamber issued a "Consequential Order for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case" ("**Order**")[2] which stipulated that the Defence would only be permitted to add witnesses or exhibits to its list upon a showing of good cause.

4. On 5 December 2005, the Defence filed its "Fofana Materials pursuant to Consequential Order for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case".[3] On 18 January 2006, the Trial Chamber issued a "Consequential Order to the Status Conference of 18 January 2006",[4] ordering the Defence to file expanded and comprehensive summaries.

5. On the 23 January 2006, the Defence filed "Fofana Materials Filed Pursuant to the Consequential Order to the Status Conference of 18 January 2006.[5] The submitted list included thirty five core witnesses and seven backup witnesses.

6. On the 5 May 2006, the Defence filed the "Fofana Notice of Reduction Witnesses"[6]. The list was reduced to 20 exclusive core witnesses and the following names were removed from its previously filed core list: Karmoh Lahai Bangura, Edmund Frank Davies, Neil

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[1] *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-640, "Fofana Application for Leave to File Additional Witness", 27 June 2006.
[2] SCSL-2004-14-T-489, 28 November 2005.
[3] SCSL-2004-14-T-500, December 5, 2005.
[4] SCSL-04-14-T-534, 18 January 2006.
[5] *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-540, "Fofana Materials Filed Pursuant to the Consequential Order to the Status Conference of 28 January 2006", 18 January 2006
[6] *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-591, "Fofana Notice of Reduction of Witnesses" 5 May 2006.

Ellis, Musa Junisa, Mustapha Koroma, Dixon Kosia, Victor Malu, Charles Moiwo, Mobino Rogers, Brima Sei, and Vandi Soka. The Defence also removed the following names from its previously filed backup witness list: Baimba Aruna, Olon Baker, Tejan Sankoh, Kinny Torma, Ibrahim Massaquoi, and John Langba. The reason being that the Defence "no longer intends to rely on the testimony of any so-called backup witnesses".[7]

III. ARGUMENT

A. The proposed additional seven factual witnesses

7. The factors that will be taken into account by the Trial Chamber in determining whether "good cause" has been established include:[8]
   (i) the materiality of the evidence sought to be added;
   (ii) the relevance of the evidence to determining the issues at stake;
   (iii) the contribution of the evidence to serving and fostering the overall interest of the law and justice;
   (iv) the absence of prejudice to the other party;
   (v) the on-going investigations;
   (vi) whether the new evidence could not have been discovered or made available at an earlier point in time notwithstanding the exercise of due diligence.
8. The Prosecution submits that the Motion fails to examine and address these factors adequately. The brevity of the summaries in Annex B to the Motion makes it difficult to assess the materiality and relevance of the proposed testimony, or to determine whether the testimony of the proposed additional witnesses duplicates or overlaps with the testimony of witnesses that are already on the witness list or have already given evidence before the Trial Chamber. Furthermore, the brevity of the explanations given in the

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[7] *Ibid.* at para 4.

[8] *Prosecutor v Norman, Fofana and Kondewa*, SCSL-04-14-T-167, "Decision on Prosecution Request for Leave to Call Additional Witnesses", 29 July 2004; *Prosecutor v Norman, Fofana and Kondewa*, SCSL-04-14-T-213, "Decision on Prosecution Request for Leave to Call Additional Expert Witness Dr. William Haglund", 1 October 2004; *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-320, "Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements", 11 February 2005, paras 34 and 35; *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-399, "Decision on Prosecution Request for Leave to Call an Additional Expert Witness", 10 June 2005; *Prosecutor v Brima, Kamara, Kanu*, SCSL-04-16-T-365, "Decision on Prosecution Request for Leave to Call an Additional Witness (Zainab Hawa Bangura) pursuant to Rule 73*bis*(E), and on Joint Defence Notice to Inform the Trial Chamber of its Position vis-à-vis the Proposed Expert Witness (Mrs. Bangura) pursuant to Rule 94bis", 5 August 2005.

Motion and in its Annex B as to the reasons why these witnesses were not listed earlier also makes it impossible to evaluate whether the new evidence could have been discovered or made available at an earlier point in time with the exercise of due diligence. The Defence makes only the vaguest statements that witnesses were previously afraid to testify or could not be located, without giving any details of the dates and nature of the previous steps taken by the Defence to secure the attendance of these witnesses. The question whether good cause has been established by a party seeking leave to call additional witnesses is one to be decided by the Trial Chamber, not the party applying for leave. A motion seeking to establish good cause must provide the Trial Chamber with sufficient facts and details, supported where necessary by sufficient evidence,[9] to enable the Trial Chamber to make this assessment. The Prosecution submits that the information provided in the Motion is wholly insufficient for the Trial Chamber to be able to apply the factors referred to in paragraph 7 above in relation to the proposed additional witnesses that are the subject of the Motion.

9. The materiality of the evidence is one factor that has been accorded considerable weight by the international tribunals in deciding whether to allow additional witnesses.[10] Hence, the content of the evidence itself has been examined by the international tribunals in determining its materiality. The international tribunals tend to consider direct evidence as material. They therefore tend to allow additional witnesses provided that they are eye

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[9] Compare *Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-A, "Decision on Motion to Preserve and Provide Evidence", App. Ch., 22 April 1999, pp. 4-5 ("In the present case, the Appellant is seeking a copy of the video recording on the basis of the alleged observations of his counsel asserted in the Motion and Reply. The Respondent is disputing the Appellant's right of access. ***Under these circumstances, first-hand and detailed evidence citing specific instances is necessary in affidavit form*** in accordance with the law and procedure of the State in which such affidavits are signed before access can be granted" (emphasis added)); and see also the "Separate Opinion of Judge Hunt", paras. 7-9 ("***It is a common practice in interlocutory matters in this Tribunal for various factual matters to be merely asserted in the Motion, in the other party's Response and in the Reply, without evidence being given to establish those factual matters.*** Such a practice works well only where there is no issue in relation to the factual matters alleged. Where access to material sought by an order to produce is not conceded, and where the factual basis for an asserted legitimate forensic purpose is also in issue, ***there must be sworn, first hand and detailed affidavit evidence*** which demonstrates that such access is likely to materially assist the case of the party seeking access, or that there is at least a good chance that it will give that assistance. ... I therefore agree, for the reasons which I have given, with the Decision of the Appeals Chamber that such evidence is required before an order is made to produce the video recording for inspection. There is no such evidence in the present case. Allegations made in the appellant's Motion or in his Reply to the prosecution's Response to the Motion do not constitute such evidence, even less do allegations made in a ground of appeal." (Emphasis added.).

[10] *Prosecutor v Delalic*, IT-96-21, "Decision on Confidential Motion to Seek Leave to Call Additional Witnesses", Tr. Ch., 4 September 1997, para. 7: "Where the testimony of a witness is important to the Prosecution or the Defence, the Trial Chamber will ensure that such witness is heard, subject, naturally, to the limits prescribed in the Statute of the International Tribunal and Rules".

witnesses,[11] and that their proposed testimony relates directly to the conduct of the Accused,[12] especially if they were "uniquely placed as an insider".[13] The tribunals have been reluctant to permit additional witnesses where their proposed testimony is merely corroborative, or a repetition of evidence previously given by other witnesses,[14] or where the evidence is indirect.[15] Again, the brevity of the summaries in Annex B to the Motion makes it difficult or impossible to evaluate these considerations in the present case.

10. The Motion and its Annex B contain mere unsupported assertions that witnesses have "recently agreed" to testify, or that efforts to reach them were "finally successful", without substantiating these assertions and without providing any sufficiently detailed evidence in support of them. The Prosecution submits that at a minimum it is necessary for the Defence, in any Motion to establish "good cause", to set out sufficient details of the dates and nature of the previous steps taken by the Defence to secure the attendance of the witnesses in question, and to set out sufficient details of the substance of the expected testimony of the proposed witnesses.

11. It is a general principle that a moving party bears the burden of establishing its entitlement to the relief that it is seeking.[16] Accordingly, the burden is in this instance on the Defence to establish "good cause" for adding further witnesses to the Defence witness

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[11] *Prosecutor v. Musema*, ICTR-96-13-T, "Decision on the Prosecutor's Request for Leave to Call Six New Witnesses", Tr. Ch. 20 April 1999, para. 12: "The Tribunal notes that the statement of witness "AE" does not constitute direct eye-witness testimony of the events and therefore is not convinced that it would be in the interests of justice to hear witness "AE"." Also see: *Prosecutor v Nahimana*, ICTR-99-52-I, "Decision on the Prosecutor's Oral Motion for Leave to amend the list of selected witnesses",26 June 2001, para. 17.

