041

SCSL-2003-08-PT-041

421-693

421

THE SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBERS

Before: Judge Thompson, Presiding Judge
Judge Itoe
Judge Boutet

Registrar: Robin Vincent

Date: 26th June 2003

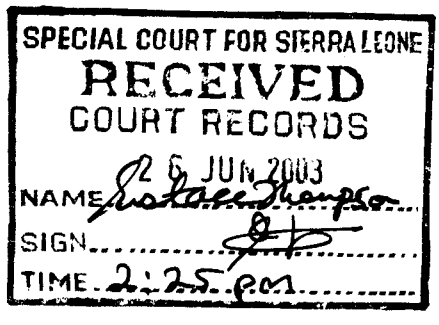
The Prosecutor

V.

Sam Hinga Norman

SCSL-2003-08-PT

PRELIMINARY MOTION BASED ON LACK OF JURISDICTION: JUDICIAL INDEPENDENCE



Office of the Prosecutor:

David Crane

Luc Cote

Defence Counsel

James Blyden Jenkins-Johnston

Sulaiman Banja Tejan-Sie

I. INTRODUCTION

1. The accused is charged on an indictment with the following crimes under the *Statute of the Special Court for Sierra Leone* (the *Statute*):

COUNTS 1-2: UNLAWFUL KILLINGS
Count 1: Murder, a **CRIME AGAINST HUMANITY,** punishable under Article 2.a. of the Statute of the Court;
Count 2: Violence to life, health and physical or mental well-being of persons, in particular murder, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II,** punishable under Article 3.a. of the Statute.

Count 3-4: PHYSICAL VIOLENCE AND MENTAL SUFFERING
Count 3: Inhumane Acts, a CRIME AGAINST HUMANITY, punishable under Article 2.i. of the Statute;
Count 4: Violence to life, health and physical or mental well-being of persons, in particular cruel treatment, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II,** punishable under Article 3.a. of Statute.

Count 5: LOOTING AND BURNING
Count 5: Pillage, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II,** punishable under Article 3.f. of the Statute.

COUNTS 6-7: TERRORIZING THE CIVILIAN POPULATION and COLLECTIVE PUNISHMENTS
COUNT 6: Acts of Terrorism, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II,** punishable under Article 3.d. of the Statute.
Count 7: Collective Punishments, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II,** punishable under Article 3.b. of the Statute.

COUNT 8: USE OF CHILD SOLDIERS
Count 8: Conscripting or enlisting children under the age of 15 years into armed force or groups or using them to participate actively in hostilities, an **OTHER SERIOUS VIOLATION OF INTERNATIONAL HUMANITARIAN LAW,** punishable under Article 4.c. of the Statute.

2. Pursuant to Rule 72 of the *Rules of Procedure and Evidence* (the *Rules*) the accused objects to the jurisdiction of the Special Court for Sierra Leone (the Court) on the grounds that the Court lacks sufficient guarantees of judicial independence as its funding arrangements create a legitimate fear of political interference by economic manipulation.

II. FACTS

3. On 16 January 2002 the Government of Sierra Leone and the Secretary-General of the United Nations concluded an agreement creating this Court. Though the conflict giving rise to the crimes allegedly within this Court's jurisdiction had begun in 1991, the agreement leading to the Court's creation had its genesis in Security Council Resolution 1315(2000)[1] of 14 August 2000 in which the Security Council expressed deep concern over "very serious crimes committed" in Sierra Leone and then requested the Secretary-General negotiate an agreement creating a "special court" having jurisdiction over "those who bear the greatest responsibility" for the crimes to which the resolution previously referred. On 4 October 2000 the Secretary-General submitted a report to the Security Council[2] which included a draft agreement and statute for the proposed court and which addressed, among other things, the structure and funding of the Court. The Secretary-General commented that a "special court based on voluntary contributions would be neither viable nor sustainable" and that "the only realistic solution is financing through assessed contributions. This would produce a viable and sustainable financial mechanism affording secure and continuous funding."[3] The Secretary-General's report was followed by a report from the Security Council[4] dated 16 October 2000 on the UN mission in Sierra Leone. The report took note of President Kabbah's recommendation the Special Court be set up soon and that it be funded from assessed (rather than voluntary) contributions from UN member States[5].

4. In a 22 December 2000 letter to the Secretary-General, the President of the Security Council suggested the establishment of a "management or oversight committee" for the Court and addressed funding issues, in particular the Security Council's insistence that the Court be funded by voluntary contributions despite the resistance of the Secretary-General and government of Sierra Leone. In a 12 January 2001 reply to the President of the Security Council's letter, the Secretary-General once again pointed out the problems with such a funding arrangement but agreed the committee suggested by the Security Council should be created. Though the government of Sierra Leone agreed in principle to the creation of the Court on 9 February 2001 lack of funds prevented conclusion of the agreement creating the Court until 16 January 2002.

5. As currently constituted and despite the misgivings of the parties to the agreement creating it, the Special Court depends on voluntary contributions from States for its funding. The practice in this regard

---

[1] attached as annex 1
[2] attached as annex 2.
[3] annex 2, paragraphs 70 & 71.
[4] attached as annex 3.
[5] annex 3, paragraph 48.

has been that States pledge amounts for each year of the Court's operations and are then requested to meet those pledges with actual payments. States do not always pay the money pledged. According to the latest information available from the Registrar[6], donors to the court have pledged and given the following amounts (in $US) in relation to the Court's second year budget:

Country	Pledges	Amount	Date Received		Outstanding Pledges
Canada	$450,000.00	$324,740.19			$125,259.81
Cyprus	15,000.00	15,000.00	14/03/2003		-
Czech Republic	100,000.00				100,000.00
Denmark	120,000.00	145,074.71			
Ireland	215,000.00	250,951.04	14/03/2003		
Lesotho	30,000.00				30,000.00
Luxembourg		24,580.00	14/03/2003		
Mauritius	1,500.00				1,500.00
Netherlands	3,800,000.00				3,800,000.00
Nigeria		90,000.00	14/03/2003	*	
South Africa	10,000.00				10,000.00
United Kingdom	2,800,000.00	3,227,980.00	28/05/2003		
United States	5,000,000.00	5,000,000.00	14/03/2003		-
Germany	500,000.00	500,000.00	Year 2002		-
Norway	500,000.00	499,970.00	Year 2002		
Cyprus		15,000.00	22/04/2003		
Luxemburg		27,347.50	28/05/2003		
Finland (1)	150,000.00				150,000.00
	$13,691,500.00	$10,120,643.44			$4,216,759.81

*Nigeria contributed $100, 000.00 but its $10, 000.00 pledge for the Court's first year of operations had not been paid.
(1) Finland's contribution is a grant.

6. The management committee of the Court has final say with respect to the budget of the Court for each fiscal year which starts in July of each year. The Registrar has submitted a budget requesting $US33 million funding for the Court's operations in 2003-04. At the moment the Court has pledges from donor States for its second year amounting to $US13, 691, 500. According to the information available from the Registrar's office, $US10, 120, 643.44 of those pledges have been paid.

[6] An Excel spreadsheet forwarded to the Defence Office on 16 June 2003 – the e-mail message forwarding the information is attached as annex 4.

7. The Court's management committee consists of representatives from Canada (the committee's chair), the United Kingdom, the United States, the Netherlands, Nigeria, Lesotho, Sierra Leone.

8. The accused submits the management committee, Registrar and Chambers view the completion of trials within the Court's 3-year mandate as their top priority. In the Court's promotional brochure, the President of the Court notes "we have a three year mandate and have adopted some original rules and procedures to ensure that our trials are fair, without being excessively delayed or expensive."[7]

9. According to information received from the Defence Office of the Special Court, the judges of the Court are paid according to a one-year contract which they enter into for the term of each budgetary year. The form of the contract and its terms are similar to contracts for other staff of the Court. In accordance with Article 2.4 of the *Agreement*, and despite the shorter length of their employment contracts, the judges of the Court are appointed for a three-year term and are eligible for re-appointment.

III. LAW

A. THE GUARANTEE OF AN INDEPENDENT TRIBUNAL

1) Under International Law

10. Every significant international human rights instrument guarantees an individual the right to an independent tribunal to determine the charge against him or her. Article 10 of the *Universal Declaration of Human Rights*, article 14 of the *International Covenant on Civil and Political Rights*, article 6 of the *European Convention for the Protection of Human Rights*, article 8 of the *American Convention on Human Rights*, and article 7 of the *African Charter on Human and Peoples' Rights*[8] differ in their language but agree that an impartial and/or independent tribunal is a minimum human rights guarantee. In addition, the *Basic Principles on the Independence of the* Judiciary[9] (endorsed by the General Assembly in resolution 40/32 of 29 November 1985 and resolution 40/146 of 13 December 1985) creates a duty on the part of every state to "respect and observe the independence of the judiciary" and "to provide adequate resources to enable the judiciary to properly perform its functions". As the appellate chamber of the ICTY in *Furundzija* points out[10], this right is "an integral component of the requirement that an accused should have a fair trial" – a right guaranteed by Article 17 of this Court's Statute.

---

[7] See annex 5 at p.1.
[8] annexes 6-10 respectively
[9] attached as annex 11.
[10] annex 12 at paragraph 177.

11. Independence and impartiality are closely linked but not synonymous concepts. Impartiality is a specific concern relating to individual judges and parties. It concerns traits unique to individuals or situations. Independence, on the other hand, concerns a status or relationship to others. Inquiries into the impartiality will usually focus on actual relationships (family, financial, etc.) between members of a tribunal and particular parties before that tribunal. Inquiries into judicial independence will usually focus on the formal or institutional relationships whether between an individual member of the tribunal and others or the tribunal as a whole. Thus the appellate chamber of the ICTR in the application for revision in *Barayagwiza* pointed out[11] that the Attorney General for Rwanda's threats that his government would not cooperate with the tribunal should its original decision to release the accused stand were not properly considered by the tribunal if it were to remain independent. The appellate chamber stressed,

> the Tribunal is an *independent* body, whose decisions are based solely on justice and law. If its decision in any case should be followed by non-cooperation, that consequence would be a matter for the Security Council [emphasis added].

12. Both concepts are in turn linked to the concept of apprehended bias. The European Court of Human Rights has held that an individual's right under Article 6(1) of the *European Convention* is violated where the public is "reasonably entitled" to entertain doubts as to the independence or impartiality of a tribunal, where there are "legitimate grounds for fearing" the tribunal is not independent or impartial, where "there are ascertainable facts that may raise doubts" as to independence or impartiality, or where such doubts can be "objectively justified"[12]. In the international context, the appellate chamber of the ICTY in *Furundzija* echoed this language when it held that there is a "general rule" requiring that a "Judge should not only be subjectively free from bias, but also . . . there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias".

2) Guarantees of Independence Before the ICTY, ICTR and ICC

---

[11] annex 13 at paragraph 34. See also the Declaration of Judge Nieto-Navia at paragraphs 1-18 and in particular paragraph 9:

> The concept of "the separation of powers" plays a central role in national jurisdictions. This concept ensures that a clear division is maintained between the functions of the legislature, judiciary and executive and provides that "one branch is not permitted to encroach on the domain or exercise the powers of another branch". It ensures that the judiciary maintains a role apart from political considerations and safeguards its independence.

Judge Nieto-Navia went on to hold that the same principle with respect to judicial independence from State influence applies in the international criminal tribunals.

[12] B. Emmerson & A. Ashworth, *Human Rights and Criminal Justice* (London: Sweet & Maxwell, 2001) at p.367-73. Attached as annex 14.

13. The terms of the statutes and rules of the ICTY and ICTR are identical on issues relevant to the judicial independence argument raised by the accused. Articles 13*bis* and 13*ter* of the statutes provide for the election of permanent and *ad litem* judges by the General Assembly. Article 32 of the ICTY Statute and Article 30 of the ICTR Statute state that any expenses of the tribunals shall be borne by the regular budget of the UN in accordance with Article 17 of its Charter by which the General Assembly apportions expenses among the member States. In practice this means that the budget for each tribunal is subsumed within the larger UN budget paid for by the contributions of all member States. While States may choose to withhold their apportioned contribution to the UN's overall budget they would have no ability to withhold contribution to one or both tribunals specifically. There is a marked contrast between the financial and administrative structures of these tribunals and the Special Court.

14. Part 4 of the *Rome Statute* of the ICC addresses the qualification, appointment, disqualification and payment of the staff of that court including the judiciary. Judges are elected by State parties to the ICC's treaty from a list of qualified candidates submitted by State parties. Article 40 mandates that judges "shall be independent in the performance of their functions". Article 41, supplemented by Rule 34 of the court's Rules of Procedure and Evidence, prohibits a judge from sitting on a case where his or her impartiality may be questioned and empowers a majority of the court's judges to determine the qualification of a judge where such an allegation is made. Although there is a limited exception[13], judges are only permitted to serve for one, nine-year, term.

15. While it has legislative, financial and administrative powers, the Assembly of States Parties has no power of, or realistic opportunity for, influence over the judiciary of the ICC. Article 112 of the statute limits the Assembly's powers over the court to exclude any direct involvement with the judiciary. More importantly, the procedure for the election of judges and the limitation on their term of service under Article 36 create an institutional barrier to any influence being exerted over serving judges. In general, judges are elected to one nine-year term and their salaries are fixed during that term. The Assembly cannot alter the terms of service of the judges during their term and therefore has very little leverage with them within the institutional structure set out by the ICC's statute. Article 49 of the statute gives the court's Assembly of States Parties the power to set staff, including judicial, salaries but prohibits their reduction during the staff member's term of office.

B. THE LACK OF INSTITUTIONAL INDEPENDENCE OF THE JUDICIARY OF THE SPECIAL COURT FOR SIERRA LEONE

[13] see Article 36 of the *Rome Statute*.

16. As stated above, the administrative and financial structure of this Court stands in stark contrast to that of the other international criminal tribunals. Whatever this Court's *Statute*, *Agreement* and other governing documents say about the appointment of judges and their independence[14], the accused submits that Articles 6 and 7 of the *Agreement* create an opportunity for pressure to be brought to bear on all organs of the Court by States who voluntarily donate to the Court's operating budget, particularly those States who have representatives on the Court's Management Committee. Those Articles read:

Article 6: Expenses of the Special Court

> The expenses of the Special 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 following 24 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 three years 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 Special Court.

Article 7: Management Committee

> It is the understanding of the Parties that interested States will establish a management committee to assist the Secretary-General in obtaining adequate funding, and provide advice and policy direction on all non-judicial aspects of the operation of the Court, including questions of efficiency, and to perform other functions as agreed by interested States. The management committee shall consist of important contributors to the Special Court. The Government of Sierra Leone and the Secretary-General will also participate in the management committee.

As mentioned above, the Management Committee approves the Court's yearly budget from which all operating expenses, including judicial salaries, are paid.

---

[14] Article 12(1) of the *Statute* states that the Court's "Chambers shall be composed of . . . independent judges". Article 13(1) of the *Statute* requires that judges of the Court "be persons of high moral character, impartiality and integrity" and that "they shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source". Article 13(3) states that each judge shall be appointed for 3 years and will be eligible for re-appointment at the end of his term.

Article 2(2) of the *Agreement* dictates that the Chambers "shall be composed of no fewer than eight independent judges" and describes how those judges are to be appointed: in the Trial Chamber, one by the Government of Sierra Leone and two by the Secretary-General of the UN from candidates nominated by States, "in particular the member States of the Economic Community of West African States and the Commonwealth"; and, in the Appeals Chamber, two by the government of Sierra Leone and three by the Secretary General in the same manner as those appointed by him to the Trial Chamber. Article 6 of the *Agreement* requires that the expenses of the Court be paid from voluntary contributions from the international community with provision for the Secretary General and Security Council of the UN to "explore alternated means of financing" should those contributions prove inadequate

Rule 14(A) of the Court's *Rules* require judges take an oath of office pledging their independence and impartiality. Rule 15(A) prohibits a judge from sitting "in any case in which he has a personal interest or concerning which he has or has had any personal association which might affect his impartiality"

17. The primary concern of the accused is this Court's reliance on voluntary contributions to pay judicial salaries coupled with donor States ability to approve those salaries year-to-year through the Court's management committee. There is nothing in the Court's structure which prevents donor States communicating their displeasure with judicial decisions to the Chambers or the public at large and then acting on that displeasure when it comes time to pledging or paying contributions to the Court. The latter action will, in turn, affect the Court's ability to pay its judges' salaries. Furthermore, the management committee exerts a great degree of *de facto* control over every aspect of the Court's organization through its power to approve a budget proposed by the Registry or send it back for revision, potentially with specific instructions as to what may be changed. The only safeguard for judicial independence in this arrangement is the goodwill of donor States. The experience of the ICTR in the *Barayagwiza* case suggests the voluntary action of States in matters as politically-charged as the prosecution of serious international crimes is far from a sufficient safeguard.

18. While its judgment is only persuasive, in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, the Canadian Supreme Court has recognized that unfettered legislative or executive control over judicial salaries inevitably compromises judicial independence. The specific issue before that court was whether provincial government legislation which reduced the salaries of judges of the provincial courts (equivalent to Magistrates Courts in England) unduly interfered with judicial independence and was therefore contrary to the Canadian Constitution's guarantee of such independence. Guided by the reality that "an unscrupulous government could utilize its authority to set judges' salaries as a vehicle to influence the course and outcome of adjudication" and that judicial independence required a "depoliticized" relationship between the judiciary and other branches of government, the Supreme Court concluded that "any changes to or freezes in judicial remuneration require prior recourse to a special process, which is independent, effective and objective, for determining judicial remuneration, to avoid the possibility of, or appearance of, political interference through economic manipulation". As a result the Supreme Court set down guidelines for the creation of judicial compensation commissions which would set judicial salaries independent of the executive or legislature and thereby preserve the institutional financial independence of provincial court judges.

19. The Supreme Court of Canada's judgment outlined above shares a common understanding among national and international tribunals of the concept of judicial independence. For example, while not

addressing directly the issue of control over judicial salaries, the ECHR in *Campbell and Fell v. U.K*[15]. ruled that a court considering its own or another tribunal's independence must consider

> the manner of appointment of its members and the duration of their term of office, *the existence of guarantees against outside pressures* and the question whether the body presents an appearance of independence [emphasis added].

Similarly, the UN Human Rights Committee's *General Comment 13* on Article 14 of the *ICCPR* asked States parties submitting reports on their compliance with that Article's guarantee of "a fair and public hearing by a competent, independent and impartial tribunal established by law" to

> specify the relevant constitutional and legislative texts which provide for the establishment of the courts and ensure that they are independent, impartial and competent, in particular with regard to the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the condition governing promotion, transfer and cessation of their functions *and the actual independence of the judiciary from the executive branch and the legislative* [emphasis added].

20. Strictly speaking, this Court is not controlled by either an executive or legislature. However, the Secretary-General, the Government of Sierra Leone, the Security Council and the Court's management committee collectively exercise the same powers as an executive AND legislative body in municipal law. The powers to determine this Court's jurisdiction, structure, administration and financing are divided between these bodies. While there are many distinctions between these bodies and a national executive or legislature, the accused submits none of those distinctions are relevant to the issue of whether or not there are sufficient objective guarantees of judicial independence. More importantly, the Court is financially dependent wholly on donor States, most of whom are represented on its management committee.

21. The accused therefore submits that the funding arrangements for paying judicial salaries insufficiently insulate the judiciary of the Court from the possibility of financial pressure. "[T]he possibility of, or appearance of, political interference through economic manipulation", to borrow from the Canadian Supreme Court, has not been avoided in the structure, administration and funding of the Court. The absolute control of finances accorded to donor States and the management committee renders the judiciary directly dependent on political forces for its salary year to year. A reasonable observer apprised of the Court's financial and administrative structure, which do not insulate the judiciary from political pressure through financial manipulation, would have legitimate grounds to fear for its independence.

[15] cited in Emmerson and Ashworth (*op cit.* footnote 11).

C. REMEDY

22. The accused submits that the lack of institutional financial independence created by the Court's current funding arrangement adversely affects the Court's jurisdiction, as that term is defined above. The argument advanced above affects directly the Court's fundamental duty to ensure each accused a fair trial. As a result, he respectfully requests that this Court declare it lacks jurisdiction over any accused and that this Court direct his immediate release from detention.

23. In the alternative, the accused requests that this Court stay proceedings against him and all other accused until sufficient guarantees of institutional financial independence are put in place and that this Court direct his immediate release from detention.

Dated at Freetown this 26th day of June 2003

James Blyden Jenkins-Johnston
Counsel for Sam Hinga Norman

Sulaiman Banja Tejan-Sie

INDEX OF ANNEXES

ANNEX 1

United Nations S/RES/1315 (2000)

Security Council

Distr.: General
14 August 2000

Resolution 1315 (2000)

Adopted by the Security Council at its 4186th meeting, on 14 August 2000

The Security Council:

Deeply concerned 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,

Commending the efforts of the Government of Sierra Leone and the Economic Community of West African States (ECOWAS) to bring lasting peace to Sierra Leone,

Noting that the Heads of State and Government of ECOWAS agreed at the 23rd Summit of the Organization in Abuja on 28 and 29 May 2000 to dispatch a regional investigation of the resumption of hostilities,

Noting also the steps taken by the Government of Sierra Leone in creating a national truth and reconciliation process, as required by Article XXVI of the Lomé Peace Agreement (S/1999/777) to contribute to the promotion of the rule of law,

Recalling that the Special Representative of the Secretary-General appended to his signature of the Lomé Agreement a statement that the United Nations holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law,

Reaffirming the importance of compliance with international humanitarian law, and *reaffirming further* that persons who commit or authorize serious violations of international humanitarian law are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law,

Recognizing that, in the particular 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,

Taking note in this regard of the letter dated 12 June 2000 from the President of Sierra Leone to the Secretary-General and the Suggested Framework attached to it (S/2000/786, annex),

Recognizing further the desire of the Government of Sierra Leone for assistance from the United Nations in establishing a strong and credible court that will meet the objectives of bringing justice and ensuring lasting peace,

Noting the report of the Secretary-General of 31 July 2000 (S/2000/751) and, in particular, *taking note* with appreciation of the steps already taken by the Secretary-General in response to the request of the Government of Sierra Leone to assist it in establishing a special court,

Noting further the negative impact of the security situation on the administration of justice in Sierra Leone and the pressing need for international cooperation to assist in strengthening the judicial system of Sierra Leone,

Acknowledging the important contribution that can be made to this effort by qualified persons from West African States, the Commonwealth, other Member States of the United Nations and international organizations, to expedite the process of bringing justice and reconciliation to Sierra Leone and the region,

Reiterating that the situation in Sierra Leone continues to constitute a threat to international peace and security in the region,

1. *Requests* the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court consistent with this resolution, and *expresses* its readiness to take further steps expeditiously upon receiving and reviewing the report of the Secretary-General referred to in paragraph 6 below;

2. *Recommends* that the subject matter jurisdiction of the special court should include notably 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;

3. *Recommends further* that the special court should have personal jurisdiction over persons who bear the greatest responsibility for the commission of the crimes referred to in paragraph 2, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone;

4. *Emphasizes* the importance of ensuring the impartiality, independence and credibility of the process, in particular with regard to the status of the judges and the prosecutors;

5. *Requests*, in this connection, that the Secretary-General, if necessary, send a team of experts to Sierra Leone as may be required to prepare the report referred to in paragraph 6 below;

6. *Requests* the Secretary-General to submit a report to the Security Council on the implementation of this resolution, in particular on his consultations and negotiations with the Government of Sierra Leone concerning the establishment of the special court, including recommendations, no later than 30 days from the date of this resolution;

7. *Requests* the Secretary-General to address in his report the questions of the temporal jurisdiction of the special 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 Criminal Tribunals for the Former Yugoslavia and Rwanda or other effective options, 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;

8. *Requests* the Secretary-General to include recommendations on the following:

(a) any additional agreements that may be required for the provision of the international assistance which will be necessary for the establishment and functioning of the special court;

(b) the level of participation, support and technical assistance of qualified persons from Member States of the United Nations, including in particular, member States of ECOWAS and the Commonwealth, and from the United Nations Mission in Sierra Leone that will be necessary for the efficient, independent and impartial functioning of the special court;

(c) 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;

(d) whether the special court could receive, as necessary and feasible, expertise and advice from the International Criminal Tribunals for the Former Yugoslavia and Rwanda;

9. *Decides* to remain actively seized of the matter.

ANNEX 2

438

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

00-66177 (E) 041000

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.

[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 3

467 A

United Nations S/2000/992

Security Council

Distr.: General
16 October 2000

Original: English

Comment: <<ODS JOB NO>>N0069132E<<ODS JOB NO>> <<ODS DOC SYMBOL1>>S/2000/992<<ODS DOC SYMBOL1>> <<ODS DOC SYMBOL2>><<ODS DOC SYMBOL2>>

Report of the Security Council mission to Sierra Leone

I. Introduction

1. By his letter dated 20 September 2000 (S/2000/886), the President of the Security Council informed the Secretary-General that the Council had decided to send a mission to Sierra Leone from 7 to 14 October. The terms of reference of the mission are annexed to that letter.

2. Following consultations among the members of the Security Council, it was decided that the composition of the mission would be as follows:

United Kingdom of Great Britain and Northern Ireland (Ambassador Jeremy Greenstock, head of mission)

Bangladesh (Ambassador Anwarul Karim Chowdhury, Chairman of the Security Council Committee established pursuant to resolution 1132 (1997) concerning Sierra Leone)

Canada (Ambassador Paul Heinbecker)

China (Ambassador Wang Yingfan)

France (Ambassador Yves Doutriaux)

Jamaica (Ambassador Patricia Durrant)

Mali (Ambassador Moctar Ouane)

Netherlands (Ambassador Peter van Walsum)

Russian Federation (Ambassador Andrei Granovsky)

Ukraine (Ambassador Volodymyr Yel'chenko)

United States of America (Ambassador James B. Cunningham)

II. Activities of the mission

3. Prior to the departure of the mission, the Security Council met informally with United Nations agencies, non-governmental organizations and representatives of Member States contributing military or civilian police personnel to the United Nations Mission in Sierra Leone (UNAMSIL). The purpose of these meetings was to hear a broad range of views on the situation in Sierra Leone and in the subregion.

00-69132 (E) 161000
0069132

Members of the Council also received briefings on the military and security situation in Sierra Leone as well as on the programme for disarmament, demobilization and reintegration. The United Nations High Commissioner for Human Rights and the United Nations High Commissioner for Refugees wrote letters to the mission before departure.

4. The mission left New York on 7 October and visited Guinea (8, 9 and 12 October), Sierra Leone (9-12 October), Mali (12 and 13 October), Nigeria (13 and 14 October) and Liberia (14 October). The Special Representative of the Secretary-General, Ambassador Oluyemi Adeniji, met the mission members at Conakry and travelled with them to all points except Monrovia. In Guinea, the mission met with President Lansana Conté and members of the Guinean cabinet. The mission also met with members of the diplomatic community in Guinea and received a briefing from the representative of the Office of the United Nations High Commissioner for Refugees (UNHCR).

5. In Sierra Leone, the mission held extensive discussions with the Special Representative and senior civilian and military personnel in UNAMSIL. Members of the mission visited various locations where UNAMSIL is deployed — Lungi, Port Loko, Rogberi Junction, Masiaka, Mile 91, Kenema and Daru as well as disarmament, demobilization and reintegration facilities and camps for internally displaced persons and child combatants. The mission held meetings with President Ahmad Tejan Kabbah and senior government officials, with members of the Commission for the Consolidation of Peace, and with representatives of political parties, civil society, United Nations agencies, international non-governmental organizations and members of the diplomatic community.

6. In Mali, the mission held discussions with President Alpha Oumar Konaré, current Chairman of the Economic Community of West African States (ECOWAS), and with senior representatives of ECOWAS countries. In Nigeria, the mission met with President Olusegun Obasanjo and senior members of his Government, with the Minister of Defence and senior defence personnel, as well as with the Executive Secretary of ECOWAS, Lansana Kouyaté and representatives of ECOWAS. Finally, the mission met in Monrovia with President Charles Taylor and received a briefing from the Representative of the Secretary-General in Liberia, Felix Downes-Thomas.

III. Findings of the mission

United Nations Mission in Sierra Leone

7. In accordance with its terms of reference, the mission spent much of its time with UNAMSIL discussing the ways to ensure the full application of the Security Council resolutions on Sierra Leone and the implementation of the measures taken by the Secretary-General to enhance the effectiveness of UNAMSIL. In this regard, the mission found that UNAMSIL had begun to make marked progress after the setbacks and pressures caused by the attacks by the Revolutionary United Front (RUF) against peacekeepers and renewed fighting in May.

8. In the field the mission was impressed by the military professionalism and dedication of the peacekeepers on the ground. The mission was particularly impressed by the excellent work done by UNAMSIL battalions, often using their

own resources, to improve the lives of the people living in their area of operation. In addition to their important peacekeeping tasks, United Nations troops and observers have been voluntarily refurbishing or even starting schools, providing medical assistance, setting up orphanages, sharing food and water with the population, repairing roads and other infrastructure and — to a limited degree — helping to prepare ex-combatants for integration into the economy. In the view of the mission, contingents should be provided with the means to continue this important work through quick impact projects financed through the Trust Fund for Sierra Leone. In addition, it would be useful to deploy more civilian affairs and human rights officers to the areas where UNAMSIL units are established.

9. Members of the mission noted that different contingents had different perceptions of the mandate and tasks of UNAMSIL. To some extent, this stems from national perceptions, but it may also be linked to a lack of precision in elements of the mandate itself. In the view of UNAMSIL, it is for the leadership of the mission to streamline these perceptions into a common view of its mandate and tasks, for example, through regular internal briefings and training programmes.

10. The mission received briefings from UNAMSIL on the implementation of the measures taken by the Secretary-General to enhance the effectiveness of UNAMSIL, as recommended by the assessment team which visited the mission area from 31 May to 8 June 2000. In this regard, UNAMSIL stated that most measures recommended by the assessment team had been implemented on the ground and that, as a result, considerable progress had been made with regard to communication and coordination within the mission, as well as with United Nations agencies and non-governmental organizations. The mission considered, however, that there were still significant shortcomings in a number of areas. It was evident that, in certain cases, implementation of the recommendations of the assessment team had taken place in name but had yet to become reality. The key areas to be addressed are the continued efforts needed to achieve full integration with headquarters, better coordination of the logistic effort and the arrangements for contingent-owned equipment. The mission can confirm that progress is being made. Some areas, however, not least the equipment of troop contributors require action by United Nations Headquarters and the troop contributors themselves. The so-called wet-lease arrangements clearly also need review.

11. The withdrawal of the Indian contingent from UNAMSIL obviously constitutes a serious loss. These very professional soldiers have made an important contribution to UNAMSIL and to civilian life in their areas of deployment. Members of the mission consider that their replacement should be carried out without leaving a security vacuum that could be exploited by RUF. Freedom of movement on the road from Kenema to Daru would facilitate the handover to incoming battalions but would raise the numbers required in that area.

12. The mission noted that the civilian components of UNAMSIL have also made important strides in their work with regard to coordination with their military colleagues. They are understaffed, however. Their staffing should be brought up to authorized levels so that they can contribute fully to the overall work of UNAMSIL, in particular in the areas of human rights, public information and civil affairs.