[12] See for example, *Prosecutor v Bagasora*, ICTR-98-41-T, "Decision on Motion to Compel the Prosecution to Comply with the chamber's Decision of 1 March 2004", 21 May 2004, paras. 14-16 and 20-22, where the Trial Chamber allowed the prosecution to add two witnesses where the first, witness AAA's evidence related to "the intent of the accused" and where the evidence of witness AFJ related to "a direct order from the Accused, Ntabakuze, which led to killings of Tutsi".

[13] *Prosecutor v Nahimana,* ICTR-99-51-I, "Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures", 14 September 2001, para. 12, where the Chamber took note of the Prosecution's arguments that the witness was uniquely positioned in the "higher echelons of authority".

[14] *Prosecutor v Bagasora*, ICTR-98-41-T, "Decision on Motion to Compel the Prosecution to Comply with the chamber's Decision of 1 March 2004", 21 May 2004, paras. 23-31, where the Trial Chamber declined to add witness AJP where the proposed testimony of that witness merely corroborated the whereabouts of another witness, and witness AMI where the evidence was repetitive as it related to evidence previously given by other witnesses, and witness ANC where the evidence "had already been adduced through other witnesses".

[15] *Prosecutor v Nahimana*, ICTR-99-52-I, "Decision on the Prosecutor's Oral Motion for Leave to amend the list of selected witnesses" 26 June 2001, para. 28 where the addition of a witness whose statement "mainly contains indirect evidence and would seem to be of limited value for the Chamber" was denied.

[16] See, by way of analogy, *Prosecutor v. Tadić*, IT-94-1-A, "Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence", App. Ch., 15 October 1998, paras. 52, 53; *Prosecutor v. Delić*, IT-96-21-R-R119, "Decision on Motion for Review", App. Ch., 25 April 2002, para. 17.

list. The Prosecution submits that, for the reasons given above, the Motion does not discharge that burden. On this basis, the Motion should be dismissed, in relation to the proposed additional seven factual witnesses.

12. Furthermore, as regards the proposed witnesses Billoh Conteh and Momoh Pemba, the Prosecution submits that from the summaries contained in Annex B to the Motion, the proposed testimony of these two witnesses overlaps entirely, since the summaries in Annex B to the Motion are identical for both of them. The Motion does not show that they are not entirely duplicative of each other. The Prosecution therefore submits that the Motion does not establish good cause for calling both of these witnesses.

13. As regards the proposed witness Hon. Tejan Sankoh, this witness has been a backup witness for the Second Accused since 23 January 2006, and was only dropped because the Defence "no longer intends to rely on the testimony of any so-called backup witnesses."[17] The Prosecution submits that it is not clear from the Motion why it is now necessary to add this witness to the witness list again. Even if he was previously afraid to testify and is now willing to do so (which is the explanation given in Annex B to the Motion), the fact remains that he was previously only a *backup* witness. If he is now to be called by the Defence as a witness, some further explanation is required.[18]

14. As regards the proposed witness Steven Lahai Fassay, from the summary given in Annex B to the Motion, this witness's proposed testimony deals with crimes committed by Kamajors at SS Camp. This is the same subject-matter as the testimony of three Prosecution witnesses (TF2-223, TF2-201, TF2-079) who were vigorously cross-examined by the Defence for Fofana, as well as the testimony of four witnesses who testified on behalf of the First Accused (Mohammed Bonnie Koroma, Fallah Bindi, Chief Lahai, and Mohammed K. Swarray). The Motion does not show that the testimony of Steven Lahai Fassay would not be duplicative of the testimony of these other witnesses. For this further reason, the Prosecution submits that the Motion does not establish good cause for calling both of these witnesses.

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[17] *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-591, "Fofana Notice of Reduction of Witnesses" 5 May 2006, para 4.
[18] SCSL-04-14-T, Transcript 29 May 2006 at p. 7.

15. Similarly, as regards the proposed witnesses Ibrahim Tucker and Baimba Zorokong, from the summary given in Annex B to the Motion, the subject-matter of the expected testimony of these proposed witnesses covers the same terrain as the testimony of five witnesses who testified on behalf of the First Accused, including the First Accused himself.[19] The Motion does not show that the testimony of Ibrahim Tucker and Baimba Zorokong would not be duplicative of the testimony of these other witnesses. The Prosecution therefore also submits that the Motion does not establish good cause for calling both of these witnesses.

B. The proposed additional expert witness

16. The Motion seeks leave to call Daniel A. Yarmey, PhD, a professor of psychology at the University of Guelph in Ontario, Canada, as an expert witness in the field of forensic voice recognition. The Motion states that Dr. Yarmey will provide the Chamber with information useful to its analysis and evaluation of the testimony of witness TF2-057, who claimed to have recognized the voice of Mr. Fofana in connection with the alleged deaths of two individuals in Bo.[20]

17. The Prosecution submits that an expert is "a person whom by virtue of some specialized knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute",[21] meaning an issue or allegation upon which the Trial Chamber must make a determination or finding. The Prosecution submits that in relation to a proposed scientific or technical expert, one question to be decided in determining whether a particular person is qualified to give an expert opinion is whether the trier of fact would be capable of forming its own opinion on the matter without the assistance of witnesses possessing special knowledge or experience in the area.

18. Furthermore, to be admissible, an expert opinion must be relevant.[22] The Prosecution submits that the concept of relevance, for purposes of determining the admissibility of evidence, includes both logical relevance and legal relevance. Logical relevance requires

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[19] Hinga Norman, Arthur Koroma, Mustapha Lumeh, Ismail S. Koroma and Mohammed Bonnie Koroma.
[20] Supra, Note 1 at para. 12 and 13.
[21] *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-435, "Decision on Prosecution Request for Leave to Call Additional Witnesses and for Orders for Protective Measures", 21 June 2005 citing *Prosecutor v. Stanislav Galic*, IT-98-29-T, "Decision Concerning the Expert Ewa Tableau and Richards Philipps", Tr. Ch., 3 July 2002, page 2.
[22] Rule 89(C) of the Rules provides: "A Chamber may admit any relevant evidence."

that a piece of evidence is so related to a fact in issue that it tends to establish it. Legal relevance, on the other hand, addresses what has been described as the cost benefit analysis or whether the value of the evidence is worth what it costs to introduce it.[23] In *R. v. Mohan*, whilst evaluating the admissibility of an expert's testimony, the Supreme Court of Canada stated that:

> Cost in this context is not used in traditional economic sense but rather in terms of its impact on the trial process. Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is over born by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with this value or if it is misleading in the sense that its effect on the trier of fact... is out of proportion to its reliability.[24]

19. The Prosecution submits that the Motion contains insufficient details to enable the above issues to be determined by the Trial Chamber. Indeed, it is not even clear from the Motion precisely what issue is to form the subject-matter of the proposed expert opinion of Dr. Yarmey. Paragraph 13 of the Motion indicates that the proposed expert opinion will relate to the evidence of witness TF2-057, who testified that he recognized the voice of the Second Accused in connection with the deaths of two individuals in Bo.[25] From that paragraph of the Motion, it can be inferred that the subject-matter of the proposed expert opinion will relate to the reliability of this witness's voice identification in the circumstances, and/or the reliability of the witness's memory of that incident.

20. The Prosecution submits that the reliability of a witness's identification of a person or voice during a particular event, and the reliability of a witness's memory, are matters that a trier of fact is commonly, indeed usually, called upon to decide in any criminal trial. It is unusual for a trier of fact to hear expert evidence on such matters. Reliability of a witness's identification or memory are matters that triers of fact are normally competent to decide on the basis of their own normal experience. In this respect, the Prosecution notes that the CV of Dr. Yarmey annexed to the Motion ends with a list of 29 cases in which Dr Yarmey was found ***not*** to be qualified as an expert witness. It also appears that in a number of other cases courts have declined to admit proposed expert evidence from

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[23] *R. v. Mohan*, [1994] 2 S.C.R. 9, 1994 CanLII 80 (S.C.C.), para. 22.
[24] Ibid.
[25] TF2-057-Transcript dated 29 November, 2004 at p. 117.

Dr. Yarmey. For instance, in *United States v. Brien*,[26] the United States Court of Appeals dismissed an appeal against a decision of the District Court to exclude a proposed expert opinion of Dr Yarmey on "the weaknesses of eyewitness identification" that dealt with "the factors that affect memory, image retention and retrieval".[27] The Court of Appeals considered that "[b]roadly speaking, the expert testimony in this case involved a credibility determination within the ken of the ordinary judge and juror--unlike, say, DNA identification".[28] Similarly, in *United States v. Stokes*,[29] the Court of Appeals dismissed an appeal against a decision of the District Court to exclude an expert opinion of Dr Yarmey on the basis that "[a]s a general proposition, the psychological factors that affect the reliability of eyewitness identification are a matter of common experience".

21. Furthermore, the Prosecution notes that in *R. v. Morin*, Dr. Yarmey conceded that voice recognition can be reliable and that a familiar "known voice" can be recognized almost instantly.[30] Dr. Yarmey drew an important distinction between recognizing a "known voice" and hearing an unknown voice and attempting to identify it later, as in a voice line-up. In *Morin*, Dr. Yarmey acknowledged that it is dangerous to transport to "known voice" recognition cases the unreliability indicated in voice line-up experiments. The Prosecution notes that in this case, witness TF2-057 gave evidence that he recognized the voice and person of Mr. Fofana, and knew Mr. Fofana since 1993 after several meetings convened by the First Accused in Bo.[31] In that case, Dr Yarmey also testified that "that there is very little scientific literature on recognition of a known voice",[32] and that he "had no way of determining the extent to which a change in the tone of a familiar voice renders it more difficult to recognize".[33] Accordingly, it is even less clear what the basis would be for Dr. Yarmey's evidence to challenge the reliability of the evidence of witness TF2-057 in the present case.

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[26] *United States v. Brien*, United States, Court of Appeals (First Circuit), No. 94-1840, 11 July 1995 < http://www.ca1.uscourts.gov/cgi-bin/getopn.pl?OPINION=94-1840.01A >.

[27] Ibid., p. 3.

[28] Ibid., p. 6.

[29] *United States v. Stokes*, United States, Court of Appeals (First Circuit), No. 00-2397, 5 November 2004 < http://www.ca1.uscourts.gov/cgi-bin/getopn.pl?OPINION=00-2397.01A >.

[30] *R. v. Morin*, 1991 O.J. No. 2528 para. 255.

[31] TF2-057-Transcript dated 29 November, 2004 at p. 120.

[32] *R. v. Morin*, 1991 O.J. No. 2528 para. 257(1).

[33] *Id.* para. 257(3).

22. Accordingly, the Prosecution submits that the Motion does not establish that Dr Yarmey's proposed testimony would relate to matters outside the normal experience of the triers of fact, or that the subject-matter of his proposed opinion would assist the Trial Chamber to understand or determine an issue in dispute. Good cause for the addition of this proposed expert witness has accordingly not been established.

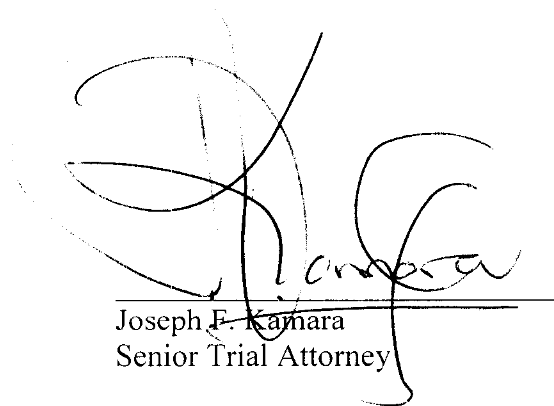
23. Alternatively, if leave is granted to call Dr. Yarmey, the Prosecution reserves its right to cross-examine the proposed expert on his Report once it is disclosed.

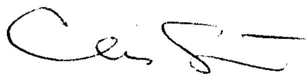
IV. CONCLUSION

24. The Defence have failed to establish good cause. The burden is on the Defence to satisfy the Trial Chamber of all relevant matters to be considered by the Trial Chamber, including those referred to in paragraph 7 above. The Motion does not discharge this burden.

Filed in Freetown,
7 July 2006

For the Prosecution,





Christopher Staker
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A. Motions, Orders, Decisions and Judgments

SCSL Cases

1. *Prosecutor v. Norman, Fofona, Kondewa,* SCSL-04-14-T-489, "Consequential Order for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case", 28 November 2005.
2. *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-640, "Fofana Application for Leave to File Additional Witness", 27 June 2006.
3. *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-500, "Fofana Materials pursuant to Consequential Order for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case, December 5, 2005.
4. *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-534, "Consequential Order to the Status Conference of 28 January 2006", 18 January 2006.
5. *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-540, "Fofana Materials Filed Pursuant to the Consequential Order to the Status Conference of 28 January 2006", 18 January 2006.
6. *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-591, "Fofana Notice of Reduction of Witnesses" 5 May 2006.
7. *Prosecutor v. Norman, Fofona, Kondewa,* SCSL-04-14-T-167, "Decision on Prosecution Request for Leave to Call Additional Witnesses", 29 July 2004.
8. *Prosecutor v. Norman, Fofona, Kondewa,* SCSL-04-14-T-213, "Decision on Prosecution Request for Leave to Call Additional Expert Witness Dr. William Haglund", 1 October 2004.
9. *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-04-15-T-320, "Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements", 11 February 2005.
10. *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-04-15-T-399, "Decision on Prosecution Request for Leave to Call an Additional Expert Witness", 10 June 2005.
11. *Prosecutor v. Brima, Kamara, Kanu,* SCSL-04-16-T-365, "Decision on Prosecution Request for Leave to Call an Additional Witness (Zainab Haba Bangura) pursuant to Rule

73bis (E), and on Joint Defence Notice to Inform the Trial Chamber of its Position vis-à-vis the Proposed Expert Witness (Mrs. Bangura) pursuant to Rule 94bis", 5 August 2005.

12. *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-435, "Decision on Prosecution Request for Leave to Call Additional Witnesses and for Orders for Protective Measures", 21 June 2005.

ICTY and ICTR Cases

13. *Prosecutor v. Nahimana et al*, ICTR-99-52-I, "Decision on the Prosecutor's Oral Motion for Leave to amend the list of selected witnesses", 26 June 2001. [http://65.18.216.88/default.htm]

14. *Prosecutor v Delalic*, IT-96-21, "Decision on Confidential Motion to Seek Leave to Call Additional Witnesses", Tr. Ch.., 4 September 1997, para. 7. [http://www.un.org/icty/celebici/trialc2/decision-e/70904WG2.htm]

15. *Prosecutor v. Galić*, IT-98-29-AR-73, "Decision on Application by Prosecution for Leave to Appeal", App. Ch.., 14 December 2001, para. 5. [http://www.un.org/icty/galic/appeal/decision-e/11214DE317061.htm]

16. *Prosecutor v. Musema*, ICTR-96-13-T, "Decision on the Prosecutor's Request for Leave to Call Six New Witnesses", Tr. Ch. 20 April 1999, para. 12: "The Tribunal notes that the statement of witness "AE" does not constitute direct eye-witness testimony of the events and therefore is not convinced that it would be in the interests of justice to hear witness "AE"."
[http://69.94.11.53/ENGLISH/cases/Musema/decisions/73BISE.htm]

17. *Prosecutor v Bagasora*, ICTR-98-41-T, "Decision on Motion to Compel the Prosecution to Comply with the chamber's Decision of 1 March 2004", 21 May 2004, paras. 14-16 and 20-22.
[http://69.94.11.53/ENGLISH/cases/Bagosora/decisions/040521.htm]

18. *Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-A, "Decision on Motion to Preserve and Provide Evidence", App. Ch., 22 April 1999, pp. 4-5.
[http://www.un.org/icty/celebici/appeal/decision-e/90422EV37228.htm]

19. Separate Opinion of Judge Hunt", paras. 7-9.

[http://www.un.org/icty/celebici/appeal/decision-e/90422EV37230.htm]

20. *Prosecutor v. Tadić*, IT-94-1-A, "Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence", App. Ch., 15 October 1998, paras. 52, 53.
[http://www.un.org/icty/tadic/appeal/decision-e/81015EV36285.htm]
21. *Prosecutor v. Delić*, IT-96-21-R-R119, "Decision on Motion for Review", App. Ch., 25 April 2002, para. 17. This authority has been filed with the following document: SCSL-04-14-T-574.
22. *Prosecutor v Nahimana*, ICTR-99-51-I, "Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures", 14 September 2001, para. 12.
http://69.94.11.53/ENGLISH/cases/Nahimana/decisions/140901.htm

Canadian and American Cases

23. *R. v. Morin*, 1991 O.J. No. 2528 para. 255.
24. *R. v. Mohan*, [1994] 2 S.C.R. 9, 1994 CanLII 80 (S.C.C.), para. 22.
[http://www.canlii.org/ca/cas/scc/1994/1994scc34.html]
25. *United States v. Brien*, United States, Court of Appeals (First Circuit), No. 94-1840, 11 July 1995.
[http://www.ca1.uscourts.gov/cgi-bin/getopn.pl?OPINION=94-1840.01A].
26. *United States v. Stokes*, United States, Court of Appeals (First Circuit), No. 00-2397, 5 November 2004.
[http://www.ca1.uscourts.gov/cgi-bin/getopn.pl?OPINION=00-2397.01A]

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[1991] O.J. No. 2528

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R. v. **Morin**

Her Majesty The Queen and Guy Paul **Morin**

Ontario General Division

Donnelly J.