13. There was general agreement among the mission's interlocutors that the strength of the force needed to be increased in order to deploy in strength throughout Sierra Leone, including the border with Liberia and the diamond-

producing areas. According to several senior military officers in UNAMSIL, this could be done under the terms of the current mandate of UNAMSIL. Other senior defence interlocutors, including the Nigerian Minister of Defence, argued for a more robust mandate. President Obasanjo, as well as Mr. Kouyaté, emphasized that ECOWAS countries stood ready to provide the necessary troops. In the case of Nigeria, such troops could include those units currently being trained and upgraded through the bilateral assistance of the United States of America, although the Nigerian Minister of Defence informed the mission that these units might be used for other purposes, as well as to relieve or augment the number of units currently serving in UNAMSIL, or as part of a mission authorized by ECOWAS. At the same time, the Government of Nigeria was working to procure the necessary equipment to bring its units in UNAMSIL to the required levels of equipment and support. However, this was a slow process which required significant resources.

14. In this regard, President Obasanjo informed the mission that he had made it clear to RUF and its supporters that he was prepared, if necessary, to send Nigerian troops to take over the diamond zones in Sierra Leone. The death of any soldier would, however, be taken extremely seriously by Nigeria. He believed that any such deployment of Nigerian troops would require air cover.

15. President Taylor said that the best way forward would be to revisit the Lomé Agreement. In addition, he felt that a government of national unity should be set up after President Kabbah's term expires. Security in Sierra Leone should be the responsibility of UNAMSIL only. ECOWAS troops should deploy into the diamond areas as soon as possible; it was not necessary to wait for the new troops that were being trained with the assistance of the United States of America. It was important that UNAMSIL stay neutral, only using force when provoked. Once UNAMSIL was deployed, all armed groups in Sierra Leone, including the army, should be disarmed and demobilized. In due course, ex-combatants should be able to apply for the new Sierra Leonean army.

16. Mr. Kouyaté provided members of the mission with a comprehensive assessment of the situation in Sierra Leone and the region. In the view of ECOWAS, the situation in Sierra Leone required a continuation of the two-track approach of military pressure on RUF and, at the same time, a dialogue to convince them to demobilize and cooperate. The alternative to this approach would be military action to seize control of RUF-held territory. To implement the two-track approach, it would be necessary to increase the strength of UNAMSIL, to which end the ECOWAS member States would be ready to contribute troops. With regard to the second, political track, there was a need to establish and maintain a dialogue with the RUF leadership.

Sierra Leone

17. During the mission's meeting with President Kabbah, he and members of his cabinet presented the views of the Government on the areas covered by the terms of reference of the mission. The political aim of the Government was to establish and maintain a free, democratic, independent and united country that was politically and economically stable and sustainable. To achieve these aims, the Government intended to work closely with UNAMSIL and its regional partners.

18. The Government expressed its full support for the draft resolution on UNAMSIL (S/2000/860) and expressed the hope that UNAMSIL would soon receive further well-trained and well-equipped troops, as well as additional command, planning and support elements. The Government would be prepared, with international assistance, to extend democratic and civil administration structures across Sierra Leone. In this regard, it has recently passed legislation and established a government body to fight corruption.

19. The Government briefed the mission on its ambitious plan for the training and equipping, with international assistance, of its armed forces. The aim of the Government was to develop, within a short period, a capacity to extend security more broadly across the country and to exert strong military pressure on RUF. This would depend, to a large extent, on the Government's ability to sustain and support its troops and to provide the necessary leadership. In this particular briefing, members of the mission noted that the Government appeared to place relatively greater emphasis on military pressure on RUF rather than on pursuing a political process. The Government's approach clearly depended strongly on the continued presence of UNAMSIL in the country. The Government had also developed plans to incorporate the Civil Defence Force into a territorial defence force which would serve as an auxiliary to the army. Mission members commented that this would require careful political and military coordination.

20. The Inspector-General of Police briefed the mission. The rehabilitation of the civilian police in Sierra Leone, starting virtually from scratch, was hampered by a serious lack of resources, infrastructure and lack of access to RUF-held areas. However, some progress had been made towards an accountable police force operating on the basis of community policing. The Sierra Leonean police force was working closely with the UNAMSIL civilian police and human rights component.

21. While visiting locations outside Freetown, members of the mission were struck by the deep desire of Sierra Leoneans to lead a normal life in peace and by their commitment to that objective. There also appeared to be a need for the Government in Freetown to establish stronger links with regional and local government structures in areas to which it had access. In Freetown, the mission met with leaders of the 17 political parties in Sierra Leone, the professed desire of which for national unity was not matched by concrete ideas to develop this in practice.

Revolutionary United Front

22. The mission heard a range of views on the current strength and intentions of RUF. The prevailing analysis was that RUF is divided into several groups: it was not certain that its commanders would respect the political leadership of the newly appointed interim leader of RUF, Issa Sessay. Many interlocutors felt that a significant portion of the rank and file of RUF would be willing to disarm but were not allowed to do so by their commanders, who often used brutal methods, including execution, to prevent fighters, including children, from leaving.

23. Most of the mission's interlocutors, including those at the most senior levels, had no doubt that President Taylor exercised strong influence, even direct control, over RUF. In the assessment of many, the main objective of RUF was to maintain control of the diamond-producing areas. Some suspected a continuing latent ambition to seize power by force, although most believed that the imprisonment of

Foday Sankoh had dulled this aspiration and that the presence of UNAMSIL was serving as a deterrent. However, recent redeployments of RUF within Sierra Leone were reportedly linked to incursions into Guinea with the aim of creating instability there. Few doubted that rebels might attempt to take advantage of any power or security vacuum in the west of Sierra Leone.

24. The mission was told of a number of recent contacts with RUF by regional leaders, the ECOWAS secretariat and the UNAMSIL military leadership, as well as contacts by UNAMSIL patrols in the field. Most of the mission's interlocutors, including regional leaders, considered that contacts with RUF should be stepped up while fighting remained at a low level, with a view to establishing a proper dialogue.

25. President Obasanjo did not conceal his view that President Taylor, with whom he would ideally wish to cooperate, was the most difficult factor in the region and exercised control over RUF. It would be important to use a mixture of dialogue (not negotiations, President Obasanjo said, but discussions to build their confidence) and the show of credible force to make RUF demobilize and cooperate with a view towards peace. This would require the transformation of RUF into a political party, for which it would need assistance. In his view, members of RUF would be ready to disarm. To help maintain contact with RUF, President Obasanjo suggested that UNAMSIL establish a small liaison office in Monrovia. This deserves consideration.

26. President Obasanjo informed the mission that he had recently been in touch with RUF. Although the interim leader, Issa Sessay, was present, "Colonel" Gbao and Gibril Massaquoi had been the main spokesmen. RUF had indicated that it would disarm after ECOWAS troops within UNAMSIL were deployed into the diamond areas.

27. In President Taylor's view, most members of RUF wanted peace and its new leadership was prepared to allow the deployment of peacekeepers into its areas and to return United Nations weapons and equipment. President Taylor said that he would be ready to facilitate a meeting to obtain a ceasefire, which could be held at Bamako or Abuja. Following a ceasefire, UNAMSIL, preferably ECOWAS contingents, would be expected to deploy into RUF areas and disarm its combatants. Since RUF had already formed a political party, it should now be encouraged to follow the political path. However, the bulk of the former political leadership was in jail. Therefore, a rapid investigation was needed to determine who was liable for prosecution.

28. In this regard, Mr. Kouyaté said his contacts with RUF indicated that it might be ready to commence a political dialogue. However, it claimed that this would only be possible if the political cadre of RUF were released from prison in Freetown and if funds were made available for their travel to a venue outside Sierra Leone for discussions. Mr. Kouyaté and others made clear that the participation of Foday Sankoh could not in any way be considered. ECOWAS believed that the release of prisoners could not be a condition for talks since RUF had designated an interim leader. Furthermore, Freetown would be the best place to hold meetings. ECOWAS was considering organizing a meeting of the Joint Implementation Committee set up under the Lomé Agreement. It was also hoped that ECOWAS would soon reconvene its committee on a ceasefire for Sierra Leone, which would work towards the earliest possible conclusion of a formal ceasefire agreement.

29. It was the understanding of the Government of Sierra Leone that the Lomé Agreement would require a review, in particular with regard to the participation of RUF in government or public office. Despite the briefing mentioned in paragraph 19 above, the Government overall appeared to remain committed to a two-track approach. This would include maintaining strong military pressure on RUF through the progressive deployment of the Sierra Leone Army and through the presence of UNAMSIL. At the same time, the Government indicated that it would keep open the possibility of contact with RUF, as well as of RUF participation in the political process in due course after it had disarmed and demobilized completely. Also, the Government did not preclude the participation of RUF ex-combatants in the new armed forces of the country, which are being created and trained with international assistance.

30. The view was firmly and frequently expressed within Sierra Leone that the cause of many of the country's problems lay in the support provided to RUF by President Taylor, motivated partly by his own political and security concerns and partly by his interest in profits from diamonds mined in Sierra Leone. The majority of the mission's interlocutors in Sierra Leone appealed to the international community to make every effort to dissuade President Taylor from supporting RUF and causing unrest in the subregion. President Taylor later vigorously denied these activities (see para. 43 below).

31. The mission visited several demobilization camps and held discussions with representatives of the National Commission on Disarmament, Demobilization and Reintegration and the National Commission for Resettlement, Rehabilitation and Reconstruction on the programme of disarmament, demobilization and reintegration. Members of the mission concluded that the programme was a vital element in the peace process. They noted, however, that there was considerable room for improvement in the management and execution of the programme, in particular in the area of reintegration. The absence of viable reintegration plans and programmes had led to the overcrowding of disarmament, demobilization and reintegration camps, which was compounded by the large numbers of dependants that accompanied ex-combatants. Members of the mission suggested enhancing the role of UNAMSIL in the programme, within the limits of its mandate and bearing in mind the Government's ownership of the programme.

Elections

32. President Kabbah informed the mission of his intention to organize elections towards the end of 2001. His present term would expire in February 2001 and, according to the Constitution of Sierra Leone, could be extended by parliament for six months. At the same time, various elements of Sierra Leonean society, United Nations agencies and non-governmental organizations, as well as several of the mission's interlocutors in the region, expressed serious doubts that the environment in Sierra Leone would permit the holding of free and fair elections. Many therefore preferred to see "peace before elections". In this regard, President Obasanjo informed the mission that some Sierra Leonean contacts had expressed to him the need for a three-year transitional government before elections could be held.

Regional dimensions of the crisis

33. From the outset of the mission, when the members were briefed by the diplomatic community and United Nations agencies in Conakry, it became clear that the impact of the conflict in Sierra Leone on the situation in the region was increasing alarmingly. The mission heard from the Presidents whom they met the unanimous message that they were deeply disturbed by the deterioration and were keenly aware of the risks posed by a further spillover of the conflict in Sierra Leone, in particular to Guinea. In their meetings with the mission, the President and Government of Guinea showed deep concern about the attacks from Liberia and Sierra Leone, which had led to the deaths of hundreds of Guineans. In the view of President Conté, echoed subsequently by President Obasanjo, the destabilization of the subregion was being caused by Liberia, with the complicity of others in the region. He denied that Guinea had ever supported Liberian dissidents and he requested that the international community take steps to dissuade President Taylor from this course of action. In his view, there should be no negotiations with the rebels; the best approach would be to defeat them militarily.

34. President Conté welcomed the decision in principle of ECOWAS to deploy troops on his borders, but noted that resource constraints would hamper the implementation of that decision. Guinea therefore suggested that the United Nations assist in their deployment. The establishment of a buffer zone would be an alternative. When asked which role the Mano River Union could play in the conflict, the President answered that it was of little value when two of its member States were in conflict with the third.

35. President Obasanjo suggested that bilateral assistance in providing security along the borders could come from Nigeria and Mali, which would require support from the United Nations. ECOWAS was considering placing observers on the border, as well as a maritime contingent. This could perhaps also be done by the United Nations. He had counselled President Conté to give priority to internal reconciliation. It was vital for the international community to support Guinea since a breakdown in that country would have disastrous results.

36. Within Guinea, the recent statements issued by the Government had generated negative sentiments towards Sierra Leonean and Liberian refugees in the country, the majority of whom had been absorbed without difficulty into Guinean society. The presence of refugees within its borders and the potential influx of additional refugees in the future was clearly putting a heavy strain on the scarce resources available for humanitarian assistance. UNHCR supported the relocation of refugees away from the border, at the request of the Government of Guinea, which would require resources as well as a favourable political environment in Guinea. In spite of these pressures, President Conté assured the mission that he would do his best to provide protection and security for refugees and humanitarian workers.

37. The Government of Sierra Leone, for its part, was deeply concerned that the conflict was now destabilizing the subregion, with serious humanitarian as well as political and economic consequences. They asked for outside assistance to cope with the movements of refugees and internally displaced persons. They also asked for Security Council assistance in strengthening the Mano River Union and its institutions in order to enhance its cohesiveness and the security of its member States.

38. President Konaré stressed that a regional approach needed to be taken in addressing the conflict in Sierra Leone, which also affected Guinea, Liberia and Sierra Leone. In this regard, he proposed that three steps be taken urgently, namely, (a) the establishment of a broad-based partnership involving the United Nations, ECOWAS, the Government of Sierra Leone and major players within the international community, which should formulate and implement a coordination strategy for the subregion aimed at promoting Governments' observance of democratic principles and the rule of law, as well as regional integration; (b) the international community should assist in improving the capacity of ECOWAS to address subregional and regional issues, such as the proposed regional investigation into the illegal trade in Sierra Leonean diamonds; and (c) ensuring the close involvement of the political parties and civil society in the peace efforts in Sierra Leone and other countries in the subregion. President Konaré feared that, should our collective efforts fail, the region would be at the mercy of an "internationale" of destabilization.

39. President Konaré announced three important initiatives being taken by ECOWAS to lower tensions between the Mano River Union member States, namely, (a) the stationing of an ECOWAS political representative in Freetown; (b) the convening in Abuja, on 17 October, under the auspices of President Obasanjo, of a meeting aimed at clarifying the mandate of the Committee of Six on a ceasefire prior to its dispatch to Freetown to obtain a ceasefire agreement between the concerned parties; and (c) the convening in Freetown on 23 and 24 October of a meeting of the Joint Security Committee of the Mano River Union at the ministerial level. President Konaré also announced the forthcoming dispatch of a technical assessment team to look into the deployment of ECOWAS observers along the border between Guinea and Sierra Leone, as well as the deployment of observer teams to various capitals in the region. He requested that international assistance be provided to ECOWAS in these efforts. He stated emphatically that no problem in West Africa could be solved without Nigeria, whose presence in any ECOWAS force was essential. Nigeria should be an active driving force in the region, rather than a regional policeman.

40. Mr. Kouyaté said that the extension of the conflict from Liberia to Sierra Leone and now Guinea was of great concern to ECOWAS member States. Any further extension had to be stopped, which was why ECOWAS had tried to strengthen the Mano River Union. However, there was little or no confidence among the leaders in the Union.

41. Mr. Kouyaté informed the mission of the preparations by ECOWAS to implement its decision to deploy military personnel to the Guinean borders. A small verification team would shortly be dispatched to the area to investigate the accusations and counter-accusations made by Guinea and Liberia. A team of five Malian and five Nigerian officers would thereafter travel to the region to make an assessment of the situation on the ground and of the logistic requirements for a substantial deployment. In view of the limited capacity of ECOWAS, international financial and logistical assistance would be needed to deploy and maintain a force on the ground. It was obvious that no force would be able to completely seal off a 1,000-kilometre border in difficult terrain. The purpose of the deployment of troops at the border would be to deter any incursion by armed groups and thus contribute to stability in the subregion. It would be important to consider how the envisaged ECOWAS presence would coordinate its activities with UNAMSIL.

Diamonds and arms

42. Many of the mission's interlocutors conveyed their concerns about the links among the armed groups operating in the country, the trade in illegally mined diamonds and the influx of weapons into the region. In this regard, the certificate-of-origin regime for rough diamonds that had recently been established by the Government of Sierra Leone would be an important first step towards curbing the contribution of the diamond trade to the instability of the region. The mission was informed that the ECOWAS regional inquiry to investigate the trade in illegal diamonds had yet to be convened and the hope was expressed that the inquiry would cooperate closely with the United Nations panel of experts on this issue.

43. Mr. Kouyaté reminded the mission that ECOWAS had adopted a moratorium on small arms, which would benefit from further support from the Security Council. Obviously, the ECOWAS moratorium could not by itself stop the arms flow, and the supporting action of arms manufacturers and weapon-exporting countries would be essential. When asked by the members of the mission, President Taylor said that his Government was not involved in the smuggling of diamonds and arms and that Governments accusing Liberia of this should come forward with the evidence that supported such accusations. Members of the mission made clear to him the feelings in the region on this matter and warned that the instability and isolation of Liberia could increase if its activities went beyond its legitimate security interests.

Humanitarian aspects

44. The Government of Sierra Leone wanted UNAMSIL to ensure that all parties to the Lomé Agreement observed their obligation to allow the necessary freedom of movement for the delivery of humanitarian assistance. The humanitarian community in Sierra Leone voiced serious concern about the lack of access to the RUF-held areas, which was depriving many Sierra Leoneans of vital support. This was further compounded by the lack of food in these areas, since few people had been able to raise crops in the current farming cycle. With regard to the disarmament, demobilization and reintegration programme, some non-governmental organizations considered that rebuilding communities would help to create incentives for fighters to give up their arms and return home. The mission could not otherwise gauge the humanitarian situation at first hand, but it was clear from the reports they heard that the situation remained extremely serious, especially for women and children.

45. As for the situation in Guinea, the mission gained the clear impression that urgent action would be required by the international community to deal with the presence and movements of refugees and internally displaced persons throughout the subregion. The Government of Guinea had developed a plan to relocate Sierra Leonean refugees away from the border area, for which it would need assistance. It would be important for United Nations agencies to continue to develop a common approach to the humanitarian problems in the region.

46. Guinea assured the mission that it would continue to host and shelter refugees from Sierra Leone in particular, and that it was taking measures to ensure the security of humanitarian workers. However, President Conté considered that all refugees should be screened to identify troublemakers. He called for international assistance for the repatriation of those able to return home, for the movement of

refugees to camps away from borders and for assistance for Guinean internally displaced persons.

Special Court

47. The Government of Sierra Leone referred to the need for an effective information campaign to explain to the public the limits of the powers of the Special Court and the delay in the commencement of its operations. The Government considered that the Court should have powers under Chapter VII of the Charter of the United Nations so as to ensure that it had sufficient authority to try any individual under international and domestic law, including the requirement upon third countries to surrender persons subject to the jurisdiction of the Court. The Government also indicated that it preferred to appoint a co-prosecutor rather than a deputy prosecutor.

48. The Government encouraged the Security Council to expedite its decision on the Special Court so that trials could start in a reasonable time (i.e., six months), since the Government could not hold suspects indefinitely. In the view of President Kabbah, the United Nations should ensure adequate funding and material support for the Special Court, to be provided from assessed contributions, in collaboration with the Government. In general, the Government would be content to abide by the decision of the Security Council on the Court, including on temporal jurisdiction.

49. Several of the mission's interlocutors, in particular non-governmental organizations and civil society, stressed the negative impact of the establishment and jurisdiction of the Court on the minds of ex-combatants who could be more reluctant to come forward to disarm for fear of prosecution. The Truth and Reconciliation Commission, they considered, would be a better alternative for the many child combatants still with RUF. Clear criteria and an effective information campaign, reaching out to this vulnerable group, would be essential to explain the limits of the Court's jurisdiction and the alternative systems available.

50. The possibility that children could be prosecuted by the Special Court was the subject of animated debate in Sierra Leone and there appeared to be no prevailing view. In the view of the Government of Sierra Leone, the Court should prosecute those child combatants who freely and willingly committed indictable crimes. On the other hand, non-governmental organizations and United Nations agencies, especially those engaged in the protection of children, favoured excluding those under the age of 18 years. In Lungi, the mission heard a passionate appeal from a 14-year-old ex-combatant, on behalf of his fellows, not to try any children. Members of the mission made it publicly clear that the purpose was to indict only those persons who bore the greatest responsibility.

IV. Conclusions and recommendations

51. The complexity of problems in Sierra Leone and its neighbours represents an extraordinary challenge, which requires extraordinary action. Since the eruption of the current phase of the crisis, Sierra Leone has been the focus of sustained international attention. The Security Council, other parts of the United Nations system, ECOWAS, the international financial institutions, individual donors and

international non-governmental organizations are all heavily engaged. Each can do and is doing much to address the different aspects of the crisis and its underlying causes. The ideas, energy, commitment and resources are there, but some of the key actors continue to work in unharmonized and, in certain cases, competing directions. Among the Government, ECOWAS and UNAMSIL, and in each of them, we found different perceptions of the reality on the ground, and of policy objectives and the strategy and means necessary to meet them.

52. The mission concluded that the highest priority must be given to the coordination of a comprehensive strategy with clear objectives. Only when all stakeholders — the Government and people of Sierra Leone, the region and the international community — act together through an agreed and interlocking approach will the latent potential for the country and the region to emerge from the current crisis be fulfilled. **Our first recommendation, therefore, is for the establishment of a United Nations-based mechanism for overall coordination (see para. 55 below).**

53. The mission assigns a similar priority to intensifying the momentum of the peace process. Military measures to enhance security in the country and on its borders should be pursued urgently: those intent on continuing the rebellion must be effectively deterred. The current tentative indications of RUF interest in dialogue must, however, be thoroughly and quickly explored. The mechanism for this must take account of a variety of views within RUF, a variety of political actors and a variety of potential channels. **The Special Representative of the Secretary-General might wish to give high and immediate priority to the coordination of active contacts, liaising in particular, beyond UNAMSIL itself, with Presidents Kabbah, Conté, Konaré, Obasanjo and Taylor.** He should keep the Security Council informed.

54. A comprehensive strategy requires action on the following core elements:

(a) Peace process. Most of the fundamental principles underlying the Lomé Agreement remain valid. While a return to the status quo ante is not envisaged, the conclusion of an effective ceasefire and the withdrawal of RUF from key areas of the country, in particular the diamond fields, as stipulated in the Agreement, must remain key objectives. A renewed dialogue both with RUF leadership and with commanders and combatants at the local level should be pursued immediately, using the levers and channels with the greatest potential both in the region and in the country. The latest efforts by ECOWAS to resume dialogue with RUF through the Joint Implementation Committee deserve the support of the Security Council and should be coordinated with the Government of Sierra Leone, with the advice of the Special Representative of the Secretary-General. **The process should, inter alia, cover an early ceasefire throughout the territory of Sierra Leone, agreed arrangements for withdrawal, the return of all seized UNAMSIL weapons and equipment, and the opening up of humanitarian and other access in the north and east of the country.** The mission carefully noted suggestions that RUF might now be prepared to permit UNAMSIL deployment into the diamond-producing areas, and thought that this required further exploration, in accordance with the concept of operations set out by the Secretary-General in his report (S/2000/832). The peace process should also focus on disarmament, demobilization and reintegration in order to attract full participation by ex-

combatants in a revived and better funded disarmament, demobilization and reintegration programme (see below). This will, however, also require guarantees from RUF that their cadres can enter it freely and without intimidation;

(b) **Special court**. In the context of the peace process, the Security Council and the Sierra Leonean authorities will need to reflect carefully before taking any final decisions on the scope of the Special Court (see paras. 47-50 above). The right balance must be struck between the requirements of justice and the need to minimize any potential disincentive to entering the disarmament, demobilization and reintegration process that the threat of prosecution may represent — especially to child combatants. The mission is not otherwise making any direct recommendations on the establishment of the Special Court, since this requires further discussion by the Security Council. The Truth and Reconciliation Commission will be an essential instrument in the wider reconciliation process;

(c) **Military aspects**. The military track remains an indispensable element of the peace process. Only a sustained and effective military instrument, with the capability to extend its reach throughout the country and following clear political and military objectives, can maintain pressure on RUF and create incentives for dialogue and disarmament. **To meet these challenges, UNAMSIL must be strengthened in terms of numbers, effectiveness and capability, as recommended by the Secretary-General (see S/2000/832), taking advantage of the offers of further troops from, inter alia, ECOWAS countries**. Strong regional involvement on the ground is as critical to the long-term success of the United Nations peacekeeping presence as is strong regional political leadership. At the same time, both within UNAMSIL and internationally, including present and potential troop-contributing countries, there needs to be a complete and thorough understanding of the stance, tasks, mandate and concept of operations of UNAMSIL, and how they work to meet the wider objectives of the Government and people of Sierra Leone, the region and the international community. The combination of firm, proactive peacekeeping, within the flexibility authorized by the resolutions, and the implementation of our broader recommendations can exert a significant impact on a rebellion, many members of which are looking for a road to life without conflict;

(d) **Regional dimension**. No lasting progress can be made in Sierra Leone without comprehensive action to tackle the current instability in the West African region, in particular in the Mano River Union member countries. Regional leaders were clearly of the opinion that President Taylor's relationship with RUF was a key to the situation in Sierra Leone, and that continued action was necessary to persuade him to use his influence to positive, rather than negative, effect. Illicit trafficking in diamonds and arms, the proliferation and encouragement of thuggish militias and armed groups, and the massive flows of refugees and internally displaced persons resulting from their activities must be addressed directly (the forthcoming report of the panel of experts is expected to provide concrete recommendations on diamonds and arms, and ECOWAS is implementing a well-prepared small arms moratorium). The region, through ECOWAS, is showing encouraging willingness to take the lead, under its current Chairman, in undertaking

specific action in these areas. The international community as a whole must be prepared to act in urgent support, both through material assistance for regional security initiatives and by exerting pressure on those most responsible for fomenting instability for selfish advantage. In this specific context and to help the wider objective of supporting capacity-building within the region, **the Security Council and individual Governments should look positively at what they can do to support the decision by ECOWAS to prepare for and deploy an ECOWAS observer force on the borders of the three Mano River Union member countries, in coordination with UNAMSIL. The Government of Guinea in particular needs encouragement and support to provide access and protection for humanitarian personnel and aid**. The Secretary-General should be requested to comment on these regional aspects in his reports to the Council on UNAMSIL. The disturbing situation in Côte d'Ivoire may also need to be watched;

(e) **Disarmament, demobilization and reintegration.** A thorough overhaul and reorientation of the disarmament, demobilization and reintegration programme is required. Effective management of the programme and development of the reintegration and rehabilitation elements in particular are vital, for example, through quick impact projects and stimulation of economic activity. Ex-combatants must be processed through the system more quickly and better provision made for their dependants. **The Security Council should give early consideration to whether the balance of responsibilities in the programme among the Government, the World Bank, UNAMSIL and bilateral agencies can be improved, following the publication of the report of the assessment team sponsored by the World Bank. The United Nations should encourage the further cooperation of civil society and non-governmental organizations in making reintegration a reality;**

(f) **Role of Government**. The primary responsibility for the resolution of the conflict must rest with the Government, Parliament and people of Sierra Leone. No coordinated strategy for the country can be taken forward unless the Government and the people of Sierra Leone themselves feel a sense of ownership of the process and demonstrate the political will to achieve genuine national reconciliation. The Government, with sustained international assistance, can do more to develop and communicate its vision for taking the peace process forward, as well as its strategic planning for economic and social development. Equally, the region and the international community should ensure that the Government of Sierra Leone is consulted at every level of planning and coordination on the future of the country, to help develop this sense of ownership, contribute to economic development, and build capacity and institutions countrywide. The country faces daunting problems in these areas, and the lack in particular of political cohesiveness and of political and administrative structures outside the capital is an alarming consequence of the conflict. **Advice and financial help on a communications and public awareness strategy would be especially useful;**

(g) **Human rights and humanitarian assistance**. There is growing evidence of hunger and disease in areas to which humanitarian organizations have no current access. **The mission recommends that UNAMSIL and ECOWAS explore with RUF the possibility of access under conditions of adequate security for a needs assessment to be conducted in the areas**

under its control, and for safe access for the delivery of humanitarian assistance thereafter. Abuses of human rights, including rape, physical abuse and extortion, remain widespread, with women and children particularly vulnerable to assault. All components of UNAMSIL, including the military, should accelerate its efforts to work with the Government and civil society to develop an environment of respect for human rights. A high priority should be to raise the awareness in Sierra Leonean society of the need for a concerted conciliation process. **The current vacant human rights posts at UNAMSIL should be filled as soon as possible, and military units reminded of their obligation, within the mandate, to protect civilians, something which is not always happening. The proposed Human Rights Commission should be established as soon as possible, in cooperation with the Office of the United Nations High Commissioner for Human Rights. Rehabilitation and reintegration programmes should be targeted towards protecting the rights of women and children. The promised Commission on War-affected Children should be established, and the international community should be encouraged to support and assist in the assessment of the needs of the juvenile justice system. The international community should also assist by providing child protection and advocacy experts to serve as required on the staffs of the Special Court and the Truth and Reconciliation Commission.**

Overall coordination

55. Together with efforts to develop a comprehensive strategy, there must be an effective, sustainable coordination mechanism in the region to drive and implement it. Current efforts are praiseworthy but inadequate. Consultation on important developments and initiatives is incomplete, and partnership is often more an aspiration then a reality. Further thought should be given to the best format and participation for an appropriate coordination mechanism. **It is clear that, at a minimum, the Security Council and the Secretariat, ECOWAS, UNAMSIL troop-contributing countries and the Government of Sierra Leone need to consult through some form of continuous structure rather than simply a series of meetings held at regular intervals**. The leadership of ECOWAS is displaying energy and vision, but the organization itself — by its own admission — lacks sufficient resources and expertise to carry forward and implement its initiatives, such as the proposal to place ECOWAS military observers on the borders. **As a key first step, the mission recommends an immediate package of international assistance to help the ECOWAS secretariat to develop its capacity, including the placing of UNAMSIL liaison staff at ECOWAS headquarters**.

56. These are tough messages and demanding proposals, but Sierra Leone is a challenge that the United Nations and the international community as a whole should gather the collective will to meet. It is a small country, rich in natural resources — not the least of which are its resilient and hopeful people, who have been let down too many times by their own leaders and by influences and circumstances beyond their control. We owe it to them to do our utmost together to unlock the doors to the peace, stability and development that they so desperately yearn for and deserve. The Security Council and the international community as a

whole can provide much of the focus and resources needed to help realize that vision; we must continue to show the commitment and resolution to deliver it.

57. Members of the mission pay tribute to the energy, selflessness and courage of all those working on the ground to bring Sierra Leone its peace and sustained stability. The Special Representative and his team and large numbers of UNAMSIL headquarters and field staff, as well as the offices of the United Nations Development Programme in the region and the United Nations Office in Liberia, proposed and executed an impeccable programme for the mission and earned its deep gratitude. The mission expresses the warmest thanks to all those, from heads of State downwards, in five countries, who looked after it with such generous hospitality. The service of the crews of the Royal Air Force of the United Kingdom who flew them safely and comfortably for 17,000 kilometres was especially appreciated. Finally, 11 Ambassadors humbly acknowledge that they could not have accomplished their week's work without the skilful, resourceful and intelligent support of the Secretariat and companion teams.