Heard: September 27, 1991
Judgment: September 27, 1991
Docket: None given.

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Counsel: None given

*** The requested pages begin below ***

voice as Guy Paul Morin's prior to September 21st, 1989. He was unable to explain the significance of the reference that:

> Janet now feels that the person she heard that night was Guy Paul Morin.

253 Janet Jessop insisted that she recognized the voice from the beginning and told that to the police in the first interview about the incident. No reference to her voice identification is contained in the reports from Officer Bunce on May 25th, 1985, and from Staff Sergeant Fitzpatrick on September 21st, 1989. There was no evidence that Janet Jessop told any of her guests that she had identified that voice.

254 Alexander **Yarmey**, a professor of psychology at the University of Guelph, testified for the applicant with respect to assessing the quality of Janet Jessop's claimed voice identification. Professor **Yarmey** has a special interest in voice identification which he identified as a sub-category of memory. He explained the three stages of memory function as:

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1) Acquisition - where learning may be intentional or incidental and is affected by the distractive characteristics of the prevailing situation.

2) Storage of the acquired information, which is subject to impingement or embellishment by post-event interference.

3) Retrieval which is a reconstruction of stored memory fragments. This can be influenced by questioning and it involves a decision-making process which is a function of personality, (i.e. a willingness to make mistakes).

255 Professor **Yarmey** testified about general aspects of voice identification such as distinctiveness, familiarity, emotional quality or a familiar context. He conceded that voice recognition can be very reliable and that a familiar voice can be recognized almost instantly. The specific factors bearing on identification of the voice heard on January 7th, 1985 were observed by him to be as follows: The voice was sudden and unexpected. The hearers of the voice were socially occupied so the learning would be incidental, not intentional. The immediate connotation was alarm, which was distractive for identification purposes. The opportunity was limited to a few seconds and to five or six words. There was the equivalence of voice disguise by the change in tone resulting from the distressed cry. There were distractive activities and discussions immediately following the voice.

256 Professor **Yarmey** concluded that the prevailing situational factors so interfered with the ability to identify a voice, that any opinion by Janet Jessop would represent a guess, and the accuracy of that stated opinion would be a reflection of chance rather than an accurate reflection of good memory. Janet Jessop's express positiveness of identification was seen by Professor **Yarmey** as unrelated to accuracy, being a function of personality rather than of memory.

257 Professor **Yarmey's** opinion must be considered in light of the following:

1) There is an important distinction between recognizing a known voice as it is heard, and attempting to identify a voice which was heard earlier but not recognized (i.e. attempting to later select and identify the unknown voice from a series of voices - a voice line-up). Professor **Yarmey** testified that voice memory fades with time and, particularly so because our society is primarily visually oriented. He testified that there is very little scientific literature on recognition of a known voice. The only published study known to him was by Goldstein & Chance; and he agreed that one study does not produce definitive answers. He acknowledged that it's dangerous to transport to voice recognition cases the principles indicated by voice "line-up" experiments. Accordingly, there was a very limited scientific basis for Professor **Yarmey's** evidence as it relates to the issue of identification of a known voice.

2) Professor **Yarmey** clearly dealt with Janet Jessop's voice identification in the context of hearing a voice and then making the identification at a later time. He spoke of factors influencing memory, uncertainty as to when the identification was made, and the identification not being a reflection of good memory. According to Janet Jessop, there is no uncertainty that she originally identified the voice on January 7th, 1985. The only uncertainty relates to when she first told police of that recognition.

3) Professor **Yarmey** conceded in cross-examination that he had no way of determining the extent to which a change in the tone of a familiar voice renders it more difficult to recognize.

4) Professor **Yarmey** conceded that he knew little of the precise situational factors prevailing when this voice was heard and that operated to limit the value of his opinion.

258 English authority on voice identification is found in the judgment of Lord Widgery in *R. v. Turnbull* (1976),

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[1977] 1 Q.B. 224 (Eng. C.A.)at 229 as follows:

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1998 WL 2014312 (UN ICT (App)(Yug))

International Criminal Tribunal for the Former Yugoslavia
IN THE APPEALS CHAMBER

Decision

Appeals Chamber

Decision

PROSECUTOR
v.

DUSKO **TADIC**

Decision of: 15 October 1998

DECISION ON APPELLANT'S MOTION FOR THE EXTENSION OF THE TIME-LIMIT AND ADMISSION OF ADDITIONAL EVIDENCE

DECISION ON APPELLANT'S MOTION FOR THE EXTENSION OF THE TIME-LIMIT AND ADMISSION OF ADDITIONAL EVIDENCE

The Office of the Prosecutor: Ms.Brenda Hollis, Mr. Michael Keegan

Counsel for the Appellant: Mr. Milan Vujin, Mr. John Livingston

Before: Judge Mohamed Shahabuddeen, Presiding, Judge Antonio Cassese, Judge Wang Tieya, Judge Rafael Nieto-Navia, Judge Florence Ndepele Mwachande Mumba

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

I. INTRODUCTION

1. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ('the International Tribunal') is seised of an appeal against conviction and sentence by Dusko Tadic ('Appellant') and a cross-appeal by the Prosecutor. Currently pending before it is a motion entitled 'Motion for The Extension Of The Time Limit' ('the Motion'), filed by the Appellant on 6 October 1997 in which the Appellant seeks to admit additional evidence pursuant to Rule 115 of the Rules of Procedure and Evidence of the International Tribunal ('the Rules'). This is a decision on the Motion.

II. PROCEDURAL BACKGROUND

2. On 7 May 1997 the Appellant was convicted by Trial Chamber II of the

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International Tribunal of certain offences under the Statute of the International Tribunal ('the Statute'), as set out in its Opinion and Judgment [FN1]. The Appellant filed Notice of Appeal against the Judgement on 3 June 1997. On 8 September 1997, the Appellant requested an extension of the time-limit for the filing of its appeal brief in order to collect and present additional evidence pursuant to Rule 115. On 19 September 1997, at the Appellant's request, the Presiding Judge of the Appeals Chamber convened an in camera hearing, at which both the Appellant and the Office of the Prosecutor ('the Prosecution') presented oral arguments.

3. On 6 October 1997, the Appellant filed the Motion, seeking to present additional evidence under Rule 115. After receiving the response of the Prosecution on 20 October 1997, a hearing on the Motion was held on 22 January 1998. At this time the Appeals Chamber ordered, inter alia, that the normal appeal proceedings were to be suspended until the determination of the Motion, and set out a ten-point timetable for receiving the further submissions of the parties [FN2].

4. On 2 February 1998, pursuant to a request filed by the Appellant, the Appeals Chamber issued an ex parte order addressed to Republika Srpska and granted the Appellant until 2 May 1998 to file any material obtained pursuant to that and other orders.

5. The Appellant filed his 'Appellant's Brief In Relation To Admission Of Additional Evidence On Appeal Under Rule 115' ('Appellant's Rule 115 Brief') and supporting material on 5 February 1998, to which the Prosecution responded on 9 March 1998.

6. On 23 March and 1 May 1998, the Appellant filed the remainder of his submissions in support of the Motion. The Appellant also sought an extension of time of 28 days in which to file one additional witness statement. On 7 May 1998 the Prosecution also sought an extension of time to file its Response to the Appellant's Rule 115 Brief. Both requests were granted: the Prosecution filed its Response to the Appellant's Rule 115 Brief on 8 June 1998 and the Appellant filed his reply on 25 June 1998, a 'Substituted Copy' of this document being later filed 15 July 1998 [FN3]. This completed the filings and submissions in this matter.