ANNEX 4

Giorgia Tortora
06/16/2003 06:00 PM

To: Sam Scratch/SCSL@SCSL
cc:
Subject: Fw: Year2 Contribution

as you were asking about it, this is the updated version

Giorgia

----- Forwarded by Giorgia Tortora/SCSL on 16/06/2003 17:58 -----

Genevieve Noundja-Noubissi
16/06/2003 14:59

To: Giorgia Tortora/SCSL@SCSL
cc: Robin Vincent/SCSL@SCSL, Robert Kirkwood/SCSL@SCSL, Paul Packham/SCSL@SCSL, Barbara Clemens/SCSL@SCSL
Subject: Year2 Contribution

Attached please find the status for Year2 contribution as at 10th June 2003.

Regards,
Genevieve

Year2 Contributions.xls

Year 2 Contributions to Special Court for Sierra Leone

Country		Pledges	Contributions			Outstanding Pledges
			Amount	Date Received		
Canada		$450,000.00	$324,740.19			$125,259.81
Cyprus		15,000.00	15,000.00	14/03/2003		-
Czech Republic		100,000.00				100,000.00
Denmark		120,000.00	145,074.71			
Ireland		215,000.00	250,951.04	14/03/2003		
Lesotho		30,000.00				30,000.00
Luxembourg			24,580.00	14/03/2003		
Mauritius		1,500.00				1,500.00
Netherlands		3,800,000.00				3,800,000.00
Nigeria			90,000.00	14/03/2003	*	
South Africa		10,000.00				10,000.00
United Kingdom		2,800,000.00	3,227,980.00	28/05/2003		
United States		5,000,000.00	5,000,000.00	14/03/2003		-
Germany		500,000.00	500,000.00	Year 2002		-
Norway		500,000.00	499,970.00	Year 2002		
Cyprus			15,000.00	22/04/2003		
Luxemburg			27,347.50	28/05/2003		
Finland	(1)	150,000.00				150,000.00
		$13,691,500.00	$10,120,643.44			$4,216,759.81

* *Please note that Nigeria contributed $100,000; However, its year 1 pledge of $10,000 was still outstanding. This brought the year 2 contribution to $90,000.*

(1) Finland's contribution is a grant. Please see attached letter for conditions.

1987

ANNEX 5

INTRODUCTION

The Special Court will try persons who are alleged to bear the greatest responsibility for the atrocities perpetrated in recent years in Sierra Leone. This is a duty that its judges are bound to discharge without fear or favour, and independently of their appointing bodies - the United Nations and the Sierra Leone government. Our aim is to deliver justice fairly and effectively, over the next three years.

Within the fallible parameters of human justice, with its fundamentals of due process, transparency and defence rights, we are charged to do our best to end the impunity that powerful perpetrators would otherwise enjoy

Our court, as this booklet briefly explains, is the most recent legacy of the Nuremberg ideal that crimes against humanity require prosecution and punishment. Those who command genocide or mass mutilation of civilians or sexual enslavement of children cannot be forgiven, or left to the delayed judgement of history or of God. Within the fallible parameters of human justice, with its fundamentals of due process, transparency and defence rights, we are charged to do our best to end the impunity that powerful perpetrators would otherwise enjoy.

This much is owed to the memory of murdered victims, to maimed survivors and to those who grieve for them. It is a duty we share with another body, the Truth and Reconciliation Commission set up by the Sierra Leone government. We shall work together to uncover the truth, although the Court alone has the power to deliver the justice that is a prerequisite for reconciliation.

Horrors have been visited upon the people of Sierra Leone in the past decade. Some 75,000 civilians are believed to have been killed, and half a million made refugees. Atrocities in some respects unique in their grotesquery have been reported: chopping off the hands of civilians who had cast electoral votes, kidnapping children for use as gunmen or sex slaves; butchering prisoners and so on. It is a poignant irony that these things should happen where the world's first humanitarian mission took place - Freetown, where the British navy in the nineteenth century set free the slaves.

Our special court is a different model to the 'ad-hoc' tribunals set up by the Security Council in the Hague and at Arusha, to deal with war crimes in ex-Yugoslavia and Rwanda. These are courts that sit outside the country where the violence occurred; our court sits in Sierra Leone, at the scene of the crimes. That does, of course, bring security risks, but will give our work particular relevance to the peace process. We have a three year mandate and have adopted some original rules and procedures to ensure that our trials are fair, without being excessively delayed or expensive.

It is a poignant irony that these things should happen where the world's first humanitarian mission took place - Freetown, where the British navy in the nineteenth century set free the slaves

There are many challenges ahead. This booklet describes the court as it is taking shape, before the Principal Defender has been appointed and just after the Prosecutor has presented his first indictments. We are conscious of the confidence that has been reposed in us by the international community, and by the people of Sierra Leone: we will do our level best to fulfill this trust.

Geoffrey Robertson,
President, Special Court
17th March 2003

ANNEX 6

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

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

Article 11

1. Everyone charged with a penal offence has the righ innocent until proved guilty according to law in a public has had all the guarantees necessary for his defence.

2. No one shall be held guilty of any penal offence o act or omission which did not constitute a penal offence, international law, at the time when it was committed. N penalty be imposed than the one that was applicable at t offence was committed.

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13

1. Everyone has the right to freedom of movement and residence within the borders of each State.

2. Everyone has the right to leave any country, including his own, and to return to his country.

Article 14

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.

2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15

1. Everyone has the right to a nationality.

2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

ANNEX 7

Paragraph 3(a) shall not be held to preclude, in countries where nent with hard labour may be imposed as a punishment for a crime, rmance of hard labour in pursuance of a sentence to such punish- a competent court;

For the purpose of this paragraph the term 'forced or compulsory all not include:

(i) Any work or service, not referred to in sub-paragraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civil obligations.

ryone has the right to liberty and security of person. No one shall ed to arbitrary arrest or detention. No one shall be deprived of except on such grounds and in accordance with such procedure blished by law.

one who is arrested shall be informed, at the time of arrest, of the his arrest and shall be promptly informed of any charges against

one arrested or detained on a criminal charge shall be brought efore a judge or other officer authorized by law to exercise judicial shall be entitled to trial within a reasonable time or to release. It the general rule that persons awaiting trial shall be detained in t release may be subject to guarantees to appear for trial, at any of the judicial proceedings, and, should occasion arise, for exe- e judgement.

ne who is deprived of his liberty by arrest or detention shall be ake proceedings before a court, in order that that court may decide

regated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and oblig-

492

ations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to be the following minimum guarantees, in full equality:

a) To be informed promptly and in detail in a language which he understand of the nature and cause of the charge against him;

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

c) To be tried without undue delay;

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

e) 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;

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

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

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

ANNEX 8

of a bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or det
entitled to take proceedings by which the lawfulness of his
be decided speedily by a court and his release ordered if the
lawful.

5. Everyone who has been the victim of arrest or detentio
tion of the provisions of this article shall have an enfor
compensation.

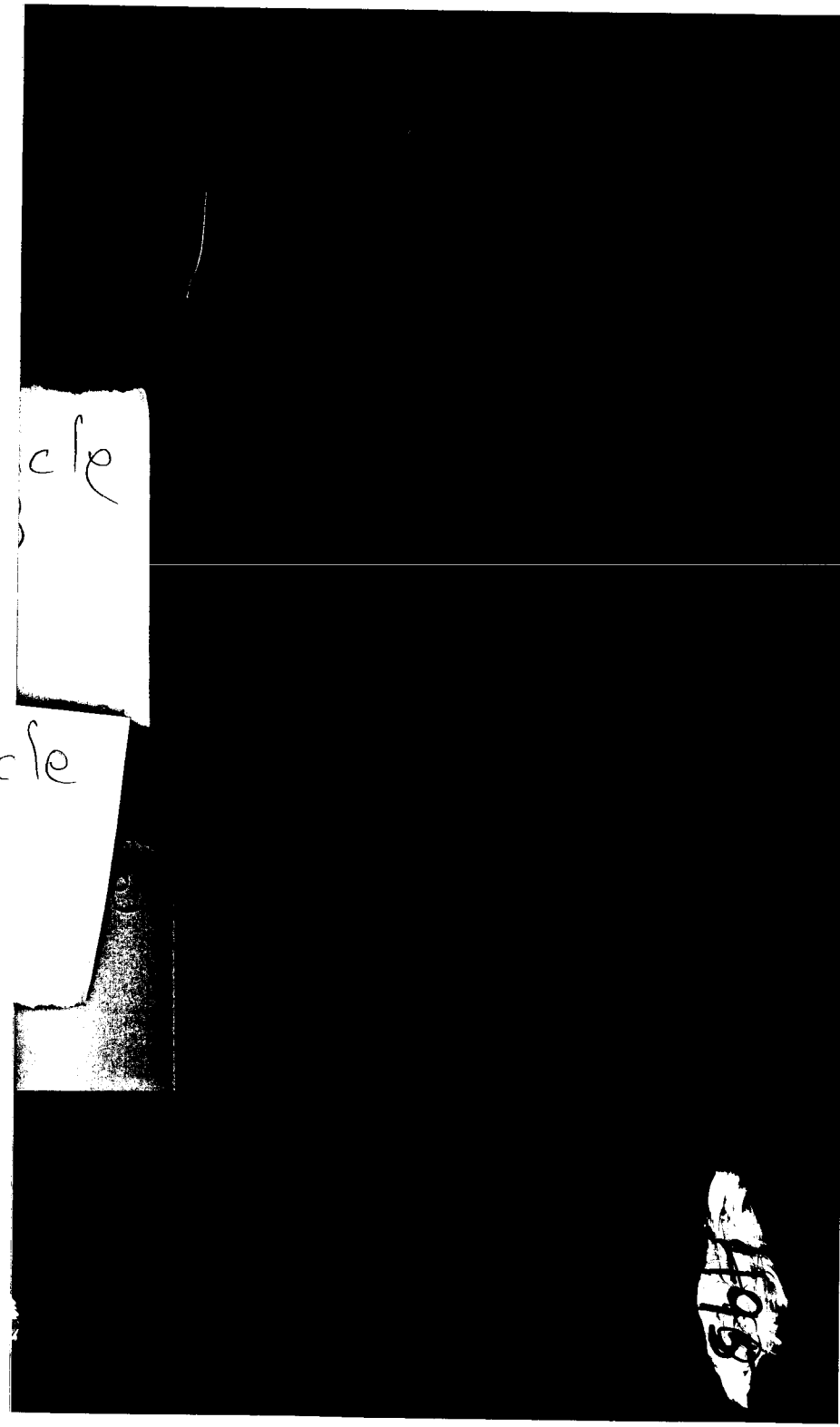
Article 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;



b) to have adequate time and facilities for the preparation of his defence;

c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or in private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10

1. Everyone has the right to freedom of expression. This right shall include

shall not prevent States from requiring the licensing of broadcasting sion or cinema enterprises.

2. The exercise of these freedoms, since it carries with it du responsibilities, may be subject to such formalities, conditions, res or penalties as are prescribed by law and are necessary in a democratic in the interests of national security, territorial integrity or public sa the prevention of disorder or crime, for the protection of health or for the protection of the reputation or rights of others, for preven disclosure of information received in confidence, or for maintair authority and impartiality of the judiciary.

Article 11

1. Everyone has the right to freedom of peaceful assembly and to of association with others, including the right to form and to join trad for the protection of his interests.

2. No restrictions shall be placed on the exercise of these righ than such as are prescribed by law and are necessary in a democratic in the interests of national security or public safety, for the preve disorder or crime, for the protection of health or morals or for the pr of the rights and freedoms of others. This article shall not pre imposition of lawful restrictions on the exercise of these rights by n of the armed forces, of the police or of the administration of the Sta

Article 12

Men and women of marriageable age have the right to marry and t a family, according to the national laws governing the exercise of th

Article 13

Everyone whose rights and freedoms as set forth in this Conven violated shall have an effective remedy before a national authority standing that the violation has been committed by persons acting in an capacity.

Article 14

The enjoyment of the rights and freedoms set forth in this Con shall be secured without discrimination on any ground such as sex, race language, religion, political or other opinion, national or social origi ciation with a national minority, property, birth or other status.

Article 15

1. In time of war or other public emergency threatening the lif nation any High Contracting Party may take measures derogating obligations under this Convention to the extent strictly required by

ANNEX 9

3. No one shall be subject to arbitrary arrest or imprisonment.

4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

7. No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for non fulfillment of duties of support.

Article 8 – Right to a Fair Trial

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal or any other nature.

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

a) the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;

b) prior notification in detail to the accused of the charges against him;

c) adequate time and means for the preparation of his defence;

d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;

e) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;

f) the right of the defence to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons v may throw light on the facts;

g) the right not to be compelled to be a witness against himself o plead guilty; and

h) the right to appeal the judgment to a higher court.

3. A confession of guilt by the accused shall be valid only if it is m without coercion of any kind.

4. An accused person acquitted by a nonappealable judgment shall be subjected to a new trial for the same cause.

5. Criminal proceedings shall be public, except in so far as may be n essary to protect the interests of justice.

Article 9 – Freedom from Ex Post Facto Laws

No one shall be convicted of any act or omission that criminal offense, under the applicable law, at the time it heavier penalty shall not be imposed than the one that v time the criminal offense was committed. If subsequen of the offense the law provides for the imposition of a the guilty person shall benefit thereform.

Article 10 – Right to Compensation

Every person has the right to be compensated in accordance with th in the event he has been sentenced by a final judgment through carriage of justice.

Article 11 – Right to Privacy

1. Everyone has the right to have his honor respected and recognized.

2. No one may be the object of arbitrary or abusive interfe private life, his family, his home, or his correspondence, or of u on his honor or reputation.

3. Everyone has the right to the protection of the law a ference or attacks.

Article 12 – Freedom of Conscience and Religion

1. Everyone has the right to freedom of conscience right includes freedom to maintain or to change one's freedom to profess or disseminate one's religion or ally or together with others, in public or in private.

2. No one shall be subject to restrictions that to maintain or change his religion or beliefs.

3. Freedom to manifest one's religion and be the limitations prescribed by law that are nece order, health, or morals, or the rights or freedom

4. Parents or guardians, as the case may be, have the

498

ANNEX 10

Conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, zionism and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, color, sex, language, religion or political opinions;

Reaffirming their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instruments adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations;

Firmly convinced of their duty to promote and protect human and peoples' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa;

Have agreed as follows:

PART I – RIGHTS AND DUTIES

Chapter I – Human and People's Rights

Article 1

The member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

Article 2

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Article 3

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

Article 4

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

Article 5

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

Article 6

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

Article 7

1. Every individual shall have the right to have his cause heard. This comprises:

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

b) the right to be presumed innocent until proved guilty by a competent court or tribunal;

c) the right to defence, including the right to be defended by counsel of his choice;

d) the right to be tried within a reasonable time by an impartial court or tribunal.

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

Article 8

Freedom of conscience, the profession and free practice
be guaranteed. No one may, subject to law and order, be subn
restricting the exercise of these freedoms.

Article 9

1. Every individual shall have the right to receive infor
2. Every individual shall have the right to express anc
opinions within the law.

Article 10

1. Every individual shall have the right to free association provided he abides by the law.
2. Subject to the obligation of solidarity provided for in article 29 no one may be compelled to join an association.

Article 11

Every individual shall have the right to assemble freely with others. The

ANNEX 11

56. Basic Principles on the Independence of the Judiciary

Welcomed by the General Assembly of the United Nations, resolution 40/146 of 13 December 1985 upon adoption by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders at Milan, 1985

Whereas in the Charter of the United Nations the peoples of the world affirm, *inter alia*, their determination to establish conditions under which justice can be maintained to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination,

Whereas the Universal Declaration of Human Rights enshrines in particular the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights both guarantee the exercise of those rights, and in addition, the Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay,

Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation,

Whereas the organization and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality,

Whereas rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles,

Whereas judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens,

Whereas the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by its resolution 16, called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

Whereas it is, therefore, appropriate that consideration be first given to the role of judges in relation to the system of justice and to the importance of their selection, training and conduct,

The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist.

Independence of the Judiciary

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

Freedom of Expression and Association

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

Qualifications, Selection and Training

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

Conditions of Service and Tenure

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

Professional Secrecy and Immunity

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

Discipline, Suspension and Removal

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

ANNEX 12

UNITED NATIONS

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

Case No. IT-95-17/1-A

Date: 21 July 2000

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Mohamed Shahabuddeen, Presiding**
Judge Lal Chand Vohrah
Judge Rafael Nieto-Navia
Judge Patrick Lipton Robinson
Judge Fausto Pocar

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Judgement of: **21 July 2000**

PROSECUTOR

v.

ANTO FURUND@IJA

JUDGEMENT

Counsel for the Prosecutor:

Mr. UpawansaYapa
Mr. Christopher Staker
Mr. Norman Farrell

Counsel for the Accused:

Mr. Luka S. Miseti}
Mr. Sheldon Davidson

507

UNITED NATIONS

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

Case No. IT-95-17/1-A

Date: 21 July 2000

Original: English

509

TABLE OF CONTENTS

5111

I. INTRODUCTION

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 Yugoslavia since 1991 ("the International Tribunal" or "the ICTY") is seized of an appeal filed by Anto Furund`ija ("the Appellant") against the Judgement rendered by Trial Chamber II of the International Tribunal on 10 December 1998.

The Trial Chamber held the Appellant individually responsible for his participation in the crimes charged in the Amended Indictment pursuant to Article 7(1) of the Statute of the International Tribunal ("the Statute"). The Trial Chamber also found that under Article 3 of the Statute, the Appellant was guilty as a co-perpetrator of torture as a violation of the laws or customs of war and for aiding and abetting outrages upon personal dignity, including rape, as a violation of the laws or customs of war.[1]

Having considered the written and oral submissions of the Appellant and the Prosecutor ("the Prosecutor" or "the Respondent"), the Appeals Chamber

HEREBY RENDERS ITS JUDGEMENT.

[1] *Prosecutor v. Anto Furund`ija*, Case No. IT-95-17/1-T, Judgement, 10 Dec. 1998 ("the Judgement").

A. Procedural background

1. In the original indictment, confirmed by Judge Gabrielle Kirk McDonald on 10 November 1995 ("the Indictment"), the Appellant was charged with three counts comprising Count 12, alleging a grave breach of the Geneva Conventions of 1949 under Article 2(b) of the Statute relating to torture and inhumane treatment, Count 13, alleging a violation of the laws or customs of war under Article 3 of the Statute relating to torture, and Count 14, alleging a violation of the laws or customs of war under Article 3 of the Statute relating to outrages upon personal dignity including rape.

2. The Appellant was arrested on 18 December 1997. At his initial appearance on 19 December 1997, he pleaded not guilty to all counts of the Indictment and was remanded in detention pending trial.

3. On 13 March 1998, the Trial Chamber issued an Order granting the Prosecutor leave to withdraw Count 12 of the Indictment and denying the Defence's motion to dismiss all counts against the Accused based on defects in the form of the Indictment.

4. Following submissions by the Prosecutor on 1 May 1998 of statements and transcripts of witnesses, and on 4 May 1998 of legal material relating to the alleged criminal conduct of the Appellant, the Trial Chamber found on 13 May 1998 that sufficient material had been provided to the Defence to enable it to prepare its case.[2]

5. On 22 May 1998, the Prosecutor filed a pre-trial brief. On 29 May 1998, the Trial Chamber directed the Prosecutor to redact and amend portions of the Indictment. An amended version of the Indictment was filed on 2 June 1998 ("the Amended Indictment"). It contained two charges: Count 13 alleging torture and Count 14 alleging outrages upon personal dignity including rape. Both counts were charged as violations of the laws or customs of war under Article 3 of the Statute.

6. The trial of the Appellant commenced on 8 June 1998. The Appellant filed a motion on 12 June 1998, seeking to exclude the portion of Witness A's testimony that related to the Appellant's presence during the sexual assaults alleged to have been perpetrated by a co-accused, hereafter Accused B, upon Witness A, on the ground that it did not fall within the scope of the Amended

[2] On 6 April 1998, the Appellant filed "Defendant's Motion for Leave to File Instanter His Motion to Dismiss Counts 13 & 14 of the Indictment Based on Defects in the Form of the Indictment (Vagueness), Lack of Subject Matter Jurisdiction, and Failure to Establish a Prima Facie Case", arguing that the Prosecutor had failed to submit facts supporting a theory of liability under Article 7(1) that the Appellant directly and substantially facilitated the rape of Witness A. On 29 April 1998, the Trial Chamber issued a Decision denying the Appellant's Motion and a further decision ordering the Prosecutor to file a supplementary document specifying the factual and legal bases upon which the Prosecutor would rely at trial.

Indictment. In a Decision issued later on the same day, the Trial Chamber held that it would "only consider as relevant Witness A's evidence in so far as it relates to Paragraphs 25 and 26 as pleaded in the Indictment against the Accused."[3]

7. By confidential decision dated 15 June 1998, the Trial Chamber responded to the Prosecutor's request for clarification of its decision of 12 June 1998 regarding Witness A's testimony and ruled as inadmissible "all evidence relating to rape and sexual assault perpetrated on [Witness A] by [Accused B] in the presence of [the Appellant] in the 'large room' apart from the evidence of sexual assault alleged in paragraph 25 of the Indictment."[4]

8. The parties presented their closing arguments on 22 June 1998, whereupon the hearing was closed with judgement reserved to a later date. On 29 June 1998, after the close of the hearings, the Prosecutor disclosed to the Appellant a redacted certificate of psychological treatment dated 11 July 1995 and a witness statement dated 16 September 1995 from a psychologist from Medica Women's Therapy Centre ("Medica") in Zenica, Bosnia and Herzegovina, concerning Witness A and the treatment she had received at Medica.

9. On 10 July 1998, the Appellant filed a motion to strike the testimony of Witness A or, in the event of a conviction, requested a new trial. The Trial Chamber issued its written Decision on the matter on 16 July 1998, finding that there had been serious misconduct on the part of the Prosecutor in breach of Rule 68 of the Rules of Procedure and Evidence of the International Tribunal ("the Rules") causing prejudice to the Appellant. As a consequence, the Trial Chamber ordered that the proceedings be re-opened but limited strictly to the cross-examination of Prosecution witnesses and the recalling of any defence witnesses or new evidence only in connection with the medical, psychological or psychiatric treatment or counselling received by Witness A after May 1993 ("the re-opened proceedings"). The Trial Chamber further ordered the Prosecutor to disclose any other connected documents.

10. On 23 July 1998, the Appellant filed a request for leave to appeal the Trial Chamber's Decision of 16 July 1998. By its Decision of 24 August 1998, a bench of the Appeals Chamber unanimously denied the application, finding that the requirements under sub-Rule 73(B) for interlocutory appeals had not been met.[5]

---

[3] The specific charges against the Accused were based on the factual allegations contained in paragraphs 25 and 26 of the Amended Indictment.

[4] *Prosecutor v. Anto Furund'ija*, Case No. IT-95-17/1-T, Confidential Decision, 15 June 1998 ("Confidential Decision"), p. 2.

[5] *Prosecutor v. Anto Furund'ija*, Case No. IT-95-17/1-AR73, Decision on Defendant's Request for Leave to Appeal Trial Chamber II's Order of 16 July 1998, 24 Aug. 1998.

11. Subsequently, the Defence sought leave to introduce the evidence of two witnesses into the re-opened proceedings by way of deposition. By its confidential ex parte Order dated 27 August 1998, the Trial Chamber denied the Defence request to take the deposition of a certain individual, referred to as Witness F for the purposes of this appeal, reasoning that his evidence did not fall within the scope of the re-opened proceedings, as circumscribed by the Trial Chamber's Decision of 16 July 1998. In this regard the Trial Chamber noted that, according to its Decision of 16 July 1998, the Appellant may call new evidence only to address any medical, psychological or psychiatric treatment or counselling received by Witness A after May 1993. Thereafter, on 13 October 1998, the Trial Chamber issued a confidential Decision denying the Defence leave to call Mr. Enes [urkovi} as a witness in the re-opened proceedings on the same grounds.[6]

12. On 9 November 1998, the proceedings were re-opened. The Appellant called four witnesses, including two expert witnesses, while the Prosecutor called two expert witnesses. On 9 and 11 November 1998, the Trial Chamber received two applications to file *amicus curiae* briefs, both of which were granted. The re-opened proceedings were closed on 12 November 1998 after the presentation of both parties' closing arguments.

13. On 10 December 1998, Trial Chamber II rendered its Judgement ("the Judgement"), finding the Appellant guilty on Count 13, as a co-perpetrator of torture as a violation of the laws or customs of war, and guilty on Count 14, as an aider and abettor of outrages upon personal dignity, including rape, as a violation of the laws or customs of war. The Trial Chamber sentenced the Appellant to ten years' imprisonment for the conviction under Count 13 and eight years' imprisonment for the conviction under Count 14. Consistent with the Trial Chamber's disposition, the Appellant is serving the sentences concurrently, *inter se*.

1. The Appeal

(a) Notice of Appeal

14. The Appellant filed the "Defendant's Notice of Appeal Pursuant to Rule 108" on 22 December 1998.

[6] *Prosecutor v. Anto Furund`ija*, Case No. IT-95-17/1-T, Decision on Proposed Calling of Mr. Enes [urkovi} as Witness, 13 Oct. 1998.

(b) Post-Trial Application

15. The Appellant filed on 3 February 1999 the "Defendant's Post-Trial Application to the Bureau of the Tribunal for the Disqualification of Presiding Judge Mumba, Motion to Vacate Conviction and Sentence, and Motion for a New Trial". By this motion, the Appellant sought an order from the Bureau disqualifying Judge Mumba, vacating the Judgement and ordering a new trial before a differently constituted Trial Chamber. On 5 March 1999, the Appeals Chamber issued an order suspending the briefing schedule in the appeal on the merits pending the decision by the Bureau. On 11 March 1999, the Bureau issued its Decision on the Post-Trial Application, dismissing the application on the ground that the determination as to the fairness of the trial was not within the competence of the Bureau.[7]

(c) Filing of Briefs

16. On 24 March 1999, following the Bureau's decision, the Appeals Chamber issued a decision resuming the briefing schedule and ordered the parties to file their briefs as follows: the Appellant's Brief by 21 May 1999, the Respondent's Brief by 21 June 1999 and the Appellant's Reply by 6 July 1999. Following a request by the Appellant, the filing deadline for the Appellant's Brief was extended until 25 June 1999, with subsequent changes in the filing dates for the Response and Reply. On 25 June 1999, the Appellant filed the "Defendant's Appellate Brief".

17. The Appellant filed on 25 June 1999 the "Defendant's Motion to Supplement the Record on Appeal" requesting that the Registrar certify the Post-Trial Application and the exhibits attached thereto as part of the Record on Appeal. The Prosecutor filed a response on 20 July 1999, opposing the motion on the ground that the Post-Trial Application contained new evidence not submitted by the Appellant at trial. In this regard, the Prosecutor contended that the Appellant must satisfy the requirements under the relevant Rules pertaining to additional evidence before the Post-Trial Application could be submitted on appeal.

18. The Appellant filed on 23 July 1999, as a confidential document, its "Reply Memorandum in Support of Defendant's Motion to Supplement Record on Appeal" requesting that the Motion to Disqualify Presiding Judge Mumba and the Affidavit of Witness F be added to the record on appeal. On 2 August 1999, the Appellant filed a non-confidential version of the "Defendant's Appellate Brief".

---

[7] *Prosecutor v. Anto Furund`ija*, Case No. IT-95-17/1, Decision on Post-Trial Application by Anto Furund`ija to the Bureau of the Tribunal for the Disqualification of Presiding Judge Mumba, Motion to Vacate Conviction and Sentence, and Motion for a New Trial, 11 Mar. 1999.

19. On 2 September 1999, the Appeals Chamber issued its "Order on Defendant's Motion to Supplement Record on Appeal". By this Order, the Appeals Chamber granted the Appellant's motion to amend the Appellate Brief, but considered that Rule 109(A) of the Rules did not allow for the record on appeal to be supplemented as requested, and that Rules 115 and 119 of the Rules were not applicable to the material sought to be admitted, as the Appellant's ground of appeal related to the partiality of a Judge at trial and not to the guilt or innocence of the Appellant.

20. On 14 September 1999, the Appellant filed the "Defendant's Amended Appellate Brief" and on 30 September 1999 the Prosecutor filed the "Respondent's Brief of the Prosecution". On 14 October 1999, the Appeals Chamber issued, at the request of the Appellant, an order granting an extension of time for the filing of the Appellant's Reply. On 8 November 1999, the Appellant filed the "Defendant's Reply Brief". All three briefs were filed as confidential documents.

21. On 28 February 2000, the President of the International Tribunal assigned Judge Fausto Pocar to the Appeals Chamber to replace Judge Wang Tieya, who had withdrawn from the bench under Rule 16 of the Rules.[8]

22. The hearing of the appeal was held on 2 March 2000 and judgement was reserved to a later date.[9]

23. Subsequently, on 8 March 2000, the Appellant filed a motion entitled "Conviction of Anto Furund`ija based upon alleged Torture of Witness D is void as being (1) Outside the Scope of the Jurisdiction of the ICTY and (2) Based upon an Alleged Crime not charged in the Indictment." The motion was rejected by the Appeals Chamber on 5 May 2000 as it was filed out of time.

24. Upon the request of the Appeals Chamber, the Appellant filed public versions of his amended appellate brief and reply brief on 23 June 2000 ("the Appellant's Amended Brief" and "the Appellant's Reply" respectively). [10] The Prosecutor filed a public version of her response brief on 28 June 2000 ("the Prosecutor's Response").[11]

---

[8] *Prosecutor v. Anto Furund`ija*, Case No. IT-95-17/1-A, Order of the President Assigning a Judge to the Appeals Chamber, 7 Mar. 2000 (the original French version was filed on 28 Feb. 2000).

[9] Transcript of hearing on appeal in *Prosecutor v. Anto Furund`ija*, Case No. IT-95-17/1-A, 2 March 2000 (hereafter pages from the transcript are referred to as "T (2 March 2000)"; all transcript page numbers referred to in the course of this Appeals Judgement are from the unofficial, uncorrected version of the English transcript. Minor differences may therefore exist between the pagination therein and that of the final English transcript released to the public).

[10] *Prosecutor v. Anto Furund`ija*, Case No. IT-95-17/1-A, Defendant's Amended Appellate Brief [Public Version], 23 June 2000; *Prosecutor v. Anto Furund`ija*, Case No. IT-95-17/1-A, Appellant's Reply [Public Version], 23 June 2000.

[11] *Prosecutor v. Anto Furund`ija*, Case No. IT-95-17/1-A, Prosecution Submission of Public Version of Confidential Respondent's Brief of the Prosecution Dated 30 Sept. 1999, 28 June 2000.

B. Grounds of Appeal

25. The Appellant submits the following grounds of appeal against the Judgement of 10 December 1998:

Ground (1): That the Appellant was denied the right to a fair trial in violation of the Statute;

Ground (2): That the evidence was insufficient to convict him on either count;

Ground (3): That the Defence was prejudiced by the Trial Chamber's improper reliance on evidence of acts that were not charged in the indictment and which the Prosecutor never identified prior to the trial as part of the charges against the Appellant;

Ground (4): That presiding Judge Mumba should have been disqualified; and

Ground (5): That the sentence imposed upon him was excessive.[12]

C. Relief Requested

26. By his appeal, the Appellant seeks the following relief:

(i) That the Appellant be acquitted or, in the alternative, that his convictions be reversed[13] or that he be granted a new trial.[14]

(ii) That, in the alternative, if the Appeals Chamber affirms the conviction imposed by the Trial Chamber, the Appeals Chamber reduce the sentence to a term that does not exceed six years, including time served since the date of his original incarceration (18 December 1997).[15]

[12] Appellant's Amended Brief, pp. 1-3 and T. 9 - 10 (2 March 2000).
[13] Appellant's Amended Brief, p. 158.
[14] *Ibid.*, and T. 190 (2 March 2000).
[15] Appellant's Amended Brief, p. 158.

519

II. STANDARD OF REVIEW ON APPEAL

A. Submissions of the Parties

1. The Appellant

27. The Appellant submits that the standard of review in the Appeals Chamber "necessarily takes into account the standard of proof in the Trial Chamber."[16] The Appellant further submits that "[i]f a reasonable person could have reasonable doubt about his guilt, the conviction must be reversed."[17]

28. The Appellant argues that to satisfy the test of proof beyond reasonable doubt, "[t]he evidence must be so overwhelming that it excludes every fair or rational hypothesis except that of guilt."[18] He contends that he "appeals on the basis that the Trial Chamber was unreasonable in concluding that the only fair or rational hypothesis that could be derived from the evidence is that Mr. Furund`ija is guilty."[19] He concludes that the Appeals Chamber must acquit him because the evidence may be read to support a fair or rational inference of innocence.[20]

2. The Respondent

29. The Respondent submits that the appealing party bears the burden of establishing an error within the terms of Article 25(1) of the Statute.[21] The Respondent further contends that the appropriate standard of review on appeal depends on the classification of the alleged error as one of fact or law.[22]

30. The Respondent submits that two categories of error fall within Article 25(1)(a) of the Statute, which provides for an appeal from "an error on a question of law invalidating the decision". The first relates to an error in the substantive law applied by the Trial Chamber and the second to an error in the exercise of the Trial Chamber's discretion.[23] Where the error alleged is one of substantive law, the Respondent says that the nature of the burden on the appealing party is that of persuasion rather than proof.[24] Where the appeal is based on an error in the exercise of the Trial

---

[16] Appellant's Reply, p.3.
[17] *Ibid.*, p. 5.
[18] T. 11 (2 March 2000).
[19] T. 12 (2 March 2000).
[20] T. 167 (2 March 2000).
[21] Prosecutor's Response, para. 2.2.
[22] *Ibid.*, para. 2.6.
[23] *Ibid.*, para. 2.7.
[24] *Ibid.*, para. 2.9.

Chamber's discretion, the Respondent contends that the Appeals Chamber should review the impugned decision under an abuse of discretion standard.[25] The Respondent submits that "absent a showing that the Trial Chamber abused its discretion, the Appeals Chamber should not substitute its own view for that of the Trial Chamber."[26]

31. As regards the standard of review under Article 25(1)(b) of the Statute, which provides for an appeal on the basis of "an error of fact which has occasioned a miscarriage of justice," the Respondent identifies two types of error which may be the subject of an appeal under this provision. The first is an error based on the submission of additional evidence that was not available at trial, and the second is an error in the factual conclusions the Trial Chamber reached based upon the evidence submitted at trial.[27]

32. The Respondent contends that the standard of review on appeal proposed by the Appellant is erroneous, and that the Appeals Chamber should not disturb the Trial Chamber's findings of fact, unless no reasonable person could have so concluded on the evidence presented.[28] The Respondent finds equally mistaken the Appellant's proposed standards as regards the burden placed on the Appellant.[29]

33. The Respondent further submits that in order to appeal a decision under Article 25(1), a party has to object at trial in a timely and proper manner to an error of the Trial Chamber or to a Trial Chamber's abuse of discretion, or the issue of waiver must be considered.[30]

B. Discussion

34. Article 25 of the Statute sets forth the circumstances in which a party may appeal from a final decision of the Trial Chamber. A party invoking a specific ground of appeal must establish an error within the scope of this provision, which provides:

> 1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:
>
> (a) an error on a question of law invalidating the decision; or
>
> (b) 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 Chambers.

[25] *Ibid.*, para. 2.10.
[26] *Ibid.*
[27] *Ibid.*, para. 2.8.
[28] T. 108 – 109 (2 March 2000).
[29] T. 111 – 112 (2 March 2000).
[30] Prosecutor's Response, para. 2.11.

521

35. Errors of law do not raise a question as to the standard of review as directly as errors of fact. Where a party contends that a Trial Chamber made an error of law, the Appeals Chamber, as the final arbiter of the law of the Tribunal, must determine whether there was such a mistake. A party alleging that there was an error of law must be prepared to advance arguments in support of the contention; but, if the arguments do not support the contention, that party has not failed to discharge a burden in the sense that a person who fails to discharge a burden automatically loses his point. The Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law.

36. Furthermore, this Chamber is only empowered to reverse or revise a decision of the Trial Chamber on the basis of Article 25(1)(a) when there is an error of law that invalidates that decision. It is not any error of law that leads to a reversal or revision of the Trial Chamber's decision; rather, the appealing party alleging an error of law must also demonstrate that the error renders the decision invalid.

37. As to an allegation that there was an error of fact, this Chamber agrees with the following principle set forth by the Appeals Chamber for the International Criminal Tribunal for Rwanda ("the ICTR")[31] in *Serushago*:

> Under the Statute and the Rules of the Tribunal, a Trial Chamber is required as a matter of law to take account of mitigating circumstances. But the question of whether a Trial Chamber gave due weight to any mitigating circumstance is a question of fact. In putting forward this question as a ground of appeal, the Appellant must discharge two burdens. He must show that the Trial Chamber did indeed commit the error, and, if it did, he must go on to show that the error resulted in a miscarriage of justice.[32]

Similarly, under Article 25(1)(b) of the ICTY Statute, it is not any and every error of fact which will cause the Appeals Chamber to overturn a decision of the Trial Chamber, but one which has led to a miscarriage of justice. A miscarriage of justice is defined in *Black's Law Dictionary* as "a grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime."[33] This Chamber adopts the following approach taken by the Appeals Chamber in the *Tadi}* case[34] in dealing with challenges to factual findings by Trial Chambers:

---

[31] International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Neighbouring States between 1 January and 31 December 1994 ("the ICTR").
[32] *Omar Serushago v. The Prosecutor*, Case No. ICTR-98-39-A, Reasons for Judgment, 6 Apr. 2000, para. 22.
[33] Black's Law Dictionary (7th ed., St. Paul, Minn. 1999).
[34] *Prosecutor v. Du{ko Tadi}*, Case No. IT-94-1-A, Judgement, 15 July 1999 ("the *Tadi}* Appeals Judgement").

> [t]he task of hearing, assessing and weighing the evidence presented at trial is left to the judges sitting in a Trial Chamber. Therefore, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. It is only where the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person that the Appeals Chamber can substitute its own finding for that of the Trial Chamber. It is important to note that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.[35]

The position taken by this Chamber in the *Tadi}* Appeals Judgement has been reaffirmed in the *Aleksovski* Appeals Judgement.[36] The reason the Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber is well known; the Trial Chamber has the advantage of observing witness testimony first-hand, and is, therefore, better positioned than this Chamber to assess the reliability and credibility of the evidence.

38. The Appeals Chamber now turns to consider the Appellant's submissions in relation to the appropriate standard of review where the sufficiency of the evidence in support of a conviction is challenged on appeal. The Appellant submits that the *Tadi}* Appeals Judgement demonstrates that, in evaluating the sufficiency of the evidence in support of a conviction, the Appeals Chamber must determine whether the standard of proof beyond reasonable doubt was correctly applied by the Trial Chamber.[37] The Appellant further invites the Appeals Chamber to: 1) conduct an independent assessment of the evidence, both as to its sufficiency and its quality; and 2) inquire whether a reasonable trier of fact could have found that an inference or hypothesis consistent with innocence of the offence charged was open on the evidence.[38] The Appellant further contends that, as to the application of the standard of proof beyond reasonable doubt, the Appeals Chamber must find that guilt was not merely a reasonable conclusion based on the evidence, but rather the only "fair and rational hypothesis which may be derived from the evidence".[39]

39. The Appellant's reliance on the *Tadi}* Appeals Judgement is misplaced. In *Tadi}*, the Appeals Chamber held that the Trial Chamber had erred in law in its application of the legal standard of proof beyond reasonable doubt to its factual findings in respect of certain charges in the indictment. The application of the correct legal standard did not support the inferences which the Trial Chamber had drawn from the facts. On a true interpretation, the *Tadi}* Appeals Chamber did not disturb the finding of facts by the Trial Chamber.

40. The Appeals Chamber finds no merit in the Appellant's submission which it understands to mean that the scope of the appellate function should be expanded to include *de novo* review. This

---

[35] *Tadi}* Appeals Judgement, para. 64.
[36] *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("the *Aleksovski* Appeals Judgement"), para. 63.
[37] Appellant's Reply, p. 4.
[38] *Ibid.*, p. 8.
[39] *Ibid.* (citing *Tadi}* Appeals Judgement, para. 174).

Chamber does not operate as a second Trial Chamber. The role of the Appeals Chamber is limited, pursuant to Article 25 of the Statute, to correcting errors of law invalidating a decision, and errors of fact which have occasioned a miscarriage of justice.

524

III. FIRST GROUND OF APPEAL

A. Submissions of the Parties

1. The Appellant

41. As a first ground of appeal against the Judgement, the Appellant argues that he was denied the right to a fair trial under Article 21 of the Statute. As a consequence, the Appeals Chamber should acquit him on Counts 13 and 14 of the Amended Indictment. In support of this ground, the Appellant submits the following arguments: (a) he did not receive fair notice of the charges to be proven against him; (b) the Trial Chamber failed to provide a reasoned opinion in respect of the conflicting testimony of Witness A and Witness D; and (c) he was denied the right under Article 21(4) of the Statute to call witnesses during the re-opened proceedings.[40]

(a) Lack of fair notice of the charges to be proven against the Appellant

42. As a first aspect of this ground of appeal, the Appellant submits that the Trial Chamber erred by failing to ensure that he received fair notice of the charges to be proven against him, as required by Articles 20 and 21 of the Statute.

43. The Appellant argues that his convictions rested upon a sequence of events which were not described in any document filed by the Prosecutor prior to trial and that the case of the Prosecutor leading to the findings of the Trial Chamber, which in turn resulted in his convictions, was not presented to him until trial.[41] He submits that the Prosecutor's case at trial proved to be inconsistent with that reflected in the Indictment and Amended Indictment and the pre-trial pleadings.[42]

44. More specifically, the Appellant contends that the documents submitted by the Prosecutor prior to trial, on which the Appellant relied for trial preparation, including the Indictment and the 1995 Statement by Witness A, do not contain any allegations of complicity in rapes or sexual assaults committed in the large room ("the Large Room") either in his presence or after his departure.[43] According to the Appellant, the Amended Indictment does not contain allegations of a conspiracy between him and Accused B, nor does it contain allegations of concert of action and forced nudity, since any rapes and sexual assaults committed in the Large Room are alleged to have taken place before the Appellant's arrival in that room.[44] The Appellant contends that, in reliance

[40] Appellant's Amended Brief, pp. 49-50, 75 and T. 9 - 10 (2 March 2000).
[41] Appellant's Amended Brief, pp. 56-57.
[42] *Ibid.*, pp. 56-60 and T. 9 (2 March 2000).
[43] Appellant's Amended Brief, pp. 59-63.
[44] T. 30 (2 March 2000).

on the Prosecutor's pre-trial submissions and the Indictment, he prepared for trial in the reasonable belief that the Prosecutor would attempt to prove that he arrived in the Large Room after the sexual assaults on Witness A by Accused B had taken place.[45] The Appellant submits that the testimony of Witness A at trial was inconsistent with the events alleged in the Amended Indictment and all pre-trial pleadings, in that Witness A testified at trial that the Appellant 1) began questioning Witness A prior to Accused B's arrival in the Large Room, 2) was present at the time of Accused B's rape of Witness A in the Large Room, 3) questioned Witness A in the "Large Room" while Accused B was raping her and otherwise sexually assaulting her, and 4) left Witness A with Accused B in the Large Room where Accused B continued to rape and sexually assault her.[46]

45. The Appellant contends that he alerted the Trial Chamber to the serious prejudice he suffered as a result of the misleading pleadings and that the Trial Chamber responded by issuing a decision, dated 12 June 1998, stating that it would consider the evidence of Witness A only "insofar as it relates to Paragraphs 25 and 26 as pleaded in the Indictment."[47] A subsequent motion for clarification submitted by the Prosecutor led to an additional confidential decision, dated 15 June 1998, specifying that '[t]he Trial Chamber rules inadmissible all evidence relating to rape and sexual assault perpetrated on [Witness A] by the individual identified as [Accused B] in the presence of the accused in the 'Large Room' apart from the evidence of sexual assault alleged in paragraph 25 of the [Amended Indictment]."[48] The Appellant submits that, in reliance on the decisions of the Trial Chamber, he did not undertake the necessary measures to obtain additional witnesses who could testify to his absence from the Large Room while Witness A was being sexually assaulted.[49] He further contends that the Amended Indictment did not allege that he left Witness A to be sexually assaulted by Accused B.[50]

46. In sum, the Appellant submits that the trial proved to be unfair when the Trial Chamber made findings concerning rapes and sexual assaults perpetrated by Accused B on Witness A in the Large Room on the basis of evidence which it had previously declared inadmissible, and convicted the Appellant based on those findings.

---

[45] Appellant's Amended Brief, p. 57 and T. 36 - 7 (2 March 2000).
[46] Appellant's Amended Brief, pp. 59-60.
[47] *Ibid.*, p. 63 (citing *Prosecutor v. Anto Furund'ija*, Case No. IT-95-17/1-T, Decision, 12 June 1998, p. 2).
[48] Appellant's Amended Brief p. 64 (citing Confidential Decision, 15 June 1998, p. 2) and T. 47 (2 March 2000).
[49] Appellant's Amended Brief, p. 64 and T. 49 (2 March 2000).
[50] T. 54 (2 March 2000).

(b) The Trial Chamber failed to provide a reasoned opinion in relation to the conflict between the testimony of Witness A and that of Witness D

47. In respect of the second aspect of this ground of appeal, the Appellant submits that he did not receive a fair trial as a result of the Trial Chamber's failure to provide a reasoned opinion to explain its evaluation of the conflicting evidence of Witness A and Witness D on a determinative issue. The Appellant contends that the Trial Chamber failed to reconcile the conflicting testimony as to whether the Appellant conducted an interrogation in the pantry ("the Pantry") and whether he was even present in that room. He argues that the absence of reasoning in the Judgement on this decisive point constitutes an error of law and violates his right to a fair trial under Articles 21 and 23(2) of the Statute as well as under Article 6(1) of the European Convention on Human Rights.[51]

48. While recognising that the Trial Chamber need not address every discrepancy in the evidence, the Appellant contends that discrepancies on issues that may be determinative of guilt or innocence must be addressed in a reasoned manner.[52] The Appellant cites the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights to support the contention that "the Trial Chamber was under an obligation to address well-founded submissions on determinative issues."[53]

(c) Denial of the right to call Witnesses F and Enes [urkovi} upon the reopening of the proceedings

49. As a third aspect of this ground of appeal, the Appellant contends that the Trial Chamber denied his right under Article 21(4) of the Statute to obtain the attendance and examination of Witness F and Enes [urkovi} during the re-opened proceedings, as part of his general right to a fair trial.[54]

50. The Appellant submits that the Trial Chamber failed to remedy the prejudice suffered by him as a consequence of the Prosecutor's inexcusable misconduct with regard to the belated disclosure of the Medica documents, since the relief chosen by the Trial Chamber failed to place him in the position he would have been in had the Prosecutor disclosed the Medica documents prior to trial.[55] According to the Appellant, the scope of the re-opened proceedings was so restrictive that he could not pursue relevant defences and, consequently, did not receive a fair trial. The Appellant

[51] European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 ("the European Convention on Human Rights").
[52] T. 76 (2 March 2000).
[53] T. 79 (2 March 2000); Appellant's Amended Brief, pp. 65-72, and in particular pp. 70-71 where the jurisprudence of the European Court of Human Rights is discussed.
[54] Appellant's Amended Brief, pp. 74-75.
[55] *Ibid.*, p. 73.

argues that, by limiting the issues at the re-opened proceedings to the psychiatric and psychological treatment received by Witness A, he was prevented from introducing relevant evidence contained in the Medica documents, such as Witness A's mental and emotional condition during the material period in 1993, the relevance of which was unknown to the Defence prior to the disclosure of the Medica documents.[56] Furthermore, according to the Appellant, the limited scope of the re-opened proceedings prevented him from introducing evidence regarding the credibility of Witness A's trial testimony in respect of her emotional condition during the relevant period of 1993.[57]

51. The Appellant further contends that the Trial Chamber erred in denying him the right to call Witness F on the ground that his testimony would fall outside the scope of the re-opened proceedings. The Appellant submits that the testimony of Witness F was within the ambit of the re-opened proceedings, since, among other things, Witness F was purportedly the first person to take Witness A for medical treatment after the events in question.[58] Furthermore, the Appellant submits that it was only in the course of the investigation arising out of the disclosure of the Medica documents that he learnt that Witness F had relevant information.[59]

52. In respect of Enes [urkovi}, the Appellant argues that his proposed testimony would bear directly on the issue of Witness A's credibility and, in particular, Witness A's repudiation of a 1993 statement which Enes [urkovi} prepared based on a conversation he had with Witness A in December 1993.[60]

2. The Respondent

53. The Prosecutor rejects the Appellant's complaints regarding the alleged errors committed by the Trial Chamber, as set out in the first ground of appeal, and requests that this ground be dismissed.

(a) Appellant received fair notice in respect of the charges to be proven against him

54. In addressing the first aspect of this ground of appeal, the Prosecutor submits that there was ample notice of the conduct alleged in paragraphs 25 and 26 of the Amended Indictment which the Appellant faced at trial,[61] and that, in any event, the issue of lack of fair notice as to conduct in the Large Room which was not reflected in the Amended Indictment was resolved by the Trial Chamber's Decision of 12 June 1998, granting the Appellant's request to exclude certain

[56] *Ibid.*, pp. 72-73 and Appellant's Reply, p. 24.
[57] Appellant's Amended Brief, p.73.
[58] T. 82 (2 March 2000).
[59] Appellant's Reply, pp. 22-24.
[60] *Ibid.*, pp. 23-24.

evidence.[62] The Prosecutor further submits that there are no findings in the Judgement which support the Appellant's argument that the Trial Chamber based its conviction on evidence which it had previously held to be inadmissible.[63]

(b) Alleged failure of the Trial Chamber to provide a reasoned opinion in relation to the conflict between the testimony of Witness A and that of Witness D

55. The Prosecutor submits that there is no inconsistency between the testimony of Witnesses A and D as to whether Witness D was interrogated in the Pantry and that there is no failure on the part of the Trial Chamber to give a reasoned opinion on this particular issue. The Prosecutor further submits that the Trial Chamber was under no obligation to provide reasons for its findings with respect to an issue that was never squarely raised by either party.[64] The Prosecutor contends that the Trial Chamber's findings (or lack thereof) with respect to the alleged inconsistencies in the evidence of Witness A and Witness D concerning the Appellant's presence in the Pantry do not amount to a violation of the Appellant's right to a reasoned opinion pursuant to Article 23 of the Statute.[65] The Prosecutor says that, upon a review of the Judgement in its totality, the Trial Chamber provided a "reasoned opinion in writing", as required by Article 23 of the Statute.[66] The Prosecutor distinguishes the circumstances of the instant case from those in the case law on which the Appellant relies.[67]

(c) Alleged denial of the right to call Witnesses F and Enes [urkovi} upon the reopening of the proceedings

56. The Prosecutor rejects the Appellant's contention that the scope of the re-opened proceedings was too limited and submits that the new matter which arose as a result of the belated disclosure of the Medica documents was correctly circumscribed by the Trial Chamber in its decision to reopen the proceedings.[68] The Prosecutor contends that the issue of medical, psychiatric or psychological treatment or counselling received by Witness A was the focus of the re-opened proceedings, and not the mental health or psychological state of Witness A generally.[69] According to the Prosecutor, the Appellant was aware that any evidence relating to the mental health or

---

[61] Prosecutor's Response, paras. 3.26-3.34.
[62] *Ibid.*, para. 3.22 and T. 118 (2 March 2000).
[63] Prosecutor's Response, paras. 3.39-3.43.
[64] T. 139 - 140 (2 March 2000).
[65] Prosecutor's Response, paras. 3.51–3.55.
[66] *Ibid.*, paras. 3.54-3.55.
[67] *Ibid.*, paras. 3.75-3.77.
[68] *Ibid.*, paras. 3.78, 3.83 – 3.87. See also *Prosecutor v. Anto Furund`ija*, Case No. IT-95-17/1-T, Decision, 16 July 1998.
[69] Prosecutor's Response, paras. 3.82-3.83.

psychological state of Witness A generally would have been material to his case since his defence had been conducted on the basis that Witness A's memory was flawed. Consequently, the Prosecutor submits, the Appellant was under an obligation to exercise due diligence in respect of the production of such evidence during the trial.[70]

57. With regard to the proposed testimony of Witness F, the Prosecutor submits that this testimony would not have been relevant to the issue of any medical, psychological or psychiatric treatment or counselling received by Witness A after 1993. The Prosecutor, therefore, argues that the Trial Chamber's decision to deny the Appellant leave to introduce the testimony of Witness F was in accordance with the limits set by the Trial Chamber's decision defining the scope of the re-opened proceedings. The Prosecutor further contends that the alleged relevance of Witness F's proposed testimony could have been ascertained through the exercise of due diligence before the Medica documents were disclosed.[71]

58. The Prosecutor contends that the same conclusions apply in respect of the proposed testimony of Enes [urkovi}.[72]

B. Discussion

(a) First aspect of the first ground of appeal

59. With regard to the first aspect of the first ground of appeal, the Appellant submits that his trial was unfair since he did not receive fair notice of the charges to be proven against him. In particular, he complains that the Trial Chamber erred by including certain findings in the Judgement relating to acts which fall outside the scope of the Amended Indictment.

60. The Appeals Chamber notes that the Indictment was filed and remains under seal. On 2 June 1998, however, the Prosecutor filed an Amended Indictment, which set forth, by way of a redacted version of the Indictment, only those allegations underlying three counts against the Appellant.[73] The only difference between the Indictment and the Amended Indictment is that in the former the introductory words "shortly after the events described in paragraphs 21 and 22" appear in paragraph 25. The Appellant did not raise any objections in respect of the Amended Indictment as filed on 2 June 1998, and his trial proceeded on the basis of the charges as set forth therein. Any complaint raised by the Appellant as to whether he received fair notice of the charges to be proven

[70] *Ibid.*, paras. 3.82-3.90.
[71] *Ibid.*, paras. 3.80-3.83.
[72] *Ibid.*, and paras. 3.87-3.89.
[73] With the filing of the Amended Indictment the count based on Article 2 of the Statute, together with any associated allegations, was also withdrawn.

against him must be assessed in light of the allegations contained in the Amended Indictment. Accordingly, the charges set forth in the Indictment against the Appellant and the other co-accused, including Accused B, are not relevant to the determination of this ground of appeal.

61. Article 18(4) of the Statute and Rule 47(C) of the Rules require that an indictment contain a concise statement of the facts of the case and of the crime with which the suspect is charged. That requirement does not include an obligation to state in the indictment the evidence on which the Prosecution has relied. Where evidence is presented at trial which, in the view of the accused, falls outside the scope of the indictment, an objection as to lack of fair notice may be raised and an appropriate remedy may be provided by the Trial Chamber, either by way of an adjournment of the proceedings, allowing the Defence adequate time to respond to the additional allegations, or by excluding the challenged evidence.

62. The Amended Indictment alleges in relevant part:

> On or about 15 May 1993, at the Jokers Headquarters in Nadioci (the "Bungalow") [the Appellant] the local commander of the Jokers, [Accused B] and another soldier interrogated Witness A. While being questioned by [the Appellant], [Accused B] rubbed his knife against Witness A's inner thigh and lower stomach and threatened to put his knife inside Witness A's vagina should she not tell the truth.[74]

63. The Appellant submits that the Trial Chamber erred in finding that his questioning of Witness A in the Large Room commenced prior to Accused B's entry, as this sequence of events is not consistent with that set forth in the Amended Indictment. While it is stated in the Judgement that "Witness A, under cross-examination was adamant that [the Appellant] was in the [Large Room] before Accused B entered",[75] this is merely a narrative account of the evidence given by Witness A and does not form part of the Trial Chamber's factual findings. The Appeals Chamber, therefore, is unable to find any merit in the Appellant's submission.

64. The Appellant further submits that the Trial Chamber erred in finding that rapes and sexual assaults were committed in his presence in the Large Room, on the basis of evidence which it had previously declared inadmissible, and in convicting him on that basis. The objection was founded on the fact that the Amended Indictment did not include an allegation that the Appellant was present in the Large Room, while rapes and sexual assaults were perpetrated there. The Appeals Chamber observes that the Trial Chamber upheld this objection insofar as it ruled "inadmissible all evidence relating to rape and sexual assault perpetrated on [Witness A] by [Accused B] in the

[74] Amended Indictment, para. 25.
[75] Judgement, para. 80.

presence of the [Appellant] in the 'Large Room' apart from the evidence of sexual assault alleged in paragraph 25 of the [Amended Indictment]".[76]

65. The Appellant however raises the additional question whether the Trial Chamber failed to adhere to the terms of its own decision by including factual findings in the Judgement concerning rapes and sexual assaults committed in the Appellant's presence in the Large Room and convicting the Appellant on that basis. These factual findings are set out in the following paragraphs of the Judgement relating to events in the Large Room:

> 124. Witness A was interrogated by the [Appellant]. She was forced by Accused B to undress and remain naked before a substantial number of soldiers. She was subjected to cruel, inhuman and degrading treatment and to threats of serious physical assault by Accused B in the course of her interrogation by the [Appellant]. The purpose of this abuse was to extract information from Witness A about her family, her connection with the ABiH and her relationship with certain Croatian soldiers, and also to degrade and humiliate her. The interrogation by the [Appellant] and the abuse by Accused B were parallel to each other.
>
> 125. Witness A was left by the accused in the custody of Accused B, who proceeded to rape her, sexually assault her, and to physically abuse and degrade her.
>
> 126. Witness A was subjected to severe physical and mental suffering and public humiliation.

66. The Appeals Chamber would observe that paragraph 125 refers to rapes and sexual assaults perpetrated by Accused B after the Appellant's departure from the Large Room. The Trial Chamber did not make any factual findings that rapes and sexual assaults were committed in the Appellant's presence in the Large Room, nor was the Appellant convicted on that basis.[77]

67. The Appellant further submits that the Trial Chamber's finding that the Appellant left Witness A in the Large Room to be raped and sexually assaulted by Accused B was impermissible as falling outside the scope of the Amended Indictment.[78] In this context, the Appeals Chamber notes the following. Although the Amended Indictment against the Appellant does not contain any allegations to that effect, at trial Witness A gave evidence that the Appellant left her in the Large Room where she was raped and sexually assaulted by Accused B. In its Judgement, the Trial Chamber states that the Defence "has not disputed that the [Appellant] left Witness A in the room and that there followed another phase of serious sexual assaults by Accused B."[79] The Trial Chamber found that "Witness A was left by the [Appellant] in the custody of Accused B, who proceeded to rape her, sexually assault her, and to physically abuse and degrade her".[80] But while finding so as part of the narrative, the Trial Chamber did not say that the Appellant, in leaving

---

[76] Confidential Decision, p.2. See also Judgement, paras. 18 and 81.
[77] Judgement, paras. 264 – 269.
[78] Appellant's Reply, p. 39.
[79] Judgement, para. 83.
[80] *Ibid.*, para. 125.

Witness A in the custody of Accused B, did so with the intent that Accused B should perform those acts on Witness A. The performance of such acts by Accused B did not influence the Trial Chamber in coming to a decision to convict the Appellant. This is borne out by a review of the Trial Chamber's legal findings in support of the Appellant's conviction for torture under Count 13 which contain no reference to rapes and sexual assaults in the Large Room:

> The Trial Chamber is satisfied that the Appellant was present in the large room and interrogated Witness A, whilst she was in a state of nudity. As she was being interrogated, Accused B rubbed his knife on the inner thighs of Witness A and threatened to cut out her private parts if she did not tell the truth in answer to the interrogation by the accused. The accused did not stop his interrogation, which eventually culminated in his threatening to confront Witness A with another person, meaning Witness D and that she would then confess to the allegations against her. To this extent, the interrogation by the accused and the activities of Accused B became one process. The physical attacks, as well as the threats to inflict severe injury, caused severe physical and mental suffering to Witness A.[81]

There is no reference in this paragraph or in any of the other paragraphs relating to these legal findings to the evidence of Witness A being "left by the [Appellant] in the custody of Accused B, who proceeded to rape her, sexually assault her, and to physically abuse and degrade her."[82]

(b) Second aspect of the first ground of appeal

68. The Appellant submits that he was denied a fair trial under Article 21(2) and Article 23(2) of the Statute, since the Trial Chamber failed to provide a reasoned opinion as to the manner in which it resolved the conflict between the testimony of Witness A and that of Witness D on the question whether the Appellant conducted an interrogation in the Pantry. The Appellant specifically objects to the Trial Chamber's conclusion that "the evidence of Witness D does confirm the evidence of Witness A in this regard."[83]

69. The right of an accused under Article 23 of the Statute to a reasoned opinion is an aspect of the fair trial requirement embodied in Articles 20 and 21 of the Statute. The case-law that has developed under the European Convention on Human Rights establishes that a reasoned opinion is a component of the fair hearing requirement, but that "the extent to which this duty . . . applies may vary according to the nature of the decision" and "can only be determined in the light of the circumstances of the case."[84] The European Court of Human Rights has held that a "tribunal' is not obliged to give a detailed answer to every argument.[85]

---

[81] *Ibid.*, para. 264.
[82] *Ibid.*, para. 125.
[83] *Ibid.*, para. 116.
[84] See *Case of Ruiz Torija v. Spain*, Judgment of 9 December 1994, Publication of the European Court of Human Rights ("Eur. Ct. H. R."), Series A, vol. 303, para. 29.
[85] *Case of Van de Hurk v. The Netherlands*, Judgment of 19 April 1994, Eur. Ct. H. R., Series A, vol. 288, para. 61.

70. From a reading of the Judgement, the Appeals Chamber considers that the Trial Chamber dealt satisfactorily with the evidence of Witnesses A and D. Paragraphs 84 - 89 of the Judgement are devoted to events in the Pantry. In these paragraphs, the Trial Chamber considered the evidence of both Witnesses A and D in respect of the events in the Pantry and, on this basis, arrived at its factual findings which are set out in paragraphs 127 - 130.

71. Moreover, the Appeals Chamber is not convinced that there was any necessary conflict in the evidence of the two witnesses. Indeed, Witness D's evidence could be read to support Witness A's testimony that the Appellant was present in the Pantry, as Witness D testified that he entered the Pantry with the Appellant and that later, while he was being beaten by Accused B, the Appellant was standing by the doorway to the Pantry.[86]

72. As to the Appellant's objection to the Trial Chamber's statement that "the evidence of Witness D does confirm the evidence of Witness A in this regard,"[87] the Appeals Chamber notes that this conclusion does not relate to the issue whether the Appellant interrogated anyone in the Pantry or whether he was present in that room. The statement was made in the context of the Trial Chamber's review of certain inconsistencies in Witness A's testimony and did not refer to the question whether the Appellant conducted any interrogation in the Pantry. The Appellant's objection is therefore unfounded.