III. ARGUMENTS OF THE PARTIES

7. The Appeals Chamber will now summarise the arguments of the parties in relation to the principal issues.

A. Unavailability under Rule 115

1. Appellant's arguments

8. The Appellant argues that there is a substantial amount of evidence which was 'unavailable' at trial within the meaning of Rule 115 of the Rules which it presents as referring to evidence which was not before the Trial Chamber for its consideration; which was 'unavailable' to Appellant for any one or more of five reasons: it was not in existence at the time of the trial; the Appellant was unaware of its existence; the Appellant's lawyers at trial were unable to adduce

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the evidence, e.g., because the witnesses felt intimidated and refused to give evidence; the Appellant's lawyers failed to seek out and/or otherwise obtain the evidence in question, whether negligently or not; the Appellant's lawyers failed to call the evidence other than with the agreement of Appellant; and which, if omitted, might create a doubt as to whether a miscarriage of justice had occurred [FN4].

9. The Appellant submits that witness and documentary evidence was not available at trial for a number of reasons, including: difficulty faced by Appellant in obtaining and collecting evidence in Republika Srpska at the time of the trial, as well as other investigatory difficulties, which meant that some witnesses were unwilling to come forward; some witnesses could not be contacted at the time of the trial; some witnesses would not come forward due to threats or intimidation, in particular by Simo Drljaca (now deceased) and/or Miso Danicic; the circumstances that the trial defence team chose not to call witnesses available to it (sometimes despite the request of the Appellant to do so); did not have access to the evidence now sought to be adduced; were ultimately responsible for the failure to present 'credible and potentially decisive evidence' on behalf of the Appellant at trial.

10. The Appellant submits that the Appeals Chamber 'should adopt a liberal rather than restricted interpretation of Rule 115 and should be [slow] to rule out any additional evidence which, if not admitted might create doubts as to whether a miscarriage of justice has occurred' [FN5]. He contends that, to satisfy the requirement of 'unavailability' pursuant to Rule 115, 'it is sufficient to present new evidence which was not known to the Trial Chamber" [FN6]. He submits that the Appeals Chamber is empowered to admit any additional evidence without restriction under and in accordance with Article 25 of the Statute and Rule 115 of the Rules [FN7], and that an appeal under those provisions is not restricted to issues of law or procedural error [FN8].

2. Prosecution arguments

11. The Prosecution argues that the criteria under Rule 115 of the Rules relating to the question whether the additional evidence 'was not available e at the trial' should be construed narrowly. Article 25 of the Statute defines the criteria of Rule 115, and limits the scope of that Rule. The right of appeal, within the purview of Article 25, does not allow for trials de novo [FN9]. The Prosecution cites the Appeals Chamber's Judgement in Prosecutor v. Erdemovic [FN10] that the 'appeal process of the International Tribunal is not designed for the purpose of allowing parties to remedy their own failings or oversights during trial or sentencing' [FN11].

12. The Prosecution submits that the evidence sought to be admitted must satisfy one of the criteria under Article 25 of the Statute, namely:

an error on a question of law invalidating the decision; or an error of fact which has occasioned a miscarriage of justice;

and that the Appellant must show that the evidence was unavailable at the time of trial and that it is in the interest of justice to admit it.

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13. The Prosecution argues that the Appellant's Motion should not be granted unless

the evidence could not have been produced at trial through the exercise of due diligence; the additional evidence, if proved, could have been a decisive factor in reaching a decision; and the new evidence is credible (in the sense that there is a likelihood it can be proved) [FN12].

14. The Prosecution submits that

'generally, appeals courts will not consider additional evidence . . . unless they determine that the evidence was unavailable at trial, that it is reliable and would be admissible evidence in the trial, and that there is a high probability the evidence would disprove or cast doubt on the findings of the court below. [FN13]

B. Due Diligence and Error of Counsel

15. In the most recent submissions in these proceedings, it is clear that, as it was put by the Appellant, the parties are not in substantial disagreement that the Defence 'must, in practice, use all due diligence in gathering evidence on behalf of their client' [FN14]. However, there is disagreement between the parties about when the due diligence requirement applies and about whether alleged failure on the part of the Appellant's counsel to act with due diligence at trial can be relied upon by the Appellant in seeking leave to admit additional evidence.

1. Appellant's arguments

16. In support of the submission that evidence 'not available to it at trial" includes evidence 'not adduced because of negligence' of the Appellant's lawyers at trial, the Appellant refers to Rule 119 of the Rules, which requires that, for a judgement to be reviewed on the basis of a new fact, that fact must not have been discoverable through the exercise of 'due diligence'. The Appellant contends that the omission of this term in Rule 115 shows that the requirement of due diligence does not apply under that Rule.

17. The Appellant presents written statements of potential witnesses and documents which it alleges 'were not accessible to the previous defense counsel of the accused' or 'which the previous defense counsel was erroneously of the view that it [would] not help determine the truth, in spite of the request by the accused for this evidence to be presented' [FN15]. The Appellant, who has changed his counsel, states that this was the reason for the change [FN16].

18. The Appellant submits that there is 'no justification, in the interests of justice for not allowing the Accused to re-open proceedings when the reason why relevant, credible and potentially decisive evidence was not obtained was because of negligence by lawyers' [FN17]. The Appellant should not, it is argued, be made to suffer for this. A similar argument is also raised in respect of evidence not presented as a consequence of a defence strategy by the Appellant's counsel at the time of trial.

2. Prosecution arguments

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19. The Prosecution argues that one of the tests for admission of additional evidence under Rule 115 of the Rules is that 'the evidence could not have been discovered before the trial by the exercise of due diligence' [FN18]. The Prosecution submits that all jurisdictions which permit the admission of additional evidence require due diligence on behalf of the moving party [FN19].

20. Furthermore, the Prosecution contends that

[a]lmost all of the proposed witnesses and evidence was available at trial or could have been discovered by the exercise of due diligence by the Trial Defence Counsel, and, therefore, fails the requirement of unavailability. [FN20]

The Prosecution also argues:

While no burden of proof is placed on the defence, the defence must be under a corresponding obligation to exercise due diligence in ensuring that all evidence on which the defence seeks to rely is placed before the Trial Chamber at the time of the trial. A party cannot, by failing to discharge its own obligation of due diligence, provide itself with a grounds of appeal in the event of an adverse judgment. [FN21]

The Prosecution also states:

In determining whether the Appellant diligently sought to make the new testimony available at trial, the court should examine whether the Appellant took certain steps such as subpoenaing the witness or moving for a continuance or an adjournment in order to obtain the testimony. [FN22]

C. The Interests of Justice

1. Appellant's arguments

21. The Appellant submits that the 'interests of justice' require that additional evidence be such that it would probably change the result of the trial proceedings conducted before the Trial Chamber [FN23]. In his view, that phrase represents a broad concept which includes any consideration necessary to ensure a fair trial, such as the need for the accused to feel that justice has been done through the presentation of evidence which bears upon his guilt or innocence [FN24].

2. Prosecution arguments

22. The Prosecution submits that the condition relating to interests of justice is to be construed narrowly as follows:

the evidence must be relevant to a material issue; the evidence must be credible; the evidence, if proven to be true and credible, must be such that it would probably change the result if a new trial or appeal were granted [FN25].

In the view of the Prosecution, the principle of finality must be considered as being in the 'interests of justice'; this principle would be undermined if either party could have proceedings reopened to hear the testimony of additional witnesses [FN26].

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B. Rule 115 or Rule 119

1. Appellant's arguments

23. The Appellant submits that if the correct interpretation of Articles 25 and 26 of the Statute and Rules 115 and 119 to 122 of the Rules is that the presentation of the additional evidence which he proposes to introduce is properly a matter for review rather than appellate proceedings, this motion should be remitted to the Trial Chamber under Rule 122 as an application for review [FN27]. It is, however, the Appellant's primary submission that the evidence he seeks to adduce is admissible under Rule 115.

2. Prosecution arguments

24. The Prosecution submits that the standards for admission are the same, but that the discovery of a new fact after judgement is a matter for review under Article 26 of the Statute and Part Eight of the Rules, rather than appeal under Article 25 of the Statute and admission as additional evidence under Rule 115 of the Rules [FN28]. If the discovery of new evidence after trial were grounds both of appeal and review, there would be potential duplication of proceedings [FN29].

25. The Prosecution also argues that the Appellant cannot file notice of appeal and, at the same time, seek extension of time to search for additional evidence to support the appeal. The Prosecution asserts that, even if recourse to the review procedure is permissible, that provision allows a party to seek review on the basis of a new fact once it has been discovered, not to permit the party to preserve its right to appeal while still searching for the evidence to support the appeal [FN30].

IV. APPLICABLE LAW

26. The relevant provisions of the Statute and the Rules are as follow:

Article 25

Appellate proceedings

The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds: an error on a question of law invalidating the decision; or an error of fact which has occasioned a miscarriage of justice. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

Article 26

Review proceedings

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

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Rule 115

Additional Evidence

A party may apply by motion to present before the Appeals Chamber additional evidence which was not available to it at the trial. Such motion must be served on the other party and filed with the Registrar not less than fifteen days before the date of the hearing. The Appeals Chamber shall authorise the presentation of such evidence if it considers that the interests of justice so require.

Rule 119

Request for Review

Where a new fact has been discovered which was not known to the moving party at the time of the proceedings before a Trial Chamber or the Appeals Chamber, and could not have been discovered through the exercise of due diligence, the defence or, within one year after the final judgement has been pronounced, the Prosecutor, may make a motion to that Chamber for review of the judgement.

Rule 122

Return of Case to Trial Chamber

If the judgement to be reviewed is under appeal at the time the motion for review is filed, the Appeals Chamber may return the case to the Trial Chamber for disposition of the motion.

V DISCUSSION

27. The Appeals Chamber will now consider the issues it regards as pertinent.

A. Distinction between Rule 115 and Rule 119

28. The parties are agreed that the Motion is to be treated as a motion for leave to admit additional evidence under Rule 115 of the Rules. However, in addition, or in the alternative, the Appellant asks that the Motion be treated as a motion for review of the Judgement on the basis of a 'new fact' within the meaning of Rule 119 of the Rules, as read with the review provisions of Article 26 of the Statute. The Prosecution does not consider the Rule 119 procedure to be applicable.

29. The Appeals Chamber considers that there is a distinction between two provisions of the Statute and their related Rules, namely Article 25 of the Statute and Rule 115, and Article 26 of the Statute and Rule 119. The Chamber will address this issue first.

30. Review proceedings under Article 26 of the Statute and Rule 119 are different from appellate proceedings under Article 25 and Rule 115. Where an applicant seeks to present a new fact which becomes known only after trial, despite the exercise of due diligence during the trial in discovering it, Rule 119 is the governing provision. In such a case, the Appellant is not seeking to admit additional evidence of a fact that was considered at trial, but rather a new fact. The proper

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venue for a review application is the Chamber that rendered the final judgement; it is to that Chamber that the motion for review should be made. In this case, it is for the Trial Chamber to review the Judgement and determine whether the new fact, if proved, could have been a decisive factor in reaching a decision.

31. Rule 122 of the Rules, set out above, empowers the Appeals Chamber to ''return the case to the Trial Chamber for disposition of the motion'. The Appellant has brought his motion under Rule 115 for the reason that he considers that the matters presented can be treated as additional evidence under that Rule. In the course of the written arguments, he leaves it to the Appeals Chamber to deal with the matter as one raising new facts if the Chamber considers that new facts are raised. The Appellant has not, however, presented any convincing arguments of his own to support the view that new facts are raised. The Appeals Chamber, for its part, considers it sufficient to say that it is not satisfied that new facts are raised.

32. The Appeals Chamber will, however, observe that a distinction exists between a fact and evidence of that fact. The mere subsequent discovery of evidence of a fact which was known at trial is not itself a new fact within the meaning of Rule 119 of the Rules. In the view of the Appeals Chamber, the alleged new fact evidence submitted by the Appellant is not evidence of a new fact; it is additional evidence of facts put in issue at the trial. Some of that additional evidence was not available at the trial. That being so, it is necessary to consider whether so much of that evidence as was not available at the trial is required by the interests of justice to be presented at the appeal. This is considered below.

B.

The Requirements of Rule 115

33. The Appeals Chamber will now consider the basic tests of admissibility under Rule 115 of the Rules.

34. To be admissible under Rule 115 the material must meet two requirements: first, it must be shown that the material was not available at the trial and, second, if it was not available at trial, it must be shown that its admission is required by the interests of justice.

35. The first issue, the 'availability' of the material, turns on the question whether due diligence is required. This is addressed in the following section of this Decision. As to the second requirement, it is clear from the structure of Rule 115 that 'the interests of justice' do not empower the Appeals Chamber to authorise the presentation of additional evidence if it was available to the moving party at the trial. Such an interpretation is supported by the principle of finality. Naturally, the principle of finality must be balanced against the need to avoid a miscarriage of justice; when there could be a miscarriage, the principle of finality will not operate to prevent the admission of additional evidence that was not available at trial, if that evidence would assist in the determination of guilt or innocence. It is obvious, however, that, if evidence is admitted on appeal even though it was available at trial, the principle of finality would lose much of the value which it has in any sensible system of

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administering justice. It is only to the extent that the Appeals Chamber is satisfied that the additional evidence in question was not available at trial that it will be necessary to consider whether the admission of the evidence is required by the interests of justice.

C. The Requirement for Due Diligence

36. Rule 115 (A) provides that a 'party may apply by motion to present before the Appeals Chamber additional evidence which was not available to it at the trial'. That relates to appeals. Rule 119 enables a party to seek a review '[w] here a new fact has been discovered which was not known to the moving party at the time of the proceedings before a Trial Chamber or the Appeals Chamber, and could not have been discovered through the exercise of due diligence'. The Appellant submits that the reference to 'diligence' in the latter but not in the former means that diligence is not required under Rule 115. However, whilst the Rules can illustrate the meaning of the Statute under which they are made, they cannot vary the Statute. If there is a variance, it is the Statute which prevails. But, for the reasons explained below, there is no variance in this case. In the view of the Appeals Chamber, there is a requirement for the exercise of due diligence by a party moving under Rule 115.

37. Article 25, paragraph 1, of the Statute provides for appeals on two grounds, namely, 'an error on a question of law invalidating the decision' and ''an error of fact which has occasioned a miscarriage of justice'. The first error is clearly an error committed by the Trial Chamber. That, in principle, would seem to be also the case with the second error. But it is difficult to see how the Trial Chamber may be said to have committed an error of fact where the basis of the error lies in additional evidence which, through no fault of the Trial Chamber, was not presented to it. Where evidence was sought to be presented to the Trial Chamber but was wrongly excluded by it, there is no need for recourse to the provisions relating to the production of additional evidence to the Appeals Chamber; there the Trial Chamber would have committed an error appealable in the ordinary way.

38. It is only by construing the reference to 'an error of fact' as meaning objectively an incorrectness of fact disclosed by relevant material, whether or not erroneously excluded by the Trial Chamber, that additional material may be admitted. Such an extension of the concept of an 'error of fact' as being not restricted to an error committed by the Trial Chamber may be required by justice; but justice would also require the accused to show why the additional evidence could not be presented to the Trial Chamber in exercise of the rights expressly given to him by the Statute. It would be right to hold that the purpose of the Statute in giving those rights was that the accused should exercise due diligence in utilising them. This would exclude cases in which the failure to exercise those rights was due to lack of diligence.

39. Under Article 21, paragraph 4, of the Statute, an accused person is entitled at his trial 'to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing'. He is also entitled 'to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'. Article 22 of the Statute provides for protection of victims and witnesses while Article 29 requires States, as a matter of law, to

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cooperate with the International Tribunal in the investigation and prosecution of accused persons. That applies in relation to material sought by either party.

40. The compulsory and protective machinery of the International Tribunal may not always be able to give total assurance that witnesses will be both available and protected if necessary. That is all the more reason why the machinery at the disposal of the International Tribunal should be used. A party seeking leave to present additional evidence should show that it has sought protection for witnesses from the Trial Chamber where appropriate, and that it has requested the Trial Chamber to utilise its powers to compel witnesses to testify if appropriate. Any difficulties, including those arising from intimidation or inability to locate witnesses, should be brought to the attention of the Trial Chamber.

41. An application pursuant to Rule 115 is part of the appellate proceedings before the Appeals Chamber. Arguments as to whether, in some countries, an appeal is by way of rehearing and, if so, to what extent, do not affect the fact that, so far as the Statute is concerned, an appeal does not involve a trial de novo [FN31].