73. Based on the foregoing analysis, the Appeals Chamber finds that the evidence is not conflicting on the question whether the Appellant conducted an interrogation in the Pantry or whether he was present in that room during the physical assaults perpetrated by Accused B upon Witnesses A and D. In view of this, the Appeals Chamber is unable to conclude that the Trial Chamber erred in the manner alleged by the Appellant.

(c) Third aspect of the first ground of appeal

74. In respect of the third aspect of the first ground, the Appellant contends that, by preventing him from introducing the testimony of Witness F and Enes [urkovi} when the proceedings were re-opened, the Trial Chamber violated his right, under Article 21(4) of the Statute, to examine, and obtain the attendance of, relevant witnesses on his behalf.

75. Article 21(4)(e) of the Statute grants an accused the right "to obtain the attendance and examination of witnesses on his behalf". This right is, for obvious reasons, subject to certain

[86] Judgement, paras. 85 and 87.
[87] *Ibid.*, para. 116.

conditions, including a requirement that the evidence should be called at the proper time.[88] In this regard, the Appeals Chamber observes that the Appellant was obliged, under the applicable rules, to present all available evidence at trial. However, it should be noted that the proceedings were re-opened due to the exceptional circumstance of the Prosecutor's late disclosure of material which, in the view of the Trial Chamber, "clearly had the potential to affect the '*credibility of prosecution evidence*'".[89] The question arises whether the Trial Chamber was correct to limit the Appellant's right to call new evidence in the re-opened proceedings to "any medical, psychological or psychiatric treatment or counselling received by Witness A after May 1993,"[90] and to deny him the right to call Witness F and Enes [urkovi} on the ground that their proposed testimony fell outside the scope of the re-opened proceedings.

76. As to the first issue, namely, whether the scope of the re-opened proceedings was too restrictive, the Appeals Chamber notes that the material belatedly disclosed by the Prosecutor was a witness statement dated 16 September 1995 from a psychologist at the Medica Women's Therapy Centre, concerning the treatment Witness A had received at the Centre. The Trial Chamber determined that the sole issue arising out of the disclosure of the material was the medical, psychological or psychiatric treatment or counselling received by Witness A, and not the more general question of the mental health and psychological state of Witness A. The Appeals Chamber sees no basis for interfering with this assessment. Furthermore, the Appeals Chamber considers that the relevance of Witness A's mental health could not have been unknown to the Appellant prior to the Prosecutor's disclosure of the material, especially in the light of the mistreatment that Witness A had endured and the circumstance that the Appellant's defence was premised on the fact that Witness A's memory was flawed and that she was therefore not a reliable witness. This conclusion is supported by the fact that, at trial the Appellant called an expert witness, Dr. Elisabeth Loftus, to testify on the effects of shock and trauma on memory. In accordance with the general rule that evidence should be called at the proper time, the Appellant was obliged to call all evidence which, in his estimation, had a bearing on the more general subject of Witness A's mental condition and her lack of reliability during the trial.

77. The second issue concerns the Trial Chamber's denial of the Appellant's alleged right to call Witness F and Enes [urkovi} on the ground that their proposed evidence fell outside the scope of the re-opened proceedings. The Appeals Chamber finds no merit in the Appellant's submission that the evidence was incorrectly excluded. The proposed evidence was clearly not relevant to the

---

[88] Rule 85 of the Rules provides that evidence at trial shall be presented in a certain sequence unless otherwise directed by the Trial Chamber in the interests of justice.
[89] *Prosecutor v. Anto Furund`ija*, Case No. IT-95-17/1-T, Decision, 16 July 1998, para. 17 (original emphasis).
[90] *Ibid.*, p. 8.

question of medical, psychological or psychiatric treatment or counselling received by Witness A, which was the subject of the re-opened proceedings. Outside of these matters, the introduction of the evidence at that stage could not be justified.

78. The Appeals Chamber accordingly finds that the Trial Chamber did not err when it decided to deny the Appellant the right to call Witness F and Enes [urkovi} on the ground that the proposed testimony fell outside the scope of the re-opened proceedings.

79. For the foregoing reasons, this ground must fail.

IV. SECOND GROUND OF APPEAL

A. Submissions of the Parties

1. The Appellant

80. As the second ground of appeal, the Appellant submits that the Prosecutor failed to prove beyond reasonable doubt: (a) that he committed torture; and (b) that he committed outrages upon personal dignity including rape.

(a) The evidence was insufficient to convict Anto Furund`ija of the crime of torture (Count 13 of the Amended Indictment)

81. The Appellant alleges that the Trial Chamber established his liability for the crime of torture on the basis of its finding that he interrogated Witness A in the Pantry, but that the evidence does not prove this beyond reasonable doubt.[91] He claims that Witness D testified that the only interrogator in the Pantry was Accused B, and that the "very, very credible" testimony of the "truthful" Witness D, as described by the Prosecutor during the trial, precludes a finding that the Appellant conducted any interrogation in the Pantry.[92]

82. The Appellant further contends that Witness A's identification of him in court is unreliable.[93] He refers to the case of *Prosecutor v. Du{ko Tadi}* where the Trial Chamber addressed the need to identify the accused independently of in-court identification.[94] He submits that in the Judgement, the Trial Chamber never addressed the possibility that Witness A's memory of him could have been displaced or altered, when she saw his image on a BBC television report, or that her in-court identification of him was merely an identification of the man she had seen on television rather than a description of the person she had seen in the Large Room or the Pantry.[95]

83. The Appellant further submits that the acts charged in the Amended Indictment would not constitute torture, even if proven. The Appellant alleges that the Prosecutor failed to prove that, by the acts and omissions charged in the Amended Indictment, he intentionally inflicted "severe pain or suffering, whether physical or mental", aimed at "obtaining information or a confession, or at

---

[91] Appellant's Amended Brief, p. 78.
[92] *Ibid.*
[93] *Ibid.*, pp. 78-80.
[94] *Ibid.*, p. 80 (citing *Prosecutor v. Du{ko Tadi}*, Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997, para. 546).
[95] *Ibid.*, pp. 82-83.

punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person."[96]

84. The Appellant contends that, to establish his liability as co-perpetrator of the crime of torture under the Trial Chamber's definition of the necessary elements of that crime, proof by the Prosecutor that he questioned Witness A is insufficient. He submits that a direct connection must be proven between his questioning and the infliction by Accused B of severe pain and suffering upon Witness A, whether physical or mental,[97] but that there has been no such proof.[98]

85. The Appellant further submits that Witness A's testimony of the events was unreliable, as she suffered from post-traumatic stress disorder ("PTSD"), and that the inconsistencies in her testimony do not justify the Trial Chamber's finding that "inconsistencies may, in certain circumstances, indicate truthfulness and the absence of interference with witnesses".[99]

(b) The evidence was insufficient to convict Anto Furund`ija of the crime of outrages upon personal dignity, including rape

86. The Appellant submits that the Trial Chamber cited no authority for the proposition that his presence alone could support a conviction for aiding and abetting.[100] He contends that the acts charged against him in paragraph 26 of the Amended Indictment do not constitute aiding and abetting, and that the cases upon which the Trial Chamber relied to support the conviction for aiding and abetting are distinguishable from the instant case. The Appellant distinguishes the circumstances in the *Dachau Concentration Camp* case and submits that the conduct of the accused in that case, which the court found to constitute "acting in pursuance of a common design to violate the laws and usages of war", did not occur in the present case.[101] Referring to the case of *Rohde*, he argues that there is no evidence that he was a link in the chain of events that led to the rape of Witness A.[102] He also refers to the decision in the *Stalag Luft III* case, and submits that there is no proof that his acts contributed directly to the rape or that the rape would not have happened in this manner had he not aided it willingly.[103] Relying on the *Schonfeld* case, the Appellant submits that he cannot be convicted of aiding and abetting merely because he did not endeavour to prevent the rape of Witness A.[104] He argues that, unlike in the *Schonfeld* case, there was no allegation in this

[96] Judgement, para. 162.
[97] Appellant's Amended Brief, p. 84.
[98] *Ibid.*, pp. 86-91.
[99] *Ibid.*, pp. 91-94 (referring to the Judgement, para. 113).
[100] *Ibid.*, pp. 95-96.
[101] *Ibid.*, p. 98.
[102] *Ibid.*, p. 99.
[103] *Ibid.*, pp. 99-100.
[104] *Ibid.*, p. 100.

case that his mere presence in or outside the Pantry "was calculated to give additional confidence" to Accused B.[105] He also submits that his case is to be contrasted with the *Almelo Trial* and the *Trial of Otto Sandrock and Three Others*, since there was no allegation or evidence that he knew that there was a common purpose behind the rape of Witness A or that he had gone to the Pantry for the very purpose of having Witness A raped.[106]

2. The Respondent

(a) The evidence was sufficient to convict the Appellant of torture

87. As regards the Appellant's argument that Witness D testified that the only interrogator in the Pantry was Accused B, the Respondent submits that there is no inconsistency between the testimony of Witnesses A and D as to whether Witness D was interrogated in the Pantry and that there is no failure on the part of the Trial Chamber to give a reasoned opinion on this particular issue.[107]

88. With respect to the Appellant's argument concerning his in-court identification by Witness A, the Prosecutor submits that a proper identification of the Appellant did not depend only on Witness A's evidence, but that Witness D's evidence, among others, was highly relevant, and that the totality of the evidence more than sufficiently identified the Appellant.[108]

89. As regards the Appellant's contention that the acts charged against him in the Amended Indictment, even if proven, do not constitute torture, the Prosecutor interprets that contention to include such issues as the insufficiency of the Amended Indictment, an error of law by the Trial Chamber in determining the elements of torture, the insufficiency of the evidence, and the lack of showing of a previous conspiracy or of evidence in support of a finding of action in concert.[109] The Prosecutor submits that the elements of torture committed in an armed conflict, as stated by the Trial Chamber in the Judgement, reflect a correct interpretation of the law.[110] It is submitted that there was sufficient and relevant evidence for the Trial Chamber to draw the factual conclusions to establish beyond reasonable doubt the elements of the offence of torture in this case.[111] The Prosecutor submits that neither the Statute and the Rules nor the jurisprudence of the International Tribunal require that each and every element of an offence be alleged in an indictment, and that, by failing to raise the insufficiency of the Amended Indictment at the pre-trial stage, the Appellant

[105] *Ibid.*
[106] *Ibid.*, p. 101.
[107] Prosecutor's Response, paras. 3.44-3.55. See *supra*, para. 55.
[108] Prosecutor's Response, para. 4.9.
[109] *Ibid.*, para. 4.17.
[110] *Ibid.*, para. 4.2.
[111] *Ibid.*, paras. 4.4-4.5.

effectively waived this argument.[112] Any challenge by the Appellant to the Trial Chamber's formulation of the elements of torture would constitute an error of law that requires *de novo* review. However, the Prosecutor considers that the determination by the Trial Chamber that the evidence proved the Appellant's guilt of torture beyond reasonable doubt should not be disturbed, as there is a reasonable basis for it.[113]

90. As to the question whether the Amended Indictment contained sufficient allegations of concerted action between Accused B and the Appellant, the Prosecutor submits that the Amended Indictment alleged that the Appellant was liable under Article 7(1) of the Statute, and that the *Tadi}* Appeals Judgement establishes that liability for action in concert is contained within Article 7(1) of the Statute.[114] With respect to the need to demonstrate a conspiracy or a pre-existing plan, the Prosecutor argues that this is unnecessary, as the *Tadi}* Appeals Judgement finds that individual criminal responsibility does not require a pre-existing plan between the parties.[115] The Prosecutor contends that the evidence provided a reasonable basis for the finding of co-perpetration, consistent with the *Tadi}* Appeals Judgement,[116] and, in her view, established that the Appellant acted "in unison" with Accused B, performing different parts of the torture process.[117] The Prosecutor submits that the events in this case should not be artificially divided between the Large Room and the Pantry, as the process was a continuum and must be assessed in its entirety.[118] It is her view that the Appellant has failed to demonstrate that the Trial Chamber's finding that the Appellant and Accused B acted in concert was unreasonable,[119] and that there is no requirement that there be proof of a pre-existing plan or design in order to find the accused criminally liable as a co-perpetrator; common design may be inferred from the circumstances of the case.[120]

91. The Prosecutor notes that Witness A testified that there was a relationship between the questions and the assaults,[121] and that the evidence demonstrated that the Appellant was seeking information from Witness A. Even assuming that the main purpose of the Appellant was to obtain information, in contrast with the purpose of Accused B, which was to humiliate and degrade

---

[112] *Ibid.*, paras. 4.18-4.20.
[113] *Ibid.*, paras. 4.22-4.27.
[114] *Ibid.*, para. 4.28 (citing the *Tadi}* Appeals Judgement, paras. 189-193).
[115] *Ibid.*, paras. 4.30-4.31 (citing the *Tadi}* Appeals Judgement, para. 227).
[116] *Ibid.*, paras. 4.32-4.36 (citing the *Tadi}* Appeals Judgement, paras. 190-206, 220).
[117] *Ibid.*, paras. 4.34-4.35.
[118] *Ibid.*, para. 4.36.
[119] *Ibid.*, para. 4.37.
[120] *Ibid.*, para. 4.37.
[121] *Ibid.*, paras. 4.38-4.39.

Witness A, that main purpose would not alter the individual criminal responsibility of the Appellant as co-perpetrator of torture.[122]

92. Contrary to the Appellant's argument that the Trial Chamber erred in finding Witness A to be reliable, the Prosecutor is of the view that the Trial Chamber had ample opportunity to assess all the submissions made on this issue and its determination should be given due weight.[123]

(b) The evidence was sufficient to convict the Appellant of the crime of outrages upon personal dignity including rape

93. It is the Prosecutor's view that the substance of the Appellant's arguments relates to the mode of participation, i.e., aiding and abetting, upon which the Appellant was found guilty of outrages upon personal dignity.

94. The Prosecutor addresses the three bases supporting the Appellant's arguments. First, as regards the Appellant's submission that the Prosecutor failed to prove beyond reasonable doubt that the Appellant conducted any interrogation in the Pantry, based on Witness D's testimony, the Prosecutor argues that the Trial Chamber's findings were reasonable and that Witness D's testimony corroborated Witness A's testimony as to the presence of the Appellant in the Pantry.[124] Secondly, concerning the Appellant's submission that Witness A's identification of the Appellant in court was unreliable, the Prosecutor contends that the totality of the evidence confirms the identity of the Appellant as the perpetrator of the crimes of which he now stands accused.[125] Thirdly, the Prosecutor submits that the Appellant's argument that the acts described in paragraph 26 of the Amended Indictment do not constitute aiding and abetting is based on the Appellant's misunderstanding of the case law cited in the Judgement. In support, the Prosecutor refers to the case law of the International Tribunal which establishes that a "knowing presence" that has a direct and substantial effect on the commission of the illegal act is sufficient "to base a finding of participation and assign the criminal culpability that accompanies it."[126]

95. Regarding the Appellant's argument that the allegations in paragraph 26 of the Amended Indictment did not meet the requirements for aiding and abetting reflected in the cases cited by the Trial Chamber, the Prosecutor submits that what is relevant to the appeal is not the allegations contained in the charging instrument, but the legal and factual findings contained in the

---

[122] *Ibid.*, para. 4.44.
[123] *Ibid.*, paras. 4.50-4.54.
[124] *Ibid.*, para. 3.61.
[125] *Ibid.*, para. 4.9.
[126] *Ibid.*, paras. 4.59-4.60 (citing *Prosecutor v. Du{ko Tadi}*, Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997, paras. 689-692; *Prosecutor v. Delali} et al.*, Case No. IT-96-21-T, Judgement, 16 Nov. 1998 ("the *^elebi}i* Judgement"), paras. 327-328).

Judgement.[127] Overall, the Prosecutor submits that the Appellant must demonstrate that the findings of the Trial Chamber are inconsistent with existing international customary law and with other decisions of this Tribunal and consequently cannot constitute the basis for determining individual criminal responsibility.[128]

3. Appellant in Reply

96. The Appellant submits that the evidence is insufficient to support the Trial Chamber's finding of his guilt beyond reasonable doubt.[129] He argues that there is no direct evidence of concerted action and that the inference could be drawn that there was no concert of action between him and Accused B.[130] He also argues that, given the unreliability of Witness A's testimony, there is no evidence that he did anything to Witness A or that he shared any criminal purpose with Accused B.[131] He contends that the testimony of Witness D raises a reasonable doubt as to the reliability of Witness A's testimony.[132]

97. The Appellant also claims that there is reasonable doubt as to whether he was present at the time the offences were committed, whether his presence was "approving" and further, whether his authority could have assisted in the commission of the offence. He argues that the Prosecutor failed to prove beyond reasonable doubt that he gave Accused B assistance, encouragement, or moral support that had a substantial effect on the perpetration of the rape or that the Appellant knew that his acts assisted Accused B in the commission of the rape.[133]

B. Discussion

98. At the outset, this Chamber identifies the constituent bases of this ground of appeal as follows. First, there is the alleged failure of the Trial Chamber to address fully Witness D's testimony in relation to its findings of events in the Pantry. That testimony, according to the Appellant, shows that he did not conduct an interrogation while Accused B beat Witnesses A and D and sexually assaulted Witness A. Secondly, the courtroom identification of the Appellant by Witness A was not reliable, in view of her previously stated impression of him. Thirdly, the Prosecutor failed to prove that the acts charged in the Amended Indictment constituted the crime of

[127] *Ibid.*, para. 4.72.
[128] *Ibid.*, paras. 4.74-4.75.
[129] Appellant's Reply, pp. 24-26.
[130] *Ibid.*, p. 25.
[131] *Ibid.*, p. 26.
[132] *Ibid.*, pp. 26-27.
[133] *Ibid.*, pp. 26-38.

torture. Fourthly, the Prosecutor did not prove beyond reasonable doubt that the Appellant was a co-perpetrator of the crime of torture. Fifthly, Witness A's testimony is not reliable as it was given in a state of post-traumatic stress disorder. Lastly, the mere presence of the Appellant at the scene of the acts charged in paragraph 26 of the Amended Indictment did not constitute aiding or abetting.

99. These elements will be dealt with separately. Before embarking on an analysis of the issues raised by this ground, the Chamber reiterates its conclusions set out above: an appellant who argues an error of fact must establish that the Trial Chamber's findings "could not reasonably have been accepted by any reasonable person",[134] and that the error was a decisive factor in the outcome. An appellant who argues an error of law must also show that the error invalidated the decision.

1. Witness D's Testimony

100. The Trial Chamber found that both Witnesses A and D were interrogated in the Pantry.[135] The Appellant submits that, contrary to the testimony of Witness A, Witness D's testimony showed that the Appellant did not interrogate anyone in the Pantry, and that the Appellant was not present when Witness D was in the Pantry with Witness A and Accused B. The Prosecutor argues that the Trial Chamber relied on the evidence given by Witness D as to the presence of the Appellant in the Pantry,[136] and that Witness D's evidence showed that the events in the Large Room and in the Pantry were part of a single process, whereby the Appellant sought information from both Witness A and Witness D. The Appellant brought in the latter to confront Witness A in the Pantry, having failed to obtain satisfactory answers from her in the Large Room.[137] According to Witness A's testimony, Witness D was questioned by the Appellant in the Pantry.

101. The evidence relied upon by the Trial Chamber in the Judgement reveals the following. Witness A gave evidence that the Appellant was standing in the doorway to the Pantry or in that room during the attacks on Witness D and the subsequent sexual assaults on Witness A,[138] and further testified that she and Witness D were interrogated by the Appellant in the Pantry.[139] Witness D testified that, when he entered the Pantry, the Appellant was there, and that the Appellant remained in the vicinity of the doorway to the Pantry.[140] Witness D's evidence thus supports the testimony of Witness A that the Appellant was present in the Pantry or at least in the doorway to

[134] *Tadi}* Appeals Judgement, para. 64.
[135] Judgement, para. 127.
[136] Prosecutor's Response, para. 3.59.
[137] *Ibid.*, para. 3.61.
[138] Judgement, para. 87.
[139] *Ibid.*, paras. 86-87.
[140] *Ibid.*

that room. It is Witness D's testimony that he did not recall if anything was said while he was being beaten in the Pantry that the Appellant argues gives rise to reasonable doubt as to whether the Appellant conducted an interrogation in the Pantry. However, given that this testimony of Witness D relates solely to the question whether he was interrogated by the Appellant while he was being beaten by Accused B, Witness D's testimony is not dispositive on the question whether the Appellant interrogated Witness A in the Pantry at any time during her confinement in that room. Moreover, Witness D was only in the Pantry for part of the period of Witness A's confinement in that room, and consequently his testimony does not cover events in the Pantry before his entry, or after his departure. Witness D did testify that upon leaving the Pantry he heard the screams of Witness A and a soldier's voice calling out the name of Furund`ija.[141] The Appeals Chamber takes the view that it was not unreasonable for the Trial Chamber to conclude, based upon a consideration of the testimony of both Witnesses A and D, that the Appellant interrogated Witness A in the Pantry.

102. For these reasons, this element of the ground must fail.

2. Courtroom Identification

103. The Appellant argues that Witness A's description of the Appellant contained in her 1995 statement differed in significant respects from her in-court description and identification of the Appellant. He further submits that Witness A's in-court identification of the Appellant is the only evidence that the Appellant was present in the Large Room and that the Trial Chamber should have found an independent basis for identifying the Appellant. Further, he recalls that the Prosecutor never asked Witness A to identify him in court, but only asked whether the voice of the person who questioned her in the Pantry was the same as the voice of the person who questioned her in the Large Room.[142] The Prosecutor submits that Witness A's identification of the Appellant as the individual who interrogated her in the Large Room is supported by the uncontested evidence of Witness D.[143]

104. The Trial Chamber made the following finding in relation to the identification of the Appellant by Witness A:

> The Trial Chamber notes that the evidence of Witness A consistently places the accused at the scenes of the crimes committed against her in the Holiday Cottage in May 1993. It is also

[141] *Ibid.*, para. 88.
[142] Appellant's Amended Brief, p.79.
[143] Prosecutor's Response, paras. 4.8-4.9 and 4.16.

> significant to note that she has been consistent throughout her statements in her recollection that the accused was never the one assaulting her during her period of captivity in the Holiday Cottage; Accused B is always described as the actual perpetrator of the rapes and other assaults. The Trial Chamber finds that Witness A has identified the accused as Anto Furund`ija, the Boss. The inconsistencies in her identification testimony are minor and reasonable. In light of her recollection at the time of seeing the accused on television and even noticing that he had put on weight, the Trial Chamber is satisfied that the accused has been sufficiently identified by Witness A.[144]

105. The Judgement shows that, in reaching this conclusion, the Trial Chamber carefully considered the significance of the differences in Witness A's 1995 description of the Appellant's appearance and his actual appearance.[145] The Trial Chamber appears to have accepted Witness A's explanation on this point. The Trial Chamber was further persuaded by Witness A's recognition of the Appellant when she saw him briefly on a BBC television news broadcast. In this regard, the Trial Chamber cited Witness A's testimony that, when she saw the Appellant on television, she recalled thinking that he had put on weight.[146]

106. Moreover, Witness A's in-court identification is not the sole evidence identifying the Appellant as present in the Large Room; there is other evidence to confirm this. This includes the testimony of Witness A of the arrival of the commander of the Joker unit, addressed by his subordinates as "the Boss" or "Furund`ija", in the Large Room where she was interrogated by him immediately after his arrival.[147] Witness A further testified that the Appellant had been irritated by her not giving satisfactory answers to his questions there, and that he had gone to set up the confrontation in the Pantry with another person who later turned out to be Witness D.[148] Both Witness A and Witness D identified the Appellant as being present in the doorway to the Pantry during the events that subsequently unfolded in that room as charged in the Amended Indictment.[149] The Appeals Chamber notes that the Appellant has not addressed any of these arguments in his reply to the Prosecutor's Response.

107. In sum, the Appeals Chamber can find no fault with the Trial Chamber's treatment of the courtroom identification of the Appellant, and notes that, in any event, there was other evidence of the Appellant's identity on the basis of which it would be reasonable for the Trial Chamber to be satisfied with the identification of the Appellant.

108. For these reasons, this element of the ground must fail.

---

[144] Judgement, para. 114.
[145] *Ibid.*, para. 78.
[146] *Ibid.*
[147] *Ibid.*, para. 77.
[148] *Ibid.*, para. 83.
[149] *Ibid.*, para. 86.

3. Whether the Acts Charged in the Amended Indictment Constitute Torture

109. The Appellant argues that the Prosecutor failed to prove that the acts charged in the Amended Indictment constituted the crime of torture. He submits that the Trial Chamber failed to consider whether the acts of Accused B in the Large Room, for which the Appellant was subsequently convicted as a co-perpetrator, were serious enough to amount to torture.[150] The Prosecutor submits that the findings of the Trial Chamber that torture was committed should not be disturbed on appeal, considering that there was a reasonable factual basis for them.[151]

110. Those arguments raised by the Appellant under this heading which relate to the Appellant's conviction as a co-perpetrator of torture will be dealt with in relation to the next element of this ground.

111. The Appeals Chamber supports the conclusion of the Trial Chamber that "there is now general acceptance of the main elements contained in the definition set out in Article 1 of the Torture Convention",[152] and takes the view that the definition given in Article 1 reflects customary international law.[153] The Appellant does not dispute this finding by the Trial Chamber. The Trial Chamber correctly identified the following elements of the crime of torture in a situation of armed conflict:

> (i) . . . the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition
>
> (ii) this act or omission must be intentional;
>
> (iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person;
>
> (iv) it must be linked to an armed conflict;
>
> (v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, *e.g.*, as a de facto organ of a State or any other authority-wielding entity.[154]

---

[150] Appellant's Amended Brief, pp. 84-86.
[151] Prosecutor's Response, paras. 4.23-4.25.
[152] Judgement, para. 161. See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly on 10 December 1984 and entered into force on 26 June 1987.
[153] Article 1 of the Torture Convention defines torture in the following terms: "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."
[154] Judgement, para. 162.

Under this definition, in order to constitute torture, the accused's act or omission must give rise to "severe pain or suffering, whether physical or mental."

112. In respect of the events in the Large Room, the Trial Chamber said:

> The physical attacks, as well as the threats to inflict severe injury, caused severe physical and mental suffering to Witness A.[155]

113. The Trial Chamber based this conclusion upon its findings that Witness A was interrogated in the Large Room in a state of nudity, and that, "[a]s she was being interrogated, Accused B rubbed his knife on the inner thighs of Witness A and threatened to cut out her private parts if she did not tell the truth in answer to the interrogation by the accused."[156] It is difficult to ignore the intimidating and humiliating aspects of that scene and their devastating impact on the physical and mental state of Witness A. The act of Accused B rubbing his knife against Witness A's inner thighs and threatening to put his knife inside her vagina was carried out parallel to the interrogation of Witness A by the Appellant. The entire scene was marked by the Appellant's showing of his annoyance with Witness A and the laughter and stares of the on-looking soldiers.

114. The Appeals Chamber finds this element of the ground to be unmeritorious. It also finds it inconceivable that it could ever be argued that the acts charged in paragraph 25 of the Amended Indictment, namely, the rubbing of a knife against a woman's thighs and stomach, coupled with a threat to insert the knife into her vagina, once proven, are not serious enough to amount to torture. This element of the second ground of appeal must fail.

4. Co-perpetration

115. The Appellant submits that in order to sustain his conviction as a co-perpetrator of torture, it must be proved that there was a "direct connection" between the Appellant's questioning and the infliction on Witness A of severe pain or suffering, whether physical or mental.[157] He also submits that "[w]hat is missing in this case is any allegation *or* proof that Mr. Furund`ija participated in any crime, *i.e.*, intentionally acted *in concert with* Accused B in questioning Witness A", and that there was no such allegation contained in the Amended Indictment, nor was proof offered at the trial in this regard.[158] He comments on the evidence of Witness A thus:

---

[155] *Ibid.*, para. 264.
[156] *Ibid.*
[157] Appellant's Amended Brief, p.84.
[158] *Ibid.*, p.85.

> Witness A's testimony shows only that Accused B's actions took place during Mr. Furund`ija's alleged interrogation of Witness A; it does not show that Mr. Furund`ija planned, agreed, or intended that Witness A would be touched or threatened in any way in the course of his questioning. There is no evidence that Mr. Furund`ija invited or encouraged Accused B's actions or threats, or that he endorsed them in any way.[159]

116. The Appellant was charged under Article 7(1) of the Statute which, in the Prosecutor's submission, clearly covers liability for action in concert and does not require that a pre-existing "conspiracy", "agreement" or "plan" between the offenders be proved beyond reasonable doubt,[160] in order for the Trial Chamber to find the Appellant to be a co-perpetrator of torture.

117. The Appeals Chamber notes that the Appellant did not challenge the Trial Chamber's use of the definition of co-perpetrator found in Article 25 of the Rome Statute.[161] Article 25 of the Rome Statute states in relevant part:

> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> . . .
>
> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> (ii) Be made in the knowledge of the intention of the group to commit the crime; . . .

118. The Trial Chamber found that two types of liability for criminal participation "appear to have crystallised in international law - co-perpetrators who participate in a joint criminal enterprise, on the one hand, and aiders and abettors, on the other".[162] It further stated that, to distinguish a co-perpetrator from an aider or abettor, "it is crucial to ascertain whether the individual who takes part in the torture process also *partakes of the purpose behind torture* (that is, acts with the intention of obtaining information or a confession, of punishing, intimidating, humiliating or coercing the victim or a third person, or of discriminating, on any ground, against the victim or a third person)".[163] It then concluded that, to be convicted as a co-perpetrator, the accused "must participate in an integral part of the torture and partake of the purpose behind the torture, that is the

---

[159] *Ibid.*, p.89.
[160] Prosecutor's Response, para. 4.31.
[161] Judgement, para. 216 (referring to the Rome Statute of the International Criminal Court, adopted at Rome on 17 July 1998, U.N. Doc. A/CONF.183/9 ("the Rome Statute")).
[162] *Ibid.*
[163] *Ibid.*, para. 252 (original emphasis).

intent to obtain information or a confession, to punish or intimidate, humiliate, coerce or discriminate against the victim or a third person".[164]

119. This Chamber, in a previous judgement, identified the legal elements of co-perpetration. It is sufficient to recall the Chamber's conclusion in that Judgement in relation to the need to demonstrate a pre-existing design:

> There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.[165]

120. There is no dispute that the Appellant sought certain information from Witness A in the events relevant to this case. There is also no dispute that the various physical attacks in the Large Room and in the Pantry were not committed by the Appellant, but by Accused B. According to the Trial Chamber's factual findings,[166] the Appellant was present both in the Large Room and the Pantry interrogating Witness A while the offences charged in the Amended Indictment took place. The Appeals Chamber agrees with the Prosecutor's submission that the events in this case should not be artificially divided between the Large Room and the Pantry, as the process was a continuum and should be assessed in its entirety. Once the abuses started and continued successively in two rooms, the interrogation did not cease. There was no need for evidence proving the existence of a prior agreement between the Appellant and Accused B to divide the interrogation into the questioning by the Appellant and physical abuse by Accused B. The way the events in this case developed precludes any reasonable doubt that the Appellant and Accused B knew what they were doing to Witness A and for what purpose they were treating her in that manner; that they had a common purpose may be readily inferred from all the circumstances, including (1) the interrogation of Witness A by the Appellant in both the Large Room while she was in a state of nudity, and the Pantry where she was sexually assaulted in the Appellant's presence; and (2) the acts of sexual assault committed by Accused B on Witness A in both rooms, as charged in the Amended Indictment. Where the act of one accused contributes to the purpose of the other, and both acted simultaneously, in the same place and within full view of each other, over a prolonged period of time, the argument that there was no common purpose is plainly unsustainable.