42. By the time proceedings have reached the Appeals Chamber, evidence relevant to the culpability of the accused has already been submitted to a Trial Chamber to enable it to reach a verdict and a sentence, if he is found guilty. From the judgement of the Trial Chamber there lies an appeal to the Appeals Chamber. The corrective nature of that procedure alone suggests that there is some limitation to any additional evidentiary material sought to be presented to the Appeals Chamber; otherwise, the unrestricted admission of such material would amount to a fresh trial. Further, additional evidence should not be admitted lightly at the appellate stage, considering that Rule 119 provides a remedy in circumstances in which new facts are discovered after the trial.

43. Consideration may be given to the consequences of the opposite holding that additional evidence may be presented to the Appeals Chamber even where, through lack of diligence, it was not presented to the Trial Chamber though available. The Prosecutor can appeal from an acquittal. She may seek to reverse the acquittal on the basis of an error of fact disclosed by additional evidence. If the additional evidence was available to her but not presented to the Trial Chamber through lack of diligence, the accused is in effect being tried a second time. In substance, the non bis in idem prohibition is breached.

44. The Appeals Chamber therefore finds that the position under the Statute is as indicated above and cannot be cut down by reference to any apparent discrepancy in the wording of Rules 115 and 119 of the Rules. The word ''apparent' is used because, on a proper construction, Rule 115 is to be read in the light of the Statute; it is therefore subject to requirements of the Statute which have the effect of imposing a duty to be reasonably diligent. Where evidence is known to an accused person, but he fails through lack of diligence to secure it for the Trial Chamber to consider, he is of his own volition declining to make use of his entitlements under the Statute and of the machinery placed thereunder at his disposal; he certainly cannot complain of unfairness.

45. In summary, additional evidence is not admissible under Rule 115 in the absence of a reasonable explanation as to why it was not available at trial. Such an explanation must include compliance with the requirement that the moving party

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exercised due diligence. This conclusion is consistent with the Statute and with the jurisprudence of many countries; it is not, however, dependent on that jurisprudence.

D. Diligence in Relation to the Responsibilities of Counsel

46. The concept of due diligence must now be considered in relation to the responsibilities of counsel.

47. Due diligence is a necessary quality of counsel who defend accused persons before the International Tribunal. The unavailability of additional evidence must not result from the lack of due diligence on the part of the counsel who undertook the defence of the accused. As stated above, the requirement of due diligence includes the appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence on behalf of an accused before the Trial Chamber.

48. Thus, due diligence is both a matter of criminal procedure regarding admissibility of evidence, and a matter of professional conduct of lawyers. In the context of the Statute and the Rules, unless gross negligence is shown to exist in the conduct of either Prosecution or Defence counsel, due diligence will be presumed.

49. In this case, the parties agree that due diligence might have been lacking in respect of certain evidence which was not presented at trial because of the decision of the Defence team to withhold it [FN32]. The Appeals Chamber is not, however, satisfied that there was gross professional negligence leading to a reasonable doubt as to whether a miscarriage of justice resulted. Accordingly, evidence so withheld is not admissible under Rule 115 of the Rules.

50. The Appeals Chamber considers it right to add that no counsel can be criticised for lack of due diligence in exhausting all available courses of action, if that counsel makes a reasoned determination that the material in question is irrelevant to the matter in hand, even if that determination turns out to be incorrect. Counsel may have chosen not to present the evidence at trial because of his litigation strategy or because of the view taken by him of the probative value of the evidence. The determination which the Chamber has to make, except in cases where there is evidence of gross negligence, is whether the evidence was available at the time of trial. Subject to that exception, counsel's decision not to call evidence at trial does not serve to make it unavailable.

F. Availability of Specific Categories of the Proposed Additional Evidence

51. The Defence called 40 witnesses at the trial, including the Appellant. It now seeks to call more than 80 witnesses and to present documentary material. It is entitled to do so if it satisfies the applicable requirements. Accordingly, the Appeals Chamber will now consider whether the requirements of Rule 115 have been satisfied in relation to the various categories of evidence put forward by the Appellant.

1. Burden of proof

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52. A preliminary matter of a general nature concerns the burden of proof. The question at issue in this Motion is whether the Appellant is entitled to a right given to him by the appeal process which he has invoked. It is for him to establish his entitlement to the right which he claims. Accordingly, it is for the Appellant to prove the elements of the entitlement.

53. In the absence of any explanation as to why certain items now sought to be admitted were not available at trial, the Appeals Chamber finds that the Appellant has failed to discharge his burden of proof in respect of these items to its satisfaction. Specific issues will be considered later in relation to particular legal criteria which are applicable. At this stage, the Appeals Chamber determines that the burden of proof has not been discharged in relation to the following potential witnesses: Vinka Andic, Zeljko MEAKIC (or Mejakic), Nada Balaban, Gradan (or Dragan) Kontic, Mirko Groarac, Dragan Lukic, Murudif (or Muradin) Mrkalj, Goran Jankovic, Njegoslav (or Negoslav) Tadic, Milovan Tadic, Dr. Kotromanovic, Muradif Aleksic, Branko Drazic, Jadranka Gavranic, Mijodrag Kostic, Milan Kovacevic (now deceased), Slobodan Kuruzovic, Dragan Lukic, Muradin Mrkalj, Pero Mrkalj, Mevlud Semenovic, Mijatovic Vaso (or Mijativic Vasa) and Drago Prcac. The testimony of these potential witnesses will therefore not be admitted. For the same reasons, the documentary evidence listed in Annexes 1, 2, 5, 6, 7, 8, 9, 10, 11, 14, 17, 20, 21, 22, 23, 24, 25, 26, 27, 30 and 31, I, II/4, II/5 and II/6 and the video-tapes numbered AB 1-16 and AB 18 and 19, will not be considered further. The Appeals Chamber has made considerable efforts to try to identify from the lengthy filings of the parties those witnesses in respect of whom specific arguments have been raised. Any witnesses or material not specifically referred to in this Decision are also rejected for failure to meet the burden of proof.

2. Material not in existence at the time of the trial

54. This category includes the testimony of potential witness Ljubica Sajcic, and the documents contained in Annexes 3, 4, 19, 28, 32 and 34, none of which was in existence at the time of the trial. However, on closer examination, the Appeals Chamber is satisfied that, with one exception, all of the information referred to in this material was available to the Defence at the time of trial and therefore cannot now be admitted.

55. Take, for example, the statement of Ljubica Sajcic. Ljubica Sajcic is an interpreter who would testify as to the content of an interview with one Milorad Tadic for which Ljubica Sajcic acted as interpreter. The interview covered events in Kozarac in May 1992 and at Omarska from June to August 1992. What is being sought in substance is 'authorisation' to present, through her, the evidence of Milorad Tadic. But his evidence was in existence at the time of trial. The Appeals Chamber is not satisfied that the Appellant has discharged the burden of proving that he exercised due diligence in seeking out and compelling the attendance of this person as a witness at the trial.

56. The exception referred to above relates to Annex 34. This contains various details of voter registration figures, including a document giving OSCE voter registration details for the 1997 Municipality Elections, which is said to show that there was no reduction in the number of eligible voters in the municipality of Prijedor [FN33]. Clearly, this document was not available at the time of the trial. It appears that the Appellant is seeking to rely on this document to

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establish that the ethnic composition of the region did not change in the way that it appeared at trial [FN34]. It follows that the OSCE records of 1997 constitute additional evidence not available at the time of trial. It thus passes the first limb of Rule 115. Its admission before the Appeals Chamber then falls to be determined under Rule 115 (B) and will be discussed with other material in this category later in this Decision.

3. Material which existed at trial but

of which the Defence was unaware

57. This category includes the testimony of potential witnesses Ernad Besirevic, Sasa Maric, Vlado Krckovski, Vinka Gajic, Slobodan Zrnic, Drago Pesevic, Slobodan Malbasic, Zivko Pusac, Vladimir Maric, Mile Ratkovic, Mladen Zgonjanin and Dragoje Cavic, together with witness XX and his medical records. Certain of these individuals are said to have been at the battlefront at the time of the trial or to have been actively avoiding contact with the authorities. Others were simply unknown to the Defence and did not come forward at the time, while some have come forward as a result of information obtained under a Binding Order of the Appeals Chamber issued to the Republika Srpska on 2 February 1998. One item, a confidential document from the United States Department of State, was only disclosed by the Prosecution to the Appellant on 21 April 1998.