121. For these reasons, this element of the ground must fail.

---

[164] *Ibid.*, para. 257.
[165] *Tadi}* Appeals Judgement, para. 227.
[166] Judgement, paras. 124-130.

5. Post-Traumatic Stress Disorder (PTSD)

122. This issue was the subject of the re-opened proceedings at which several experts testified. The weight of the expert testimony, PTSD's impact upon memory, and the effect of treatment of PTSD on memory, were fully argued before the Trial Chamber which, having examined the inconsistencies in Witness A's evidence, held that:

> 108. ...Witness A's memory regarding material aspects of the events was not affected by any disorder which she may have had. The Trial Chamber accepts her evidence that she has sufficiently recollected these material aspects of the events. There is no evidence of any form of brain damage or that her memory is in any way contaminated by any treatment which she may have had....
>
> 109. The Trial Chamber bears in mind that even when a person is suffering from PTSD, this does not mean that he or she is necessarily inaccurate in the evidence given. There is no reason why a person with PTSD cannot be a perfectly reliable witness.[167]

123. Under the standard established in the *Tadi}* Appeals Judgement, the Appeals Chamber will only disturb a finding of fact by the Trial Chamber where "the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person. . .".[168] In the re-opened proceedings, numerous experts gave evidence on the potential effects of PTSD on memory. The Trial Chamber was best placed to assess this evidence and to draw its own conclusions.[169] The Appeals Chamber can find no reason to disturb these findings and accordingly this element must fail.

6. Presence of the Appellant and Aiding and Abetting

124. The Appellant raises three points in connection with his conviction for aiding and abetting outrages upon personal dignity including rape. First, the Prosecutor failed to prove that the Appellant interrogated anyone in the Pantry. The Trial Chamber failed to cite any authority to support the proposition that presence alone would implicate the Appellant as an aider and abettor.[170] Secondly, the allegations in paragraph 26 of the Amended Indictment do not meet the requirements for aiding and abetting set forth in the cases cited by the Trial Chamber.[171] Thirdly, the Prosecutor did not prove beyond reasonable doubt that the Appellant gave Accused B assistance, encouragement, or moral support that had a substantial effect on the perpetration of the rape or that

---

[167] Judgement, paras. 108-109.
[168] *Tadi}* Appeals Judgement, para. 64.
[169] Judgement, paras. 96-109.
[170] Appellant's Amended Brief, pp. 95-97.
[171] *Ibid.*, pp. 97-101.

he knew that his acts assisted Accused B in the commission of the rape.[172] The reasons are that the Appellant never interrogated anyone in the Pantry, that Witness D's evidence conflicts with that of Witness A, and that mere presence would not constitute aiding and abetting.

125. The Prosecutor replies that the case law of the International Tribunal establishes that "knowing presence" that has a substantial effect on the commission of an offence is sufficient for a finding of participation and attendant liability.[173] Further, as to the second point of the Appellant, the Prosecutor considers that the Appellant failed to identify and discuss any legal finding of the Trial Chamber in the Judgement.[174] The cases were cited by the Trial Chamber in its inquiry into whether there were relevant rules of customary law on this point.[175] As to the third point, the Prosecutor refers to its various replies in relation to the reasons given by the Appellant.

126. The Trial Chamber found that the Appellant's "presence and continued interrogation of Witness A encouraged Accused B and substantially contributed to the criminal acts committed by him".[176] As the Trial Chamber found that the Appellant was not only present in the Pantry, but that he acted and continued to interrogate Witness A therein, it is not necessary to consider the issue of whether mere or knowing presence constitutes aiding and abetting.[177] Although the Appellant disputed Witness A's testimony in this regard, the Trial Chamber was in the best position to assess the demeanour of the witness and the weight to be attached to that testimony. This Chamber can find no reason to disturb this finding.

127. For the reasons given, this element of the second ground of appeal must fail and thus the second ground of appeal fails as a whole.

---

[172] *Ibid.*, p. 102.
[173] Prosecutor's Response, para. 4.60.
[174] *Ibid.*, para. 4.63.
[175] *Ibid.*, para. 4.73.
[176] Judgement, para. 273.
[177] *Ibid.*, para. 266.

V. THIRD GROUND OF APPEAL

A. Submissions of the Parties

1. The Appellant

128. The Appellant argues that the Defence was prejudiced by the Trial Chamber's admission of, and reliance on, evidence of acts not charged in the Indictment and which the Prosecutor never identified prior to trial as part of the charges against the Appellant.

(a) Evidence concerning other acts in the Large Room and the Pantry

129. The Appellant submits that, despite having ruled in its Decision of 12 June 1998 and the Confidential Decision of 15 June 1998 that it would only consider Witness A's testimony as relating to paragraphs 25 and 26 of the Amended Indictment, the Trial Chamber made factual and legal findings relating to facts not alleged in the Amended Indictment, which led to his conviction for torture. These include findings that the Appellant (i) interrogated Witness A while she was in a state of forced nudity, (ii) threatened in the course of his interrogation to kill Witness A's sons, and (iii) abandoned Witness A in the Large Room to further assaults by Accused B.[178]

(b) Evidence of alleged acts committed by the Appellant which are unrelated to Witness A

130. The Appellant refers to specific paragraphs in the Judgement to support the proposition that the Trial Chamber allowed the Prosecutor to introduce evidence concerning events which are unrelated to the acts with which the Appellant is charged. In this regard, the Appellant points in particular to the events which occurred in the village of Ahmi}i on 16 April 1993. He also contests the alleged finding by the Trial Chamber of his guilt of persecution, a crime with which he was not charged.[179]

(c) Violation of Rule 50 by the Prosecutor and the Trial Chamber: Evidence of acts not charged in the Amended Indictment

131. Rule 50 of the Rules sets forth the procedure for amending indictments. The Appellant contends that by attempting to amend the Amended Indictment through proof at trial, the Prosecutor violated Rule 50, and that, by admitting the evidence and finding him guilty of a crime without

[178] Appellant's Amended Brief, pp. 103-104.
[179] *Ibid.*, pp. 104-105.

giving him notice of charges relating to the village of Ahmi}i, the Trial Chamber violated Rule 50.[180]

2. The Respondent

132. The Respondent submits that under this ground of appeal, the Appellant must demonstrate that the Trial Chamber erred in concluding that the evidence was within the scope of the Amended Indictment and that such evidence was relied upon by the Trial Chamber to convict the Appellant.[181]

(a) Evidence concerning other acts in the Large Room and the Pantry

133. The Respondent submits that, neither before nor during trial did the Appellant seek to exclude the evidence which he claims to be at variance with the Amended Indictment. The Respondent contends that the issue is being raised for the first time on appeal.[182]

134. The Respondent submits that, although the Trial Chamber includes sexual assaults by Accused B in the Large Room in the factual findings, these assaults are not mentioned in the legal findings.[183] Overall, the Respondent submits that (i) the factual findings were not at variance with the Amended Indictment, (ii) even if they were at variance, this would be permissible in light of their minor nature, and (iii) even if the Trial Chamber erred in finding facts allegedly outside the scope of the Amended Indictment, there has been no showing that this would invalidate the decision.[184]

135. As regards acts not charged in the Amended Indictment, the Respondent submits that Article 18(4) of the Statute and Rule 47 of the Rules prescribe that an indictment should identify the suspect's name and particulars and provide a concise statement of the facts and of the crime with which the suspect is charged.[185] The Respondent indicates that the case law of the International Tribunal demonstrates that an indictment must contain information that permits an accused adequately to prepare his defence. The Respondent notes that, in two recent decisions, a distinction has been drawn between the material facts underpinning the charges and the evidence that goes to prove those facts.[186]

---

[180] *Ibid.*, pp. 105-106.
[181] Prosecutor's Response, para. 5.11.
[182] *Ibid.*, para. 5.8.
[183] *Ibid.*, para. 5.9.
[184] *Ibid.*, para. 5.10.
[185] *Ibid.*, para. 5.14.
[186] *Ibid.*, para. 5.17 (citing *Prosecutor v. Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, Case No. IT-97-25-PT, 24 Feb. 1999, para. 12; *Prosecutor v. Kvo~ka et al.*, Case No. IT-98-30-PT,

136. As regards the evidence challenged by the Appellant as being at variance with the Amended Indictment, which concerns the manner in which the interrogation alleged in the Amended Indictment was carried out, the Respondent submits that it constitutes evidence which "relates to Paragraphs 25 and 26 as pleaded in the Indictment against the Accused" and is therefore admissible pursuant to the Trial Chamber's own order.[187]

137. With respect to the evidence that the Appellant threatened to kill Witness A's sons during the course of the interrogation, the Respondent submits that there is no indication that the Trial Chamber relied upon this evidence in convicting the Appellant.[188] The Respondent further submits that the evidence relating to the assaults against Witness A by Accused B after the Appellant's departure from the Large Room relates to the ongoing acts which occurred during the course of the interrogation and was not relied upon in convicting the accused.[189]

138. The Respondent alleges that, even if the evidence were at variance with the Amended Indictment, such variance would be permissible, as it did not alter the scope of the charges against the Appellant, nor did it affect his right to be notified of the charges against him (the Appellant received sufficient notification of the precise nature of the charges in the pre-trial documents disclosed).[190] The Respondent concludes that the Appellant's failure to seek to have the evidence excluded constitutes a waiver of the issue on appeal.[191]

(b) Evidence of alleged acts by Appellant unrelated to Witness A

139. As regards the Appellant's argument that he was found guilty of the crime of persecution, the Respondent submits that the Appellant was not found guilty of persecution, but that the evidence was properly admitted to prove the existence of an armed conflict and the nexus of the Appellant to that armed conflict.[192]

(c) Allowing evidence not charged in the Indictment violates Rule 50

140. With respect to the Appellant's argument that the Respondent violated Rule 50 of the Rules by attempting to further amend the Amended Indictment through evidence submitted at trial, the Respondent reiterates that the evidence was not at variance with the Amended Indictment, that even

---

Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999; and also *Prosecutor v. Tadi}*, Case No. IT-94-1-PT, Decision on the Defence Motion on the Form of the Indictment, 14 Nov.1995, paras. 6-8).

[187] *Ibid.*, para. 5.21.

[188] *Ibid.*, para. 5.24.

[189] *Ibid.*, paras. 5.25-5.26.

[190] *Ibid.*, para. 5.30.

[191] *Ibid.*, para. 5.31.

[192] *Ibid.*, paras. 5.32-5.38.

if the evidence were at variance, that variance would be permissible, and that the evidence submitted was directly relevant to the charges.[193]

3. Appellant in Reply

141. The Appellant rejects the Respondent's interpretation of this ground of appeal. The Appellant indicates that his argument is that he was misled and that the Amended Indictment failed to provide sufficient notice of the proof that would be offered at trial. Instead, the Appellant submits, he was tried and convicted on the basis of acts which either fell outside the scope of the Amended Indictment or were ordered by the Trial Chamber to be excluded pursuant to its Decisions dated 12 June 1998 and 15 June 1998.[194] The Appellant argues that the Trial Chamber's findings of facts as contained in paragraphs 120-130 of the Judgement "relate to acts that are outside the scope of [Amended Indictment]" and should have been excluded.[195]

142. The Appellant submits that "[a]n Indictment defines and circumscribes the elements of the crimes for which a defendant can be convicted. The Trial Chamber cannot convict a defendant of crimes not charged in the Indictment or crimes committed by means of acts not set forth in the Indictment."[196]

143. As regards the crime of torture specifically, the Appellant submits that he was found guilty of torture on the basis of a particular course of conduct not charged in the Amended Indictment or committed by means of acts not set forth in the Amended Indictment.[197]

B. Discussion

144. The Appellant submits that, notwithstanding the assurance given by the Trial Chamber, the latter made factual findings inconsistent with the Amended Indictment and its decisions of 12 and 15 June 1998. In this regard, the Appellant refers specifically to the factual findings listed in paragraphs 124 -130 of the Judgement, which are as follows:

---

[193] *Ibid.*, paras. 5.39-5.40.
[194] Appellant's Reply, pp. 39-40.
[195] *Ibid.*, p. 40.
[196] *Ibid.*, p. 41.
[197] *Ibid.*, p. 44.

In the Large Room:

124. Witness A was interrogated by the accused. She was forced by Accused B to undress and remain naked before a substantial number of soldiers. She was subjected to cruel, inhuman and degrading treatment and to threats of serious physical assault by Accused B in the course of her interrogation by the accused. The purpose of this abuse was to extract information from Witness A about her family, her connection with the ABiH and her relationship with certain Croatian soldiers, and also to degrade and humiliate her. The interrogation by the accused and the abuse by Accused B were parallel to each other.

125. Witness A was left by the accused in the custody of Accused B, who proceeded to rape her, sexually assault her, and to physically abuse and degrade her.

126. Witness A was subjected to severe physical and mental suffering and public humiliation.

In the Pantry:

127. The interrogation of Witness A continued in the pantry, once more before an audience of soldiers. Whilst naked but covered by a small blanket, she was interrogated by the accused. She was subjected to rape, sexual assaults, and cruel, inhuman and degrading treatment by Accused B. Witness D was also interrogated by the accused and subjected to serious physical assaults by Accused B. He was made to watch rape and sexual assault perpetrated upon a woman whom he knew, in order to force him to admit allegations made against her. In this regard, both witnesses were humiliated.

128. Accused B beat Witness D and repeatedly raped Witness A. The accused was present in the room as he carried on his interrogations. When not in the room, he was present in the near vicinity, just outside an open door and he knew that crimes including rape were being committed. In fact, the acts by Accused B were performed in pursuance of the accused's interrogation.

129. It is clear that in the pantry, both Witness A and Witness D were subjected to severe physical and mental suffering and they were also publicly humiliated.

130. There is no doubt that the accused and Accused B, as commanders, divided the process of interrogation by performing different functions. The role of the accused was to question, while Accused B's role was to assault and threaten in order to elicit the required information from Witness A and Witness D.

145. The Appellant argues that in convicting him of torture, the Trial Chamber relied on evidence to make findings as to material facts not alleged in the Amended Indictment. Article 18 of the Statute provides in relevant part:

> 4. Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

146. Moreover, Rule 47 of the Rules provides *inter alia* that:

> (C) The indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged.

147. Under both the Statute and the Rules, as discussed in paragraph 61 above, there is no requirement that the actual evidence on which the Prosecutor relies has to be included in the indictment. Where, in the course of the trial, evidence is introduced which, in the view of the accused, does not fall within the scope of the indictment, or is within the scope but in relation to

which there is no corresponding material fact in the indictment, the defence may challenge the admission of the evidence or request an adjournment.

1. Evidence Concerning Other Acts in the Large Room and the Pantry

148. Trial Chambers have been consistently mindful of the primary function of the International Tribunal, which is to ensure that justice is done and that the accused receives a fair trial. It is, no doubt, in light of this preoccupation that in evaluating the testimony of Witness A, the Trial Chamber limited its consideration to that part of the testimony relating to the Amended Indictment. This exercise by the Trial Chamber is indicative of its sensitivity to any prejudice to the fairness of the trial that could result from Witness A's testimony. Consistent with this concern, the Trial Chamber acknowledged that "[t]he witness has testified that rapes and sexual abuse took place in the large room in the presence of the accused", and that the relevant "evidence falls outside the facts alleged in paragraphs 25 and 26 of the Amended Indictment, and is contrary to earlier submissions by the Prosecutor."[198] The Trial Chamber also remarked that during the proceedings the Prosecutor did not seek to modify the Amended Indictment to charge the Accused with participation in the rapes and sexual abuse.

149. It is on the basis of the aforementioned grounds that the Trial Chamber decided that "the Trial Chamber will not consider evidence relating to rapes and sexual assault of Witness A in the presence of the accused, other than those alleged in paragraph 25 and 26 of the Amended Indictment."[199]

150. The factual allegations contained in paragraphs 25 and 26 of the Amended Indictment and pertaining to Counts 13 and 14 are as follows:

> 25. On or about 15 May 1993, at the Jokers Headquarters in Nadioci (the "Bungalow"), Anto FURUND@IJA the local commander of the Jokers, [REDACTED] and another soldier interrogated Witness A. While being questioned by FURUND@IJA, [REDACTED] rubbed his knife against Witness A's inner thigh and lower stomach and threatened to put his knife inside Witness A's vagina should she not tell the truth.
>
> 26. Then Witness A and Victim B, a Bosnian Croat who had previously assisted Witness A's family, were taken to another room in the "Bungalow". Victim B had been badly beaten prior to this time. While FURUND@IJA continued to interrogate Witness A and Victim B, [REDACTED] beat Witness A and Victim B on the feet with a baton. Then [REDACTED] forced Witness A to have oral and vaginal sexual intercourse with him. FURUND@IJA was present during this entire incident and did nothing to stop or curtail [REDACTED] actions.

[198] Judgement, para. 81 (citing the Confidential Prosecutor's Reply to Trial Chamber's Order, 1 May 1998, filed in this case).
[199] *Ibid.*

151. In its written decision of 12 June 1998, the Trial Chamber allowed the oral motion by the Defence and held that "in the circumstances, the Trial Chamber will only consider as relevant Witness A's evidence in so far as it relates to Paragraphs 25 and 26 as pleaded in the Indictment against the accused." In the written Confidential Decision issued on 15 June 1998, addressing the "Prosecutor's Request for Clarification of Trial Chamber's Decision Regarding Witness A's Testimony", the Trial Chamber "rules as inadmissible all evidence relating to rape and sexual assault perpetrated on [Witness A] by the individual identified as [Accused B] in the presence of the accused in the large room apart from the evidence of sexual assault alleged in paragraph 25 of the [Amended Indictment]."

(a) The interrogation of Witness A by the Appellant while she was in a state of forced nudity

152. In relation to the interrogation of Witness A while she was in a state of forced nudity, the Trial Chamber found that "[Witness A] was forced by Accused B to undress and remain naked before a substantial number of soldiers", and that "Witness A was left by the accused in the custody of Accused B."[200] Although the fact of Witness A's nudity appears in the Judgement under the section entitled "Legal Findings"[201] and was obviously a factor in arriving at the decision to convict, it was nonetheless permissible for the Trial Chamber to take account of it, since it fell within the scope of the acts alleged in the Amended Indictment.

153. In this context, the Appeals Chamber considers as correct the distinction made in *Krnojelac*[202] between the material facts underpinning the charges and the evidence that goes to prove those material facts. In terms of Article 18 of the Statute and Rule 47, the indictment need only contain those material facts and need not set out the evidence that is to be adduced in support of them. In the instant case, the Appeals Chamber can find nothing wrong in the Trial Chamber's admission of this evidence which supports the charge of torture, even though it was not specified in the Amended Indictment. It would obviously be unworkable for an indictment to contain all the evidence that the Prosecutor proposes to introduce at the trial.

(b) Alleged threats in the course of the Appellant's interrogation to kill Witness A's sons

154. In relation to this aspect of the third ground of appeal, the Trial Chamber accepted the evidence of Witness A about the nature of her interrogation by the Appellant.[203] This finding was

---

[200] *Ibid.*, paras. 124-125.
[201] *Ibid.*, para. 264.
[202] *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 Feb. 1999, para. 12. See also *Prosecutor v. Kvo-ka et al.*, Case No. IT-98-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 Apr. 1999, para. 14.
[203] Judgement, para. 65.

made in the context of the Trial Chamber's discussion of the link between the armed conflict and the Appellant, and did not form part of the legal findings underlying the Appellant's convictions.

(c) Witness A abandoned in the Large Room to further assaults by Accused B

155. The Trial Chamber found that "Witness A was left by the [Appellant] in the custody of Accused B, who proceeded to rape her, sexually assault her, and to physically abuse and degrade her".[204] In this respect, the Appeals Chamber recalls paragraph 67 of this Judgement and reiterates that the finding was not one that influenced the Trial Chamber in coming to a decision to convict the Appellant. This is borne out by a review of the legal findings in Chapter 7 of the Judgement, and in particular paragraphs 264 – 269 relating to Count 13 (torture), which show that the Trial Chamber did not rely upon this evidence in convicting the Appellant. In paragraph 264, the Trial Chamber found that the Appellant

> was present in the large room and interrogated Witness A, whilst she was in a state of nudity. As she was being interrogated, Accused B rubbed his knife on the inner thighs of Witness A and threatened to cut out her private parts if she did not tell the truth in answer to the interrogation by the accused. The accused did not stop his interrogation, which eventually culminated in his threatening to confront Witness A with another person, meaning Witness D and that she would then confess to the allegations against her. To this extent, the interrogation by the accused and the activities of Accused B became one process. The physical attacks, as well as the threats to inflict severe injury, caused severe physical and mental suffering to Witness A.[205]

156. There is no reference in paragraph 264, or in any of the other paragraphs relating to these legal findings, to the evidence of Witness A being "left by [the Appellant] in the custody of Accused B, who proceeded to rape her, sexually assault her, and to physically abuse and degrade her."[206]

2. Evidence of alleged acts by the Appellant unrelated to Witness A

157. The Appellant submits the following findings by the Trial Chamber as evidence of acts unrelated to Witness A and upon which the Trial Chamber relied in convicting him:[207]

> The accused was a member of the Jokers, a special unit of the HVO military police, which participated in the armed conflict in the Vitez municipality and especially in the attack on the village of Ahmi}i. These attacks led to the expulsion, detention, wounding and deaths of numerous civilians.[208]
>
> Finally, on 16 April 1993, the HVO carried out a concerted attack on both Vitez and Ahmi}i.[209]

---

[204] *Ibid.*, para. 125.
[205] *Ibid.*, para. 264.
[206] *Ibid.*, para. 125.
[207] Appellant's Amended Brief, pp.104-105.
[208] Cf. Judgement, para. 51.
[209] Cf. *Ibid.*, para. 53.

> Witness B testified about the HVO attack on Ahmi}i. On 16 April 1993, she woke up to the sound of shooting and explosions. A group of HVO soldiers, including the accused, entered her house and searched it while verbally abusing the witness and her mother. Witness B appealed to the accused for help as he was an acquaintance of hers, but he remained silent. She was then forced to flee as the soldiers fired at her feet. Her house was set on fire.[210]
>
> Witness B also testified that during the attack on Ahmi}i, the accused was wearing a Jokers patch on his sleeve.[211]

158. The above paragraphs are not findings made by the Trial Chamber; rather they are the Trial Chamber's recitation of the factual allegations submitted by the Prosecutor. It is not of little consequence that these paragraphs of the Judgement are preceded by the heading: "The Prosecution Case".

159. The Appellant further submits that the Trial Chamber held that he "was an active combatant and participated in expelling Moslems from their homes."[212] This section in the Judgement comprises the factual findings of the Trial Chamber for purposes of the requirement under Article 3 of the Statute that the violations of the laws or customs of war occur during an armed conflict; thus the heading "The Link Between the Armed Conflict and the Alleged Facts".

160. Finally, the Appellant refers to the following legal findings of the Trial Chamber in support of his proposition that "the Trial Chamber found that Mr. Furund`ija was guilty of the crime of persecution":[213]

> The accused was a commander of the Jokers, a special unit of the HVO. He was an active combatant and had engaged in hostilities against the Moslem community in the La{va Valley area, including the attack on the village of Ahmi}i, where he personally participated in expelling Moslems from their homes in furtherance of the armed conflict already described.[214]

161. The Appeals Chamber finds no support in the Judgement for the Appellant's contention that the Trial Chamber found him guilty of the crime of persecution.

3. Alleged violation of Rule 50 of the Rules

162. The Appeals Chamber finds wholly unmeritorious the argument that the Prosecutor violated Rule 50 by further amending the Amended Indictment through proof at trial. As discussed above, under Article 18 of the Statute and Rule 47 of the Rules, an indictment need only plead the material

---

[210] Cf. *Ibid.*, para. 55.
[211] Cf. *Ibid.*, para. 62
[212] *Ibid.*, para. 65.
[213] Appellant's Amended Brief, p. 105.
[214] Judgement, para. 262.

acts underlying the charges and need not set out the evidence that is to be adduced in support of them.[215] The evidence admitted at trial did not alter the charges in the Amended Indictment.

163. Thus, this ground of appeal fails.

[215] Supra, para. 153.

VI. FOURTH GROUND OF APPEAL

164. The issue which has been raised as the fourth ground of appeal is that of recusal, namely, whether or not Judge Mumba, the Presiding Judge in the Appellant's trial was impartial or gave the appearance of bias. The allegations turn on her former involvement with the United Nations Commission on the Status of Women ("the UNCSW"). It is the nature of her involvement with this organisation and its implications on the Appellant's trial which have led the Appellant to assert that she should have been disqualified pursuant to Rule 15 of the Rules.

165. The Appeals Chamber finds it useful to set out initially the factual basis for the allegations made by the Appellant.

166. Judge Mumba has served as a Judge of the International Tribunal since her election on 20 May 1997. For a period of time prior to her election, she was a representative of the Zambian Government on the UNCSW.[216] At no stage was she a member of the UNCSW whilst at the same time serving as a Judge with the International Tribunal. The UNCSW is an organisation whose primary function is to act for social change which promotes and protects the human rights of women.[217] One of its concerns during Judge Mumba's membership of it was the war in the former Yugoslavia and specifically the allegations of mass and systematic rape. This concern was exhibited by its resolutions which condemned these practices and urged the International Tribunal to give them priority by prosecuting those allegedly responsible.[218]

167. The UNCSW was involved in the preparations for the UN Fourth World Conference on Women held in Beijing, China, 4-15 September 1995, and specifically participated in the drafting of the "Platform for Action," a document identifying twelve "critical areas of concern" in the area of women's rights and which contained a five-year action plan for the future, the aim being to achieve gender equality by the year 2000. Three of the critical areas of concern were particularly relevant to issues in the former Yugoslavia.[219] There was an Expert Group Meeting following the Beijing conference, whose purpose was to work towards achieving certain of the goals drawn from the

---

[216] The Appellant states that Judge Mumba's term with the UNCSW was from 1992-1995 and this is not disputed by the Prosecutor (Appellant's Amended Brief, p. 122 and Prosecutor's Response, para. 6.28).

[217] Established by the United Nations Economic and Social Council ("ECOSOC") Resolution 11 (II) on 21 June 1946, Section 1 provides that "[t]he functions of the Commission shall be to prepare recommendations and reports to the Economic and Social Council on promoting women's rights in political, economic, social and educational fields. The Commission shall also make recommendations to the Council on urgent problems requiring immediate attention in the field of women's rights." The Commission was subsequently enlarged by ECOSOC Resolutions 1987/22, 1987/23, and 1989/45.

[218] Both the Appellant and Respondent refer to several of these resolutions including, ECOSOC Resolution 38/9, ECOSOC Resolution 37/3 and ECOSOC Resolution 39/4.

[219] Critical Area D (Violence against Women), Critical Area E (Women and armed conflict) and Critical Area I (Human Rights of Women). United Nations Economic and Social Council, Commission on the Status of Women; *Report of the Commission on the Status of Women on its Fortieth Session*, U.N. Doc. E/199/27 (1996).

Beijing Conference and set out in the Platform for Action, including the reaffirmation of rape as a war crime, by the end of 1998. Three authors of one of the *amicus curiae* briefs later filed in the instant case[220] and one of the Prosecutors in the instant case, Patricia Viseur-Sellers ("the Prosecution lawyer"), attended this meeting.[221] This Expert Group proposed a definition of rape under international law.[222]

168. The Appeals Chamber notes that it is not so much that the parties dispute the factual basis of the Appellant's allegations, but rather that they differ in their interpretation of it and the relevance of it to the ground of appeal. For example, the parties do not dispute that Judge Mumba was involved in the UNCSW in the past, but they do dispute the nature of her involvement and the exact role which she played. The parties do not dispute that the Prosecution lawyer and the three authors of one of the *amicus curiae* briefs may also have been involved in either the activities of the UNCSW on some level or the Expert Group Meeting, but they do dispute the extent of the contact they may have had with Judge Mumba and its impact on, or relevance to, the Appellant's trial.

A. Submissions of the Parties

1. The Appellant

169. The Appellant submits that because of Judge Mumba's personal interest in, and association with the UNCSW, the ongoing agenda or campaign of the Platform for Action, the three authors of one of the *amicus curiae* briefs, and the Prosecution lawyer, she should have been disqualified under Rule 15 of the Rules.[223] He argues that the test which should be applied by the Appeals Chamber in ascertaining if disqualification is appropriate is whether "a reasonable member of the public, knowing all of the facts [would] come to the conclusion that Judge Mumba has *or had* any associations, which *might* affect her impartiality."[224] Based on this test, he submits that Judge Mumba should have been disqualified as an appearance was created that she had sat in judgement

---

[220] By orders of 10 and 11 November 1998, the Trial Chamber granted leave for two *amicus curiae* briefs to be filed, pursuant to Rule 74 of the Rules, which provides that, "[a] Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organisation or person to appear before it and make submissions on any issue specified by the Chamber." (Judgement, paras. 35 and 107).
[221] Prosecutor's Response, para. 6.29.
[222] United Nations Division for the Advancement of Women, *Report of the Expert Group Meeting, Toronto, Canada (9 – 12 November 1997)*, EGM/GBP/1997/Report.
[223] Appellant's Amended Brief, p. 121 and Appellant's Reply, pp. 46-47. Rule 15(A) provides: "A Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case."
[224] Appellant's Reply, p. 46.

in a case that could advance and in fact did advance a legal and political agenda which she helped to create whilst a member of the UNCSW.[225]

170. The Appellant alleges that Judge Mumba continued to promote the goals and interests of the UNCSW and Platform for Action after her membership concluded, and contends that this was reflected directly in his trial. He does not allege that Judge Mumba was actually biased.[226] Rather, the issue was whether a reasonable person could have an apprehension as to her impartiality.[227] In this regard, he argues that a tribunal should not only be unbiased but should avoid the appearance of bias.[228] Hence the submission that there could be no other conclusion based on the above test than that Judge Mumba has or had associations which might affect her impartiality.[229]

2. The Respondent

171. The Respondent submits that the Appellant has failed to establish the existence of either a personal interest by Judge Mumba in the instant case, or the existence of an association or working relationship between Judge Mumba, the three authors of one of the *amicus curiae* briefs and the Prosecution lawyer, such that she should have been disqualified. In addition, the Appellant has submitted no evidence to support an allegation that Judge Mumba exhibited actual bias or partiality.[230] The Prosecutor contends that the standard for a finding of bias should be high and that Judges should not be disqualified purely on the basis of their personal beliefs or legal expertise.[231] In the view of the Prosecutor, the Appellant has failed to meet the "reasonable apprehension" of bias standard.[232] The prior involvement of a Judge in a United Nations body such as the UNCSW cannot give rise to any reasonable apprehension that the Judge has an agenda which would cause him or her to be biased against an accused appearing before him or her. [233]

---

[225] *Ibid.*, p. 48 and Appellant's Amended Brief, p. 121.
[226] Appellant's Reply, p. 48.
[227] *Ibid.*, p. 49.
[228] Appellant's Amended Brief, p. 136.
[229] *Ibid.*, p.138.
[230] Prosecutor's Response, para. 6.33.
[231] *Ibid.*, paras. 6.50-6.54.
[232] *Ibid.*, para. 6.55.
[233] *Ibid.*, paras. 6.54–6.55.