58. The Appeals Chamber is mindful of the difficulties of conducting investigations in the conditions relevant to this case. It appreciates that some witnesses, who were unknown to the Defence, would not volunteer themselves and indeed might not have been aware of the trial. While the Defence is required to use due diligence to identify and seek out witnesses, there are limits to this obligation. The Appeals Chamber finds that the Appellant has provided sufficient indication that these witnesses and materials were unknown to the Defence, despite the exercise of due diligence, and thus not available at the time of trial and will examine in a later part of this Decision whether it would be in the interests of justice to admit this evidence.

4. Material which the Appellant was unable to adduce at trial

59. This category relates to witnesses of whom the Defence was aware at the time of trial but whose evidence they were unable to produce. The material under this heading may be divided into three sub-categories: witnesses who were unwilling or unable to come forward at the trial stage, for example, witnesses who were imprisoned at the time; witnesses alleged to have been intimidated; and potential witnesses who could not be located at the time of trial.

60. First, then, there is the category of potential witnesses who were simply unwilling to come forward at the trial stage but are now willing to do so at the appeal stage. There are four witnesses in this category, namely, D.D., Miroslav Kvocka, Mladen Radic and one other witness, whose name the Appellant has asked to be kept confidential. The Appellant claims that this witness was unavailable at the time of trial due to imprisonment. All four had been indicted at the time of trial, the last three in connection with events at the Omarska camp; the first, namely D.D., whose identity is unknown to the Chamber, is acknowledged to have been employed at Omarska [FN35]. The three named witnesses could have been

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discovered at the time of trial from the public indictment concerning events at the Omarska camp, events that were clearly relevant to the charges against the Appellant. No evidence has been submitted to the Appeals Chamber to indicate that any request was made to the Trial Chamber for the issue of subpoenas to compel the attendance of these witnesses. Despite the obvious practical difficulties in obtaining the evidence of such witnesses, a party cannot later seek to have such material admitted as additional evidence unavailable at trial unless it has raised the issue with the Trial Chamber at the time. As discussed above, the requirement of due diligence is not satisfied where there is insufficient attempt to invoke such coercive measures as were at the disposal of the International Tribunal. Therefore, it cannot be said that the evidence of these three witnesses was not available at trial.

61. The Appeals Chamber is unable to determine whether the evidence of witness D.D. was available at trial or not, as it does not know his true identity. The Chamber will therefore assume that this evidence was not available and will consider in a later part of this Decision whether it would be in the interests of justice to admit such evidence.

62. The second category is a substantial one. It relates to potential witnesses who were known to the Defence at the time of trial but who are said to have been intimidated by persons in authority in the former Yugoslavia. These include witness D.J. (and the Annex of 15 photographs), D.S., D.B., Bosko Dragicevic, Dusan Babic, D.V., Vaso Mijatovic, P.Q., Bosana (or Bozana) Grahovac, Stoja Coprka, Milos Preradovic, Brane Bolta, Mile Cavic, Milan Vlacina, Milan Andjic, D.T.Z., D.R.M., Mladen Majkic, Dusan (or Dule) Jankovic, Milorad Tadic, Simo Kevic and D.S.D. Again, in the absence of any evidence to demonstrate that attempts were made to obtain such protection for these witnesses as the International Tribunal could offer, the Appeals Chamber finds that reasonable diligence was not exercised. Consequently, the testimony of these witnesses cannot be said to have been unavailable at trial.

63. The third category concerns potential witnesses who were known to the Defence but who could not be located at the time of trial. They include Milka Saric, D.O., and Milan Grgic. The Appellant claims that all three of these witnesses had fled abroad and could not be located. In view of the difficulties facing defence counsel in locating such witnesses, the Appeals Chamber finds that the Appellant has provided sufficient indication that these witnesses were not available at the time of trial. The Appeals Chamber will examine in a later part of this Decision whether it would be in the interests of justice to admit their evidence.

r. Material not called by Defence counsel

64. This large category of items includes the testimony of potential witnesses Miroslav Cvijic, Srdjan Staletovic, Dara Jankovic, Slavica Tadic, Pero Curguz, Radoslavka Vidovic, Risto Vokic, Mladen Tadic, Mira Tadic (on matters other than those on which she did testify), Ostoja Trebovac, Slavko Svraka and Dragan Radakovic. In addition, the Appellant seeks to admit the expert evidence of Dr. Dusan Dunjic, which was obtained prior to trial, plus substantial amounts of documentary evidence under this category, including Annexes 12, 13, 15, 16, 18, 29, 33, 35 and II/3, together with video-tape AB17.

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65. As indicated above, when evidence was not called because of the advice of defence counsel in charge at the time, it cannot be right for the Appeals Chamber to admit additional evidence in such a case, even if it were to disagree with the advice given by counsel. The unity of identity between client and counsel is indispensable to the workings of the International Tribunal. If counsel acted despite the wishes of the Appellant, in the absence of protest at the time, and barring special circumstances which do not appear, the latter must be taken to have acquiesced, even if he did so reluctantly [FN36]. An exception applies where there is some lurking doubt that injustice may have been caused to the accused by gross professional incompetence. Such a case has not been made out by the Appellant. Consequently, it cannot be said that the witnesses and material were not available to the Appellant despite the exercise of due diligence.

66. Also in this category are the 11 expert witnesses whom the Appellant would now like to call. One, Thomas Deichmann, testified at trial. Barring exceptional circumstances, which are not made out in this case, it is difficult to think of circumstances which would show that expert witnesses were not available to be called at trial despite the exercise of reasonable diligence. The evidence of these experts, and the related documents in Annexes 36, 37, II/1a, II/1b and II/2, cannot be said to have been unavailable at trial for the purposes of Rule 115.

7. Testimony of Dragan Opacic

67. The Appellant also seeks to recall this witness, who originally testified as witness L for the Prosecution. The testimony of this witness was discredited, largely as a result of the efforts of the Defence counsel at the time, and the Prosecution asked the Trial Chamber to disregard the evidence in its entirety. The matter is also dealt with in the Judgement [FN37].

68. The evidence of this witness was available to the Appellant at trial and therefore it cannot be admitted as additional evidence under Rule 115.

G. Interests of Justice

69. As mentioned above, the Appeals Chamber finds that the following items were not available at trial within the meaning of Rule 115 (A):

- OSCE voting registration details for Municipality Elections in autumn 1997;

- witnesses Ernad Besirevic, Sasa Maric, Vlado Krckovski, Vinka Gajic, Slobidan Zrnic, Drago Pesevic, Slobodan Malbasic, Zivko Pusac, Vladimir Maric, Mile Ratkovic, Mladen Zgonjanin, Dragoje Cavic and witness XX, together with his medical records;

- the confidential document from the United States Department of State;

- witnesses Milka Saric, D.O., and Milan Grgic.

In relation to these items and, for the reasons given in paragraph 61 above, the evidence of witness D.D., it will accordingly be necessary to consider the operation of the criteria relating to the interests of justice.

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70. If the Appeals Chamber at this stage authorises the presentation of additional evidence, it will be for the Chamber at a later stage to decide whether the evidence discloses an 'error of fact which has occasioned a miscarriage of justice' within the meaning of Article 25, paragraph 1(b), of the Statute. At this stage, the Chamber cannot pre-empt this decision by definitively deciding that the proposed evidence does or does not disclose 'an error of fact which has occasioned a miscarriage of justice'.

71. The task of the Appeals Chamber at this stage is to apply the somewhat more flexible formula of Rule 115 of the Rules, which requires the Chamber to ''authorise the presentation of such evidence if it considers that the interests of justice so require'. For the purposes of this case, the Chamber considers that the interests of justice require admission only if:

(a) the evidence is relevant to a material issue;

(b) the evidence is credible; and

(c) the evidence is such that it would probably show that the conviction was unsafe.

72. The Appeals Chamber would only add that, in applying these criteria, account has to be taken of the principle of finality of decisions. As mentioned above, the principle would not operate to prevent the admission of evidence that would assist in determining whether there could have been a miscarriage of justice. But clearly the principle does suggest a limit to the admissibility of additional evidence at the appellate stage.

73. The Appeals Chamber also considers that, in applying these criteria, any doubt should be resolved in favour of the Appellant in accordance with the principle in dubio pro reo.

74. However, even taking that principle into account, the Appeals Chamber is not satisfied that any material which was not available at trial is required by the interests of justice to be presented at the hearing of the appeal. The Chamber does not consider that it is necessary to give details of the application of the criteria in relation to each of the various pieces of evidence. The importance of avoiding the risk of prejudgement in relation to other aspects of the case is also evident.

Dated this fifteenth day of October 1998

[FN1]..

[FN2]..

[FN3]..

[FN4]..

[FN5]..

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