B. Discussion

172. Before proceeding to consider this matter further, the Appeals Chamber makes two observations.

173. First, the Appellant states that he first discovered Judge Mumba's associations and personal interest in the case after judgement was rendered, and for this reason, only then raised the matter before the Bureau.[234] Although the Appeals Chamber has decided to consider this matter further, given its general importance,[235] it would point out that information was available to the Appellant at trial level, which should have enabled him to discover Judge Mumba's past activities and involvement with the UNCSW. The Appeals Chamber notes, in this context, public documentation issued by the International Tribunal, including, for example, its published yearbooks which contain sections devoted to biographies of the Judges elected to serve at the International Tribunal.[236] In addition, Public Information Service of the Tribunal, which is responsible for ensuring public awareness of the International Tribunal's activities, regularly publishes Bulletins and releases information on the International Tribunal's web-site. Both the Yearbook and the Public Information Service of the Tribunal provide official information to the public regarding such issues as the election of new Judges to the International Tribunal and details of a Judge's legal background. The information was freely available for the Appellant to discover.

174. The Appeals Chamber considers that it would not be unduly burdensome for the Appellant to find out the qualifications of the Presiding Judge of his trial. He could have raised the matter, if he considered it relevant, before the Trial Chamber, either pre-trial or during trial. On this basis, the Appeals Chamber could find that the Appellant has waived his right to raise the matter now and could dismiss this ground of appeal.

175. These observations however, should not be construed as relieving an individual Judge of his or her duty to withdraw from a particular case if he or she believes that his or her impartiality is in question. This is in fact what Rule 15(A) of the Rules calls for when it says that the Judge shall in any such circumstance withdraw. The Appeals Chamber finds that Judge Mumba had no such duty for the reason that she had no potentially disqualifying personal interest or associations.

---

[234] Appellant's Amended Brief, p. 121. The Appellant raised the matter before the Bureau by filing on 3 February 1999 the "Defendant's Post Trial Application to the Bureau of the Tribunal for the Disqualification of Presiding Judge Mumba, Motion to Vacate Conviction and Sentence, and Motion for a New Trial."
[235] *Tadi}* Appeals Judgment, paras. 247 and 281.
[236] *E.g.*, Yearbook of the International Tribunal (1997) stated that Judge Mumba was a member of the UNCSW from 1992-1995 (pp. 26-27).

176. The second observation is concerned with the additional material annexed to the Appellant's Amended Brief. It is to be recalled that, in an order dated 2 September 1999, the Appeals Chamber granted leave to the Appellant to amend his Appellate Brief, although not specifically admitting the material referred to in the "Defendant's Motion to Supplement Record on Appeal".[237] The Appeals Chamber confirms that, by granting leave to file an amended Appellate Brief, it granted leave to file the annexed documents, which the Appeals Chamber will take into account in considering the Appellant's submissions.

1. Statutory Requirement of Impartiality

177. The fundamental human right of an accused to be tried before an independent and impartial tribunal is generally recognised as being an integral component of the requirement that an accused should have a fair trial. Article 13(1) of the Statute reflects this, by expressly providing that Judges of the International Tribunal "shall be persons of high moral character, *impartiality* and integrity".[238] This fundamental human right is similarly reflected in Article 21 of the Statute, dealing generally with the rights of the accused and the right to a fair trial.[239] As a result, the Appeals Chamber need look no further than Article 13(1) of the Statute for the source of that requirement.

---

[237] Filed on 28 June 1999.

[238] (Emphasis added). Article 13(1) provides: "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. In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law." See also Arts. 2 and 11 of Statute of the International Tribunal for the Law of the Sea (Annex VI of United Nations Convention on the Law of the Sea of 10 December 1982); Art. 19 of Statute of the Inter-American Court of Human Rights (adopted by Resolution 448 by the General Assembly of the Organisation of American States at its ninth regular session held in La Paz, Bolivia, October 1979); Arts. 36(3)(a), 40 and 41 of the Rome Statute.

[239] Under Article 21(2) of the Statute, the accused is entitled to "a fair and public hearing" in the determination of the charges against him. Paragraph 106 of the Report of the Secretary General provides that "[i]t is axiomatic that the International Tribunal must fully respect internationally recognised standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognised standards are, in particular, contained in Article 14 of the International Covenant on Civil and Political Rights." (Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808(1993)). Article 14(1) of the ICCPR provides in relevant part: "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." The fundamental human right of an accused to be tried before an independent and impartial tribunal is also recognised in other major human rights treaties. The Universal Declaration of Human Rights provides in Art. 10 that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the full determination of his rights and obligations of any criminal charge against him". Art. 6(1) of the European Convention on Human Rights protects the right to a fair trial and provides *inter alia* that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Art. 8(1) of the American Convention provides that "[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law". Art. 7(1)(d) of the African Charter on Human and Peoples' Rights provides that every person shall have the right to have his case tried "within a reasonable time by an impartial court or tribunal."

178. However, it is still the task of the Appeals Chamber to determine how this requirement of impartiality should be interpreted and applied to the circumstances of this case. In doing so, the Appeals Chamber notes that, although the issue of impartiality of a Judge has arisen in several cases to date, before both the Bureau and a Presiding Judge of a Trial Chamber,[240] this is the first time that the Appeals Chamber has been seized of the matter.

2. Interpretation of the Statutory Requirement for Impartiality

179. Interpretation of the fundamental human right of an accused person to be tried by an impartial tribunal is carried out by considering situations in which it is alleged that a Judge is not or cannot be impartial and therefore should be disqualified from sitting on a particular case. A two-pronged approach appears to have developed. Although interpretation on a national or regional level is not uniform, as a general rule, courts will find that a Judge "might not bring an impartial and unprejudiced mind"[241] to a case if there is proof of actual bias or of an appearance of bias.

180. The Appellant acknowledges that he "makes no claim that Judge Mumba was actually biased".[242] The Appeals Chamber will proceed on this basis.

181. The European Convention on Human Rights has generated a large amount of jurisprudence on the interpretation of Article 6 of that Convention which provides, *inter alia,* that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." In the view of the European Court of Human Rights:

> Whilst impartiality normally denotes absence of prejudice or bias, its existence or otherwise can, notably under Article 6§1 (art.6-1) of the Convention, be tested in various ways. A distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given Judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect.[243]

---

[240] In each case, application has been made under Rule 15(B) of the Rules and considered by either the Presiding Judge of the Chamber in question who confers with the Judge in question, or if necessary, the matter is determined by the Bureau. See for example, *Prosecutor v. Zejnil Delalic et al.*, Case No. IT-96-21-T, Decision of the Bureau on Motion to Disqualify Judges Pursuant to Rule 15 or in the Alternative that Certain Judges Recuse Themselves, 1 Oct. 1999; *Prosecutor v. Zejnil Delalic et al.*, Case No. IT-96-21-T, Decision of the Bureau on Motion on Judicial Independence, 4 Sept. 1998; *Prosecutor v. Dario Kordic et al.*, Case No. IT-95-14/2-PT, Decision of the Bureau, 4 May 1998; *Prosecutor v. Radoslav Br|anin and Momir Talic*, Case No. IT-99-36-PT, Decision on Application by Momir Talic for the Disqualification and Withdrawal of a Judge, 18 May 2000 ("*Talic* Decision").

[241] *Talic* Decision, para. 15.

[242] Appellant's Reply, p. 48.

[243] *Piersack v. Belgium*, Judgment of 21 September 1982, Eur. Ct. H. R., Series A, No. 53 ("*Piersack*"), para. 30. This test has been confirmed and applied in *De Cubber v. Belgium*, Judgment of 26 October 1984, Eur. Ct. H. R., Series A, No.86 ("*De Cubber*"), para. 24; *Hauschildt v. Denmark*, Judgment of 24 May 1989, Eur. Ct. H. R., Series A, No. 154 ("*Hauschildt*"), para. 46; *Bulut v. Austria*, Judgment of 22 February 1996 Eur. Ct. H. R, Series A, No.5 ("*Bulut*"), para

182. In considering subjective impartiality, the Court has repeatedly declared that the personal impartiality of a Judge must be presumed until there is proof to the contrary.[244] In relation to the objective test, the Court has found that this requires that a tribunal is not only genuinely impartial, but also appears to be impartial. Even if there is no suggestion of actual bias, where appearances may give rise to doubts about impartiality, the Court has found that this alone may amount to an inadmissible jeopardy of the confidence which the Court must inspire in a democratic society.[245] The Court considers that it must determine whether or not there are "ascertainable facts which may raise doubts as to...impartiality."[246] In doing so, it has found that in deciding "whether in a given case there is a legitimate reason to fear that a particular Judge lacks impartiality the standpoint of the accused is important but not decisive.... *What is decisive is whether this fear can be held objectively justified.*"[247] Thus, one must ascertain, apart from whether a judge has shown actual bias, whether one can apprehend an appearance of bias.

183. The interpretation by national legal systems of the requirement of impartiality and in particular the application of an appearance of bias test, generally corresponds to the interpretation under the European Convention.

184. Nevertheless, the rule in common law systems varies. In the United Kingdom, the court looks to see if there is a "real danger of bias rather than a real likelihood",[248] finding that it is "unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time."[249] However, other common law jurisdictions have rejected this test as being too strict, and cases such as *Webb, R.D.S.,* and the *South African Rugby Football Union* case use the reasonable person as the arbiter of bias, investing him with the requisite knowledge of the circumstances before an assessment as to impartiality can be made.

31; *Castillo Algar v. Spain,* Judgment of 28 October 1998, Eur. Ct. H. R., Series A, No.95 ("*Algar*"), para. 43; *Incal v. Turkey,* Judgment of 9 June 1998, Eur. Ct. H. R , Series A, No.78 ("*Incal*"), para. 65.

[244] See *Le Compte, Van Leuven and de Meyere,* Judgment of 27 May 1981, Eur. Ct. H. R., Series A, No. 43, para. 58 ("*Le Compte*"); *Piersack,* para. 30; *De Cubber,* para. 25. In fact, there has yet to be a case in which a violation of Article 6 has been found under this element of the test.

[245] See *Sramek v. Austria,* Judgment of 22 October 1984, Eur. Ct. H. R., Series A, No.84, para.42; *Campbell and Fell v. United Kingdom,* Judgment of 28 June 1984, Eur. Ct. H. R., Series A, No.80, para. 85.

[246] *Hauschildt,* para. 48.

[247] *Ibid.* (emphasis added). See also *Algar,* para. 45; *Incal,* para. 71 and *Bulut,* para. 33.

[248] *R v. Gough,* [1993] A.C. 646 at 661.

[249] *Ibid.*

185. In the case of *Webb*, the High Court of Australia found that, in determining whether or not there are grounds to find that a particular Judge is partial, the court must consider whether the circumstances would give a fair-minded and informed observer a "reasonable apprehension of bias".[250] Similarly, the Supreme Court of Canada identified the applicable test for determining bias to be whether words or actions of the Judge give rise to a reasonable apprehension of bias to the informed and reasonable observer: "This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must be reasonable in the circumstances of the case. Further, the reasonable person must be an informed person, with knowledge of all the relevant circumstances".[251]

186. A recent case to confirm the above formula is the *South African Rugby Football Union Case,*[252] where the Supreme Court of South Africa stated that "[t]he question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel." [253]

187. In the United States a federal Judge is disqualified for lack of impartiality where "a reasonable man, cognisant of the relevant circumstances surrounding a Judge's failure to recuse himself, would harbour legitimate doubts about the Judge's impartiality."[254]

188. This is also the trend in civil law jurisdictions, where it is required that a Judge should not only be actually impartial, but that the Judge should also appear to be impartial.[255] For example, under the German Code of Criminal Procedure, although Articles 22 and 23 are the provisions setting down mandatory grounds for disqualification, Article 24 provides that a Judge may be challenged for "fear of bias" and that such "[c]hallenge for fear of bias is proper if there is reason to distrust the impartiality of a Judge". Thus, one can challenge a Judge's partiality based on an

---

[250] *Webb v. The Queen* (1994) 181 CLR 41, 30 June 1994. The court reasoned that "public confidence in the administration of justice is more likely to be maintained if the Court adopts a test that reflects the reaction of the ordinary reasonable member of the public to the irregularity in question."

[251] *R.D.S. v. The Queen* (1997) Can. Sup. Ct, delivered 27 September 1997.

[252] *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others, Judgement on Recusal Application,* 1999 (7) BCLR 725 (CC), 3 June 1999 (*"South African Rugby Football Union").*

[253] *Ibid.,* para. 48.

[254] *U.S. v. Bremers et al.,* 195 F. 3d 221, 226 (5th Cir. 1999). Disqualification is governed by 28 USCS, Section 455 (2000), which provides that a Judge shall disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." The Supreme Court has stated that '[t]he goal of section 455(a) is to avoid even the appearance of impartiality." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860 (1988) (citing *Hall v. Small Administration,* 695 F.2d 175, 179 (5th Cir. 1983).

[255] *See e.g.,* Arts. 22-24, German Code of Criminal Procedure (Strafprozeßordnung), Art 668 of the French Code de Procédure Pénale, Arts. 34-36, Italian *Codice de Procedura Penale,* and Arts. 512-519 of the Dutch Code of Criminal Procedure (Wetboek van Strafvordering). It should also be noted that as a general rule, these civil law systems also consider actual bias as being grounds for disqualification.

objective fear of bias as opposed to having to assert actual bias. Similarly in Sweden, a Judge may be disqualified if any circumstances arise which create a legitimate doubt as to the Judge's impartiality.[256]

3. A standard to be applied by the Appeals Chamber

189. Having consulted this jurisprudence, the Appeals Chamber finds that there is a general rule that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. On this basis, the Appeals Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the Statute:

A. A Judge is not impartial if it is shown that actual bias exists.

B. There is an unacceptable appearance of bias if:

i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or

ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[257]

190. In terms of the second branch of the second principle, the Appeals Chamber adopts the approach that the "reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold."[258]

191. The Appeals Chamber notes that Rule 15(A) of the Rules provides:

> A Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her

[256] Sections 13 and 14 of the Swedish Code of Judicial Procedure (1998).
[257] In the *Talic* Decision, it was found that the test on this prong is "whether the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the actual circumstances to make a reasonable judgement) would be that [the Judge in question]... might not bring an impartial and unprejudiced mind" (para. 15).
[258] *R.D.S. v. The Queen* (1997) Can. Sup. Ct., delivered 27 September 1997.

impartiality. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case.[259]

The Appeals Chamber is of the view that Rule 15(A) of the Rules falls to be interpreted in accordance with the preceding principles.

4. Application of the statutory requirement of impartiality to the instant case

(a) Actual Bias

192. As mentioned above,[260] the Appellant does not allege actual bias on the part of Judge Mumba. Accordingly, the Appeals Chamber sees no need to consider this aspect further in the instant case.

(b) Whether Judge Mumba was a party to the cause or had a disqualifying interest therein

193. With regard to the first branch of the second principle, the Appellant highlights the similarities in the circumstances of this case and that of *Pinochet*.[261] However, the *Pinochet* case is distinguishable from the instant case on at least two grounds.

194. First, whereas Lord Hoffmann was at the time of the hearing of that case a Director of Amnesty International Charity Limited, Judge Mumba's membership of the UNCSW was not contemporaneous with the period of her tenure as a Judge in the instant case.[262] Secondly, the close link between Lord Hoffmann and Amnesty International in the *Pinochet* case is absent here. As Lord Browne-Wilkinson said, "[o]nly in cases where a judge is taking an active role as trustee or director of a charity which is closely allied to and acting with a party to the litigation should a judge normally be concerned either to recuse himself or disclose the position to the parties."[263] While Judge Mumba may have been involved in the same organisation, there is no evidence that she was closely allied to and acting with the Prosecution lawyer and the three authors of one of the *amicus curiae* briefs in the present case. The link here is tenuous, and does not compare to that existing between Amnesty International and Lord Hoffmann in the *Pinochet* case. Nor may this link be established simply by asserting that Judge Mumba and the Prosecution lawyer and the three *amici*

[259] Rule 14 also provides that a Judge must make a solemn declaration before taking up duties, in the following terms: "I solemnly declare that I will perform my duties and exercise my powers as a Judge of the International Tribunal...honourably, faithfully, impartially and conscientiously."
[260] *Supra*, para. 180.
[261] *R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No.2)* [1999] 1 All ER 577 (*"Pinochet"*).
[262] Judge Mumba served on the UNCSW between 1992 and 1995.
[263] *Pinochet*, p. 589.

authors shared the goals of the UNCSW in general. There is, therefore, no basis for a finding in this case of partiality based on the appearance of bias test established in the *Pinochet* case.

(c) Whether the circumstances of Judge Mumba's membership of the UNCSW would lead a reasonable and informed observer to apprehend bias

195. The Appeals Chamber, in applying the second branch of the second principle, considers it useful to recall the well known maxim of Lord Hewart CJ that it is of "fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[264] The Appellant, relying on the findings in the *Pinochet* case, alleges that there was an appearance of bias, because of Judge Mumba's prior membership of the UNCSW and her alleged associations with the Prosecution lawyer and the three authors of one of the *amicus curiae* briefs.[265]

196. In the view of the Appeals Chamber, there is a presumption of impartiality which attaches to a Judge. This presumption has been recognised in the jurisprudence of the International Tribunal,[266] and has also been recognised in municipal law. For example, the Supreme Court of South Africa in the *South African Rugby Football Union* case found:

> The reasonableness of the apprehension [of bias] must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves.[267]

197. The Appeals Chamber endorses this view, and considers that, in the absence of evidence to the contrary, it must be assumed that the Judges of the International Tribunal "can disabuse their minds of any irrelevant personal beliefs or predispositions." It is for the Appellant to adduce sufficient evidence to satisfy the Appeals Chamber that Judge Mumba was not impartial in his case. There is a high threshold to reach in order to rebut the presumption of impartiality . As has been stated, "disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgement and this must be 'firmly established.'"[268]

198. The Appellant suggests that, during her time with the UNCSW, Judge Mumba acted in a personal capacity and was "personally involved" in promoting the cause of the UNCSW and the Platform for Action. Consequently, she had a personal interest in the Appellant's case and, as this

---

[264] *R v. Sussex Justices ex parte McCarthy* [1924] 1 KB 256 at p. 259.
[265] Appellant's Amended Brief, p. 127.
[266] See e.g., *Prosecutor v. Dario Kordic et al.*, Case No. IT-95-14/2-PT, Decision of the Bureau, 4 May 1998, p. 2.
[267] *South African Rugby Football Union*, para. 48.
[268] Mason J, in *Re JRL; Ex parte CJL* (1986) CLR 343 at 352. Adopted in the subsequent Australian High Court decision in *Re Polities; Ex parte Hoyts Corporation Pty Ltd* (1991) 65 ALJR 444 at 448.

created an appearance of bias, she should have been disqualified.[269] The Prosecutor argues that Judge Mumba acted solely as a representative of her country and, as such, was not putting forward her personal views, but those of her country.[270]

199. The Appeals Chamber finds that the argument of the Appellant has no basis. First, it is the Appeals Chamber's view that Judge Mumba acted as a representative of her country and therefore served in an official capacity. This is borne out by the fact that Resolution 11(II) of the UN Economic and Social Council that established the UNCSW provides that this body shall consist of "one representative from each of the fifteen Members of the United Nations selected by the Council."[271] Representatives of the UNCSW are selected and nominated by governments.[272] Although the Appeals Chamber recognises that individuals acting as experts in many UN human rights bodies do serve in a personal capacity, [273] the founding Resolution of the UNCSW does not provide for its members to act in such capacity. Therefore, a member of the UNCSW is subject to the instructions and control of the government of his or her country. When such a person speaks, he or she speaks on behalf of his or her country. There may be circumstances which show that, in a given case, a representative personally identified with the views of his or her government, but there is no evidence to suggest that this was the case here. In any event, Judge Mumba's view presented before the UNCSW would be treated as the view of her government.

200. Secondly, even if it were established that Judge Mumba expressly shared the goals and objectives of the UNCSW and the Platform for Action, in promoting and protecting the human rights of women, that inclination, being of a general nature, is distinguishable from an inclination to implement those goals and objectives as a Judge in a particular case. It follows that she could still sit on a case and impartially decide upon issues affecting women.

---

[269] Appellant's Amended Brief, pp. 122 and 135.
[270] Prosecutor's Response, paras. 6.13-6.15.
[271] Resolution adopted 21 June 1946, section 2(a).
[272] *Ibid.* Section 2(b) provides that "[W]ith a view to securing a balanced representation in the various fields covered by the Commission, the Secretary-General shall consult with the governments so selected before the representatives are finally nominated by these governments and confirmed by the Council."
[273] *E.g.*, Art. 17 of the Convention on the Elimination of Discrimination against Women (entering into force on 3 September 1981) which calls for the establishment of the Committee on the Elimination of Discrimination against Women to monitor the above, states that the "experts shall be elected by States Parties from among their nationals and shall serve in their personal capacity..." Similarly, such language which expressly provides that members of committees shall act in their personal capacity is found in Art. 43(2) of the Convention on the Rights of the Child establishing the Committee on the Rights of the Child; Art. 8(1) of the International Convention on the Elimination of All Forms of Racial Discrimination establishing the Committee on the Elimination of all forms of Racial Discrimination; Art. 17(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment establishing the Committee against Torture; and Art. 28(3) of the International Covenant on Civil and Political Rights, establishing the Human Rights Committee.

201. Indeed, even if Judge Mumba sought to implement the relevant objectives of the UNCSW, those goals merely reflected the objectives of the United Nations,[274] and were contemplated by the Security Council resolutions leading to the establishment of the Tribunal. These resolutions condemned the systematic rape and detention of women in the former Yugoslavia and expressed a determination "to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them."[275] In establishing the Tribunal, the Security Council took account "with grave concern" of the "report of the European Community investigative mission into the treatment of Muslim women in the former Yugoslavia" and relied on the reports provided by, *inter alia*, the Commission of Experts and the Special Rapporteur for the former Yugoslavia, in deciding that the perpetrators of these crimes should be brought to justice.[276] The general question of bringing to justice the perpetrators of these crimes was, therefore, one of the reasons that the Security Council established the Tribunal.

202. Consequently, the Appeals Chamber can see no reason why the fact that Judge Mumba may have shared these objectives should constitute a circumstance which would lead a reasonable and informed observer to reasonably apprehend bias. The Appeals Chamber agrees with the Prosecutor's submission that "[c]oncern for the achievement of equality for women, which is one of the principles reflected in the United Nations Charter, cannot be taken to suggest any form of pre-judgement in any future trial for rape."[277] To endorse the view that rape as a crime is abhorrent and that those responsible for it should be prosecuted within the constraints of the law cannot in itself constitute grounds for disqualification.

203. The Appeals Chamber recognises that Judges have personal convictions. "Absolute neutrality on the part of a judicial officer can hardly if ever be achieved."[278] In this context, the Appeals Chamber notes that the European Commission considered that "political sympathies, at least insofar as they are of different shades, do not in themselves imply a lack of impartiality towards the parties before the court".[279]

204. The Appeals Chamber considers that the allegations of bias against Judge Mumba based

---

[274] Article 1(3) of the UN Charter includes as a purpose of the United Nations: "To achieve international co-operation in solving international problems of an economic, social cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion..." Article 55(c) provides that based on respect for the principle of equal rights and self-determination of peoples, the United Nations will promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."

[275] UN Security Council Resolution 827(1993) (S/RES/827 (1993)). S/RES/798 (1992) directly addressed to crimes against women in Bosnia and Herzegovina and being appalled by the "massive, organised and systematic detention and rape of women" in Bosnia and Herzegovina, condemned it as "acts of unspeakable brutality."

[276] S/RES/808 (1993).

[277] Prosecutor's Response, para.6.23.

[278] *South African Rugby Football Union Case*, para. 42.

upon her prior membership of the UNCSW should be viewed in light of the provisions of Article 13(1) of the Statute, which provide that "[i]n the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law."

205. The Appeals Chamber does not consider that a Judge should be disqualified because of qualifications he or she possesses which, by their very nature, play an integral role in satisfying the eligibility requirements. Judge Mumba's membership of the UNCSW and, in general, her previous experience in this area would be relevant to the requirement under Article 13(1) of the Statute for experience in international law, including human rights law. The possession of this experience is a statutory requirement for Judges to be elected to this Tribunal. It would be an odd result if the operation of an eligibility requirement were to lead to an inference of bias. Therefore, Article 13(1) should be read to exclude from the category of matters or activities which could indicate bias, experience in the specific areas identified. In other words, the possession of experience in any of those areas by a Judge cannot, in the absence of the clearest contrary evidence, constitute evidence of bias or partiality.[280]

206. The Appellant has alleged that "Judge Mumba's decision [the Judgement] in fact promoted specific interests and goals of the Commission."[281] He states that she advocated the position that rape was a war crime and encouraged the vigorous prosecution of persons charged with rape as a war crime.[282] He erroneously states that this was the first case in which either the International Tribunal or the ICTR was offered the opportunity to reaffirm that rape is a war crime,[283] and that through this case the Trial Chamber expanded the definition of rape.[284] The Appellant alleges that this expanded definition of rape which emerged in the Judgement reflected that which had been adopted by the Expert Group Meeting, at which the three authors of one of the *amicus curiae* briefs and the Prosecution lawyer were present.[285] In his submissions, these circumstances could cause a reasonable person to reasonably apprehend bias.

---

[279] *Crociani et al. v. Italy*, Decisions and Reports, European Commission of Human Rights, vol. 22 (1981) 147, 222.
[280] Such a statutory requirement for experience of this general nature is by no means novel to this Tribunal. *See e.g.*, Art. 36 of the Rome Statute; Art. 34 of the American Convention; Art. 39(3) of the European Convention; Art. 2 of the Statute of the International Court of Justice.
[281] Appellant's Amended Brief, p. 135.
[282] *Ibid.*, p. 122.
[283] Appellant's Reply, p. 47. Cf. *^elebi}i* Judgement, paras. 478 - 479.
[284] Appellant's Amended Brief, p. 116.
[285] *Ibid.*

207. On the other hand, the Prosecutor argues that, in terms of the definition of rape, there is no evidence that Judge Mumba acted under the influence of the Expert Group Meeting or that she was even aware of it or its report. The Prosecutor states that the three authors of one of the *amicus curiae* briefs did not advance a definition of rape in their submissions (the Appellant does not dispute this statement[286]), and that in any event, the Appellant took no issue with the submissions made by the Prosecutor on the elements of rape during trial.[287]

208. The Appeals Chamber notes that there was no dispute at trial as to whether rape can, or should, be categorised as a war crime. The Prosecutor addressed the definition of rape in both her pre-trial brief and during the trial,[288] and, as found by the Trial Chamber, these submissions went unchallenged by the Appellant.[289] In addition, the Appellant confirmed during the oral hearing on the appeal that there was no issue raised at trial as to whether rape could be categorised as a war crime;[290] in fact, at the same hearing, he made no oral submission on the question of recusal.[291] For these reasons, the Appeals Chamber finds that the circumstances could not lead a reasonable observer, properly informed, to reasonably apprehend bias.

209. Moreover, the Appeals Chamber notes that both the International Tribunal and the ICTR have had the opportunity, prior to the Judgement, to define the crime of rape.[292]

210. With regard to the issue of the reaffirmation by the International Tribunal of rape as a war crime, the Appeals Chamber finds that the international community has long recognised rape as a war crime.[293] In the *^elebi}i* Judgement, one of the accused was convicted of torture by means of rape, as a violation of the laws or customs of war.[294] This recognition by the international community of rape as a war crime is also reflected in the Rome Statute where it is designated as a war crime.[295]

---

[286] Appellant's Amended Brief, footnote 29.
[287] Prosecutor's Response, para. 6.30.
[288] Prosecutor's pre-trial Brief, pp. 14-15; transcript of trial proceedings in *Prosecutor v. Anto Furund'ija*, Case No. IT-95-17/1-T, p. 658 (this reference is from the unofficial, uncorrected version of the English transcript. Minor differences may therefore exist between the pagination therein and that of the final English transcript released to the public).
[289] Judgement, para. 174.
[290] T. 98 (2 March 2000).
[291] T. 93 (2 March 2000).
[292] *^elebi}i* Judgement, paras. 478 – 479; *The Prosecutor v. Jean-Paul Akayesu,* Case No. ICTR-96-4-T, Judgement, para. 598.
[293] *^elebi}i* Judgement, para. 476. The Lieber Code of 1863 considered rape by a belligerent to be punishable as a war crime (Instructions for the Government of the United States in the Field by Order of the Secretary of War, Washington D.C., 24 April 1863). Rape was prosecuted as a war crime under Control Council Law No. 10. Rape was also prosecuted as a war crime before the International Military Tribunal in Tokyo, with officials held criminally responsible for war crimes including rape committed by officers under their command.
[294] *^elebi}i* Judgement, paras. 943 and 965.
[295] Article 8(2)(b)(xxii) and Article 8(2)(e)(vi) of the Rome Statute.

211. The Appeals Chamber also finds without merit the allegation that Judge Mumba is shown to have been biased by the fact that the Judgement expanded the definition of rape in a manner which reflected the definition put forward by the Expert Group Meeting. There is no evidence that Judge Mumba was influenced by the latter definition. On the other hand, there was jurisprudence which led the Trial Chamber to take the direction which it took. In the case of *The Prosecutor v. Jean-Paul Akayesu* before the ICTR, the Trial Chamber, while acknowledging that there was no generally accepted definition of rape in international law and that there were also variations at the national level,[296] defined rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."[297] This definition was subsequently adopted in the *^elebi}i case.*[298]

212. In the instant case, there was no issue on this point at trial.[299] The Trial Chamber stated that it sought to arrive at an "accurate definition of rape based on the criminal law principle of specificity".[300] The Appeals Chamber recognises that the Trial Chamber was entitled to interpret the law as it stood.

213. Finally, the Appellant alleges that the association Judge Mumba had with the three authors of an *amicus curiae* brief created an apprehension of bias. He contends that, in filing the briefs before the Trial Chamber, the "amici actively assisted the prosecution in its effort to convict Mr. Furundžija by seeking to prevent the reopening of the trial after the Defence discovered that relevant documents had been withheld by the prosecution....the amici advanced legal arguments that assisted the prosecution in order to advance an agenda they shared with Judge Mumba."[301] The Appellant quotes sections of the briefs to illustrate the attitude which Judge Mumba shared; those sections, he says, reminded "the Tribunal that its ruling 'profoundly affects (a) women's equal rights to access to justice and (b) the goal of bringing perpetrators of sexual violence in armed conflict before the two International Criminal Tribunals."[302]

214. The Judgement notes that the *amicus curiae* briefs "dealt at great length with issues pertaining to the re-opening of the...proceedings" and the suggested scope of the reopening.[303] They did not address the question of rape or the Appellant's personal responsibility for the rapes in

---

[296] *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 Sept. 1998, para. 596.
[297] *Ibid.*, para. 598.
[298] *^elebi}i* Judgement, para. 479.
[299] Judgement, para. 174.
[300] *Ibid.*, para. 177.
[301] Appellant's Amended Brief, p. 118.
[302] *Ibid.*, p. 119.
[303] Judgement, para. 107.

question.[304] In any event, by the time the briefs were filed on 9 and 11 November 1998, the Trial Chamber had already decided to reopen the proceedings which commenced on 9 November 1998.[305]

215. The Appeals Chamber finds that there is no substance in the Appellant's allegations as contained in this ground of appeal. This ground therefore fails.

[304] The Appellant concedes that the *amicus curiae* briefs did not address the issue of the definition of rape (Appellant's Amended Brief, footnote 29).
[305] Judgement, para. 107.

VII. FIFTH GROUND OF APPEAL

A. Submissions of the Parties

1. The Appellant

216. The Appellant contends that the sentences of ten years' imprisonment for the commission of acts of torture and eight years' imprisonment for aiding and abetting an outrage upon personal dignity, in violation of the laws or customs of war, constitute "cruel and unusual punishment".[306] He submits that, in the event that the Appeals Chamber affirms either conviction, it should reduce the sentence to a length of time consistent with the emerging penal regime of the Tribunal.[307]

217. The Appellant submits that the sentence is too harsh in light of evidence which suggests the possibility that he could be innocent,[308] and that the judgements issued by the Tribunal to date demonstrate an emergent jurisprudence embodying several general sentencing principles. According to the Appellant, the first such principle is that crimes against humanity should attract a harsher sentence than war crimes. In support, he cites the Trial Chamber's opinion in *Prosecutor v. Du{ko Tadi}* and the Appeals Chamber's agreement with the principle in *Prosecutor v. Dra`en Erdemovi}*.[309] The second principle is that crimes resulting in the loss of human life are to be punished more severely than other crimes. The Appellant argues that in the Sentencing Judgement at trial in the *Tadi}* case[310] ("the *Tadi}* Sentencing Judgement"), in respect of a crime in which Du{ko Tadi} participated, i.e., cruel and inhumane treatment leading to the death or disappearance of the victims, he received a sentence of three years additional to that received for the same crime when no death resulted.[311] Relying on the *Tadi}* Sentencing Judgement, the Appellant submits that six years is an appropriate benchmark for a violation of the laws or customs of war when the accused is convicted of particularly cruel and terrorising treatment that did not result in the victim's death.[312]

---

[306] Appellant's Amended Brief, p. 139.
[307] *Ibid.*, p. 138 and T. 93 - 94 (2 March 2000).
[308] T. 94 - 95 (2 March 2000).
[309] Appellant's Amended Brief, pp. 140-145 (citing *Prosecutor v. Du{ko Tadi}*, Case No. IT-94-1-T, Sentencing Judgment, 14 July 1997; *Prosecutor v. Dra'en Erdemovi}*, Case No. IT-96-22-A, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, 7 Oct.1997, para. 20).
[310] *Prosecutor v. Du{ko Tadi}*, Case No.: IT-94-1-T, Sentencing Judgment, 14 July 1997.
[311] Appellant's Amended Brief, pp. 148-149.
[312] *Ibid.*, p. 149 and T. 95 - 96 (2 March 2000).

218. Referring to the *^elibi}i* Judgement, the Appellant submits that the Trial Chamber in that case also reaffirmed the principle that crimes warrant a harsher penalty where they result in loss of human life.[313]

219. The Appellant further offers the judgement of the Trial Chamber in the *Aleksovski* case as an important precedent for the purposes of this appeal. In that case, Zlatko Aleksovski was sentenced to two and a half years' imprisonment for outrages upon personal dignity. By contrast, in respect of a crime of the same category, the Appellant has received eight years' imprisonment.[314]

220. Overall, the Appellant submits that, in order to ensure consistency between the sentence imposed on him and those imposed by the Trial Chamber in the *Tadi}, Erdemovi}* and *Aleksovski* cases,[315] his sentence should be reduced to six years' imprisonment or less.[316]

2. The Respondent

221. The Respondent submits that a sentence is imposed in the exercise of a Trial Chamber's discretion. Therefore, the Appeals Chamber may not substitute its opinion for that of a Trial Chamber, unless it is demonstrated that the Trial Chamber's discretion has not been validly exercised due to error. The Respondent contends that the Appellant in this case failed to demonstrate an error in the exercise of the Trial Chamber's discretion in sentencing.[317]

222. The Respondent submits that every sentence imposed by a Trial Chamber must be individualised as there are a great many factors to which the Trial Chamber may have regard in exercising its discretion in each case.[318]

223. The Respondent disputes the contention that there is a cognisable sentencing regime at the Tribunal, noting that the Appeals Chamber has only addressed the question of sentencing on one occasion.[319] Further, each of the sentences imposed by a Trial Chamber to date, which the Appellant contends reflect an emerging penal regime, is the subject of an appeal. The Respondent

[313] Appellant's Amended Brief, p. 150.
[314] Appellant's Amended Brief, p. 152.
[315] The Appellant refers to the *Tadi}* Sentencing Judgement, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Judgement, 25 June 1999 and *Prosecutor v. Dra'en Erdemovi}*, Case No. IT-96-22-T, Sentencing Judgement, 5 Mar. 1998 ("the Second *Erdemovi}* Sentencing Judgement"), respectively.
[316] Appellant's Amended Brief, pp. 154-157.
[317] Prosecutor's Response, paras. 7.6-7.7.
[318] *Ibid.*, para. 7.9.

submits that the *Erdemovi}* case[320] cannot serve as an appropriate guideline, as the circumstances surrounding that case were unique. The accused in that case pleaded guilty to the charges against him, and duress was treated as a significant mitigating factor. Therefore, the Respondent argues, *Erdemovi}* is clearly distinguishable from the instant case.[321]

224. Contrary to the Appellant's submission that the Appeals Chamber be guided by the sentences passed by the Trial Chambers to date, the Respondent submits that it would be desirable for the Appeals Chamber to establish appropriate sentencing principles in order to achieve consistency and even-handedness.[322]

225. The Respondent further argues that deterrence and retribution should be the primary goals of sentencing. In the Respondent's view, deterrence has two aspects, one "suppressive" and the other "educative". The Respondent submits that both of these aspects of deterrence and the aim of retribution would be defeated were the sentences imposed by the Tribunal generally lower than those typically imposed in national systems.[323]

226. As to the suppressive aspect, the Respondent contends that a prospective violator of international humanitarian law would not be dissuaded by the sanctions imposed by an international tribunal if they were lower than those imposed under national law. As to the educative aspect, the Respondent argues that lower sentences imposed by the International Tribunal would signal that genocide, crimes against humanity and war crimes are less serious than ordinary crimes under national law. Finally, the imposition by the International Tribunal of sentences lower than those prevailing in national jurisdictions would undermine the Tribunal's aim of contributing to the restoration of peace and security in the former Yugoslavia.[324]

227. The Respondent submits that the gravity of the crime must form the starting point for any determination of sentence. Rather than subscribing to some form of hierarchy between the offences generally, a Trial Chamber should impose a sentence which reflects the inherent gravity of the accused's criminal conduct.[325] The gravity of the crimes must ultimately be determined with regard

---

[319] In fact, as of the date of this Judgement, the Appeals Chamber has addressed sentencing in two additional decisions, and in each instance has revised the sentence imposed by the Trial Chamber. See the *Tadi}* Sentencing Appeals Judgement and the *Aleksovski* Appeals Judgement.
[320] *See* the Second *Erdemovi}* Sentencing Judgement.
[321] Prosecutor's Response, paras. 7.11-7.14 and T. 152 (2 March 2000)).
[322] Prosecutor's Response, paras. 7.16-7.17 and T. 155 (2 March 2000).
[323] Prosecutor's Response, paras. 7.25-7.27 and T. 156 (2 March 2000).
[324] Prosecutor's Response, para. 7.28 and T. 159 (2 March 2000).
[325] Prosecutor's Response, para. 7.33 and T. 158 (2 March 2000).

to the particular circumstances of the case; the degree of the accused's participation should be considered and, generally, the closer a person is to actual participation in the crime, the more serious the nature of his crime.[326] However, an individual who orders or plans a course of criminal conduct will be responsible for his role in having ordered all of the crimes committed by the perpetrators and his responsibility may, therefore, be greater.[327]

228. As a general proposition, the Respondent agrees with the Appellant that a crime that results in the death of the victim is more serious than a crime not involving the loss of human life. However, this principle may not apply in the circumstances of every case. The Respondent rejects the Appellant's argument that six years' imprisonment has been established as the "appropriate benchmark" for violations of the laws or customs of war when the accused is convicted of particularly cruel and terrorising treatment that did not result in the death of a victim.[328] The Respondent also highlights other factors which are to be considered, such as the personal circumstances of the accused, aggravating and mitigating factors, and the general practice regarding prison sentences in the courts of the former Yugoslavia.[329]

229. The Respondent submits that the Appellant has not demonstrated that his sentence of ten years for torture was manifestly disproportionate to the gravity of the criminal conduct in question. The Trial Chamber found the Appellant guilty as a co-perpetrator of the act of torture, suggesting that the criminal conduct of the Appellant and that of Accused B were equally serious. Therefore, the sentence imposed cannot be regarded as disproportionate.[330] The Respondent adds that the sentence for outrages upon personal dignity reflects the Appellant's diminished role in this crime, although the conduct underlying this count was the same as that underlying the torture count.[331] The Prosecutor concludes that the Defence has failed to establish that the Trial Chamber abused its discretion in imposing the sentences.[332]

230. The Respondent further submits that, even if any weight is given to sentences imposed by Trial Chambers in other cases, the sentences do not appear to be inconsistent. The Respondent highlights as an example the accused Hazim Deli}, in the *^elebi}i* case, who received a sentence of fifteen years for rape. The Respondent contends that this sentence is probably the one most

[326] Prosecutor's Response, paras. 7.34-7.35.
[327] *Ibid.*, para. 7.35 and T. 160 (2 March 2000).
[328] Prosecutor's Response, para. 7.36.
[329] *Ibid.*, para. 7.37.
[330] *Ibid.*, para. 7.42-7.45.
[331] *Ibid.*, para. 7.46.
[332] *Ibid.*, para. 7.48 and T. 162 (2 March 2000).

analogous on its facts to the circumstances of this case.[333] Furthermore, the Respondent submits that, although sentences imposed by Trial Chambers should not serve as a point of reference before this Appeals Chamber, life imprisonment has been imposed in several cases before the ICTR and in the *Jelisi}* case before this Tribunal a sentence of 40 years was imposed.[334] In the view of the Respondent, the overall ten-year sentence in this case is within the appropriate range, and on that basis the Appellant has shown no abuse of discretion by the Trial Chamber.[335]

231. Finally, the Respondent submits that the Appellant seems to suggest that an accused might be convicted where doubts about his innocence still exist, and that in such cases, doubts should function as a mitigating factor in sentencing.[336]

3. Appellant in Reply

232. The Appellant rejects the Respondent's arguments that his sentence is not inconsistent with the Tribunal's practice. He reiterates his objections to the emphasis placed by the Respondent on his interrogation of Witness A while she was being sexually assaulted, a scenario which he says is not supported by the evidence.[337]

233. The Appellant reiterates his position as submitted in the Appellant's Amended Brief, that the sentence imposed by the Trial Chamber is entirely inconsistent with those imposed at trial in the *Tadi},*[338] *Erdemovi}*[339] and *Aleksovski*[340] cases. He asserts that the Respondent made no attempt to reconcile the *Tadi}* and *Aleksovski* sentencing decisions with that of *Furund'ija,* and that such a reconciliation would, in any event, not have been possible.[341]

234. As regards the *Erdemovi}* case, the Appellant submits that in the First *Erdemovi}* Sentencing Judgement, the accused was sentenced to ten years' imprisonment for the commission of more than seventy murders, absent mitigating circumstances, but that, in the Second *Erdemovi}*

---

[333] Prosecutor's Response paras. 7.49-7.52 (citing *^elebi}i* Judgement, paras. 1285-1286) and T. 154 (2 March 2000).
[334] T. 163 (2 March 2000).
[335] T. 163-164 (2 March 2000).
[336] *Ibid.*
[337] Appellant's Reply, pp. 51-52.
[338] *Tadi}* Sentencing Judgement and *Prosecutor v. Du{ko Tadi},* Case No. IT-94-1-T*bis*-R117, Sentencing Judgement, 11 Nov. 1999.
[339] *Prosecutor v. Dra'en Erdemovi},* Case No. IT-96-22-T, Sentencing Judgement, 29 Nov. 1996, ("the First *Erdemovi}* Sentencing Judgement "), and the Second *Erdemovi}* Sentencing Judgement.
[340] *Prosecutor v. Zlatko Aleksovski,* Case No. IT-95-14/1-T, Judgement, 25 June 1999.
[341] Appellant's Reply, p. 52.

Sentencing Judgement, the accused received only a five-year sentence on account of duress and a plea-bargaining agreement reached with the Prosecutor.[342]

B. Discussion

235. The relevant provisions concerning sentencing procedure before the Tribunal are Articles 23 and 24 of the Statute and Rule 101 of the Rules.

Article 23 – Judgement

1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.

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

Article 24 – Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.

2. In imposing the sentences, the Trial Chambers 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 Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Rule 101 – Penalties

(A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life.

(B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as:

(i) any aggravating circumstances;

(ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;

(iii) the general practice regarding prison sentences in the courts of the former Yugoslavia;

(iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10, paragraph 3, of the Statute.

---

[342] *Ibid.*

(C) The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.

(D) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal.

236. Before addressing individual arguments concerning sentencing, it is worth examining the Appellant's overall contention on this ground. He submits that, in the event that the Appeals Chamber affirms either of the convictions at trial, the sentence relating to the upheld conviction should be reduced to a length of time consistent with the emerging penal regime of the Tribunal.[343] This submission implies that an "emerging penal regime" exists and is identifiable. Although the fundamental function of the Appeals Chamber is to determine whether the sentence imposed by the Trial Chamber is appropriate in terms of the Statute and the Rules, it may, nonetheless, be helpful to consider first whether there is, as contended by the Appellant, an emerging penal regime in the Tribunal.

237. The Appeals Chamber notes that the practice of the Tribunal with regard to sentencing is still in its early stages. Several sentences have been handed down by different Trial Chambers but these are now subject to appeal. Only three final sentencing judgements have been delivered: one by a Trial Chamber established for sentencing purposes following a successful appeal by the accused in *Erdemovic*,[344] and the others by the Appeals Chamber in *Tadic*[345] and *Aleksovski*,[346] each of which has resulted in a revision of the sentence imposed by the original Trial Chamber. It is thus premature to speak of an emerging "penal regime",[347] and the coherence in sentencing practice that this denotes. It is true that certain issues relating to sentencing have now been dealt with in some depth; however, still others have not yet been addressed. The Chamber finds that, at this stage, it is not possible to identify an established "penal regime". Instead, due regard must be given to the relevant provisions in the Statute and the Rules which govern sentencing, as well as the relevant jurisprudence of this Tribunal and the ICTR, and of course to the circumstances of each case.

238. The Prosecutor submits that, while there is no existing penal regime, it would be appropriate for the Appeals Chamber to set out sentencing guidelines which should be applied, based on the functions and purposes of sentencing in the legal system of the Tribunal.[348] Without questioning the possible utility of such guidelines, the Chamber considers it inappropriate to establish a

[343] Appellant's Amended Brief, p. 139.
[344] Second *Erdemovi}* Sentencing Judgement.
[345] *Tadi}* Sentencing Appeals Judgement.
[346] *Aleksovski* Appeals Judgement.
[347] Even including a decision from the ICTR Appeals Chamber (*Omar Serushago v. The Prosecutor*, Case No. ICTR-98-39-A, Reasons for Judgment, 6 Apr. 2000, which affirmed the sentence imposed by a Trial Chamber), the number of final sentencing decisions from two Tribunals is limited to four.
[348] Prosecutor's Response, para. 7.17.

definitive list of sentencing guidelines for future reference, when only certain matters relating to sentencing are at issue before it now. Thus, the Appeals Chamber will limit itself to the issues directly raised by this appeal.

239. One other preliminary matter merits consideration – the standard of review to be applied in an appeal against sentence. The Prosecutor submits that the Appeals Chamber should not substitute its opinion for that of a Trial Chamber unless it is demonstrated that the latter's discretion was not validly exercised.[349] The Appeals Chamber's finding in the *Tadic* Sentencing Appeals Judgement supports this view:

> Insofar as the Appellant argues that the sentence of 20 years was unfair because it was longer than the facts underlying the charges required, the Appeals Chamber can find *no error in the exercise of the Trial Chamber's discretion* in this regard. The sentence of 20 years is within the discretionary framework provided to the Trial Chambers by the Statute and the Appeals Chamber will not, therefore, quash the sentence and substitute its own sentence instead.[350]

The test of a discernible error in respect of the exercise of the Trial Chamber's discretion set out in paragraph 22 of the same judgement has been followed in the *Aleksovski* Appeals Judgement.[351]

1. Crimes against humanity attract harsher penalties than war crimes

240. In the Appellant's Amended Brief, the argument was advanced that a principle has emerged in the practice of the Tribunal that an act classified as a crime against humanity should be punished more severely than an act classified as a war crime.[352]

241. In support of this submission, the Appellant relies on, *inter alia,* certain decisions of this Tribunal.[353] In particular, he draws attention to the judgement of the Appeals Chamber in the *Erdemovic* case in which the majority of the Appeals Chamber found that crimes against humanity should attract a harsher penalty than war crimes.[354]

242. This Chamber notes that, when the Appellant's Amended Brief was filed on 14 September 1999, the Judgement of the Appeals Chamber in the *Tadic* Sentencing Appeals Judgement was yet to be delivered.[355] In this latter case, the Chamber considered the case law now relied upon by the

---

[349] Prosecutor's Response, para. 7.6 and T. 149 (2 March 2000).
[350] *Tadi}* Sentencing Appeals Judgement, para. 20 (emphasis added). *See* also *Omar Serushago v. The Prosecutor,* Case No. ICTR-98-39-A, Reasons for Judgement, 6 April 2000, para. 32.
[351] *Aleksovski* Appeals Judgement, para. 187.
[352] Appellant's Amended Brief, pp. 140-145.
[353] Notably the *Tadic* Sentencing Judgement and the Joint Separate Opinion of Judge McDonald and Judge Vohrah in *Prosecutor v. Dražen Erdemovic,* Case No. IT-96-22-A, Judgement, 7 Oct. 1997.
[354] Joint Separate Opinion of Judge McDonald and Judge Vohrah in *Prosecutor v. Dražen Erdemovic,* Case No. IT-96-22-A, Judgement, 7 Oct. 1997, para. 20.
[355] Although the *Tadi}* Sentencing Appeal Judgement was pronounced prior to the oral hearings in this case, counsel for the Appellant did not change this line of argument.

Appellant, but reached a conclusion, by majority, contrary to that which the Appellant now advocates:

> *[T]here is in law no distinction between the seriousness of a crime against humanity and that of a war crime.* The Appeals Chamber finds no basis for such a distinction in the Statute or the Rules of the International Tribunal construed in accordance with customary international law; the authorized penalties are also the same, the level in any particular case being fixed by reference to the circumstances of the case.[356]

243. This Chamber notes that the same arguments now advanced by the Appellant were considered and rejected by the Appeals Chamber in the *Tadic* Sentencing Appeals Judgement. The question arises whether this Chamber should follow the *ratio decidendi* on this issue set out in that Judgement. In the recent *Aleksovski* Appeals Judgement the Appeals Chamber held that:

> [w]here, in a case before it, the Appeals Chamber is faced with previous decisions that are conflicting, it is obliged to determine which decision it will follow, or whether to depart from both decisions for cogent reasons in the interests of justice.[357]

The Appeals Chamber will follow its decision in the *Tadic* Sentencing Appeals Judgement on the question of relative gravity as between crimes against humanity and war crimes.

2. Crimes resulting in loss of life are to be punished more severely than other crimes

244. The Appellant submits, and the Prosecutor agrees in principle, that crimes which result in the loss of human life should be punished more severely.[358]

245. The Appellant submits that certain judgements of the Tribunal may serve as benchmarks for sentences to be handed down in relation to specific crimes. In particular, it is submitted that the judgements of the Trial Chambers in the *Tadic*[359] and *Erdemovi}*[360] cases establish the maximum sentence for war crimes as nine years' imprisonment in cases in which the violation led to the death of the victim.[361] In the *Tadic* case, a person convicted of crimes against humanity was consistently sentenced to an additional three years in cases that resulted in the death or disappearance of victims.

---

[356] *Tadi}* Sentencing Appeals Judgement, para. 69 (emphasis added). Further argument in support of this view was set out in the Separate Opinion of Judge Shahabuddeen in that same judgement. *See also Prosecutor v. Duško Tadic*, Case No. IT-94-1-T*bis*-R117, Sentencing Judgement, 11 Nov. 1999, Separate Opinion of Judge Robinson, in which Judge Robinson expressed the view that there is no basis for "the conclusion that, as a matter of principle, crimes against humanity are more serious violations of international humanitarian law than war crimes" (*ibid.*, p.10) and *Prosecutor v. Dražen Erdemovic*, Case No. IT-96-22-A, Judgement, 7 Oct. 1997, Separate and Dissenting Opinion of Judge Li, in which Judge Li stated "that the gravity of a criminal act, and consequently the seriousness of its punishment, are determined by the intrinsic nature of the act itself and not by its classification under one category or another". *Ibid.*, para. 19.

[357] *Aleksovski* Appeals Judgement, para. 111. See also *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Decision, 31 May 2000, para. 92.

[358] *See* Appellant's Amended Brief, p. 145 -155, and Prosecutor's Response, para. 7.36.

[359] *Tadi}* Sentencing Judgement.

[360] Second *Erdemovi}* Sentencing Judgement.

[361] Appellant's Amended Brief, p. 154.

From this the Appellant deduces that violations which do not result in death should receive a sentence three years less than for those from which death results. In view of the above, the Appellant submits that an appropriate benchmark sentence for a violation of the laws or customs of war that does not result in the death of the victim is six years.

246. The reasoning behind this proposed benchmark of six years depends in part on the view that crimes resulting in loss of life are to be punished more severely than those not leading to the loss of life. The Appeals Chamber considers this approach to be too rigid and mechanistic.

247. Since the *Tadi}* Sentencing Appeals Judgement, the position of the Appeals Chamber has been that there is no distinction in law between crimes against humanity and war crimes that would require, in respect of the same acts, that the former be sentenced more harshly than the latter. It follows that the length of sentences imposed for crimes against humanity does not necessarily limit the length of sentences imposed for war crimes.

248. The argument implicitly advanced by the Appellant in support of a six-year benchmark sentence is that all war crimes should attract similar sentences. The reasoning may be summarised as follows: because war crimes not resulting in death received sentences of six years in *Tadic*, it stands to reason that war crimes not resulting in death in this case should receive the same or a similar sentence. The Appeals Chamber does not agree with this logic, or with the imposition of a restriction on sentencing which does not have any basis in the Statute or the Rules.

249. In deciding to impose different sentences for the same type of crime, a Trial Chamber may consider such factors as the circumstances in which the offence was committed and its seriousness. While acts of cruelty that fall within the meaning of Article 3 of the Statute will, by definition, be serious, some will be more serious than others. The Prosecutor submits that sentences must be individualised according to the circumstances and gravity of the particular offence. The Appeals Chamber agrees with the statement of the Prosecutor that "the sentence imposed must reflect the inherent gravity of the accused's criminal conduct",[362] which conforms to the statement of the Trial Chamber in the *Kupreškic* Judgement:

> The sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime.[363]

[362] Prosecutor's Response, para. 7.32.
[363] *Kupreškic* Judgement, para. 852.

This statement has been endorsed by the Appeals Chamber in the *Aleksovski* Appeals Judgement,[364] and there is no reason for this Chamber to depart from it.

250. The sentencing provisions in the Statute and the Rules provide Trial Chambers with the discretion to take into account the circumstances of each crime in assessing the sentence to be given. A previous decision on sentence may indeed provide guidance if it relates to the same offence and was committed in substantially similar circumstances; otherwise, a Trial Chamber is limited only by the provisions of the Statute and the Rules. It may impose a sentence of imprisonment for a term up to and including the remainder of the convicted person's life.[365] As a result, an individual convicted of a war crime could be sentenced to imprisonment for a term up to and including the remainder of his life, depending on the circumstances.

251. The Appellant's submission regarding the appropriate length of benchmark sentences is contradicted by recent Appeals Chamber practice. In the *Tadic* Sentencing Appeals Judgement, the Appeals Chamber pronounced sentences of twenty years for wilful killings under Article 2 of the Statute and for murders under Article 3 of the Statute,[366] both of which surpass the nine-year benchmark which the Appellant argues is appropriate for war crimes resulting in death.

252. The Appellant further relies upon the judgement of the Trial Chamber in the *Aleksovski* case in order to establish a benchmark for sentencing. In that case, the convicted person was sentenced to two and a half years in prison for outrages upon personal dignity. However, in the recent *Aleksovski* Appeals Judgement, the Appeals Chamber found that there was a discernible error on the part of the Trial Chamber in the exercise of its discretion, namely:

> giving insufficient weight to the gravity of the conduct of the Appellant and failing to treat his position as commander as an aggravating feature in relation to his responsibility under Article 7(1) of the Statute.[367]

The Appeals Chamber went on to sentence Zlatko Aleksovski to seven years, stating that, had it not been for an element of double jeopardy involved in the process, "the sentence would have been considerably longer."[368]

3. Additional arguments

253. The Appellant submits that "there are substantive issues that hang over the case" that suggest innocence is a possibility and that this should be considered in sentencing.[369] The Appeals

[364] *Aleksovski* Appeals Judgement, para. 182.
[365] Article 24 of the Statute and Rule 101(A) of the Rules.
[366] Noted by the Prosecutor at T. 154 (2 March 2000).
[367] *Aleksovski* Appeals Judgement, para. 187.
[368] *Ibid.*, para. 190.

Chamber rejects this argument. Guilt or innocence is a question to be determined prior to sentencing. In the event that an accused is convicted, or an Appellant's conviction is affirmed, his guilt has been proved beyond reasonable doubt. Thus a possibility of innocence can never be a factor in sentencing.

254. Accordingly, this ground of appeal must fail.

---

[369] T. 95 (2 March 2000).

VIII. DISPOSITION

For the foregoing reasons, **THE APPEALS CHAMBER, UNANIMOUSLY**, rejects each ground of appeal, dismisses the appeal, and affirms the convictions and sentences.

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

Mohamed Shahabuddeen
Presiding

Lal Chand Vohrah

Rafael Nieto-Navia

Patrick Lipton Robinson

Fausto Pocar

Dated this twenty-first day of July 2000
At The Hague,
The Netherlands.

Judge Shahabuddeen, Judge Vohrah and Judge Robinson append declarations to this Judgement.

[SEAL OF THE TRIBUNAL]

590

IX. DECLARATION OF JUDGE SHAHABUDDEEN

255. I agree with the judgment of the Appeals Chamber. This declaration offers some comments on the basis of the principle of judicial impartiality, which is considered in the judgment, and on the way in which the principle works.

*

256. As to the basis of the principle of impartiality, article 13, paragraph 1, of the Statute of the Tribunal expressly provides that the "judges shall be persons of ... impartiality...". That being so, as the judgment points out, it is not necessary to look further into the foundation of the requirement in international law. However, if it were necessary to do so, it would be my respectful opinion that the Statute is, on this point, appealing to a general principle of law. Recourse to general principles of law has to be had with care; it has not been frequent in the practice of the International Court of Justice. Nevertheless, there is weight in the view that, at any rate in the case of international judicial proceedings, the principle of impartiality rests on a general principle of law,[1] and not on customary international law. This is consistent with Waldock's observation that the "main spheres in which these [general] principles [of law] have been held to apply have been either the general principles of legal liability and of reparation for breaches of international obligations or the administration of justice" [2] The matter being one of fundamental importance to the administration of justice, there is no reason to suppose that that remark is inapplicable to criminal proceedings.

257. The real problem in this case is to discover a standard by which that general principle of law may be applied in particular circumstances. Is the standard a norm of customary international law? No doubt, a new rule of

[1] See *Oppenheim's International Law*, 9th end., Vol. I, Part 1 (Essex, 1992), p. 37, footnote 5; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge, 1987), chapter 13; and Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. II (Cambridge, 1986), pp. 627 ff. and pp. 676 ff. As to whether the principle applies in non-judicial matters in international law, see, *inter alia*, *Article 3, paragraph 2, of the Treaty of Lausanne (Frontier between Turkey and Iraq), (1925), P.C.I.J., Series B, No. 12*, p. 32; *Voting Procedure on Questions Relating to Reports and Petitions concerning the Territory of South-West Africa, I.C.J. Reports 1955*, pp. 99-100, separate opinion of Judge Lauterpacht; Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (London, 1958), pp. 158-161; Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. III (London, 1976), pp. 64-71, and, by him on the same subject, in *Anglo-American Law Review*, 1972, Vol. I, No. 4, pp. 482-498.

[2] H. Waldock, "General Course on Public International Law", 106 *Hague Recueil* 58 (1962-II).

customary international law may override a general principle,[3] or add to it, or subtract from it, or otherwise qualify it. But, if the question is whether there has emerged in customary international law a norm setting a standard for the operation of the general principle of law concerning impartiality, it would be necessary to examine the evolution of customary international law on the point, and that inquiry would of course have to be done in accordance with the principles regulating that evolution. It is settled that uniformity of acceptance or observance[4] is not required for proof of the emergence of a new norm of customary international law, generality being enough. Yet, given the divergent position[5] adopted in a major law area such as that of England and Wales (and possibly in other countries), there could be doubt as to whether it is correct to say that a new norm of customary international law has crystallised as regards the standard by which an application of the principle of impartiality should be made.

258. But I do not believe that it is necessary to consider whether there has emerged a customary norm as to the standard by which a determination is to be made as to whether the principle of impartiality has been breached in particular circumstances. The duty of the Appeals Chamber is the same as that of any court charged with responsibility for implementing a principle. That duty is to interpret, and to apply the principle as interpreted, to the circumstances of the particular case. In discharging that duty, the Appeals Chamber may see value in consulting the experience of other judicial bodies with a view to enlightening itself as to how the principle is to be applied in the particular circumstances before it. However, in doing that, it does not have to undertake a comparative review designed to show whether a new customary norm has come into being on the basis of general concordance of state practice.

259. In effect, the principle of impartiality itself authorises the Tribunal to interpret it and to apply it as interpreted to any set of circumstances. A new customary norm does not have to be found. In this respect, I would suggest a distinction between the emergence of a new customary norm prescribing how an existing principle is to be applied to particular circumstances before a court and a

---

[3] See Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996,* Vol. III (The Hague, 1997), p. 1606.
[4] The phenomenon of the "persistent objector" need not be considered.
[5] See *Reg. v. Gough* [1993] A.C. 646, HL.

judicial interpretation of an existing principle as to how it is to apply to those circumstances. In the first case, what is applied is not the original principle, but the original principle as modified or qualified by the new customary norm; in the second case, what is applied is the original principle as explained by the interpretation. The distinction may be criticised as semantic; I do not think it is.

260. The second case (in which a principle is interpreted) seems consonant with the nature of a general principle of law. The part of international law to which such a principle belongs "does not consist ... in specific rules formulated for practical purposes, but in general propositions underlying the various rules of law which express the essential qualities of juridical truth itself, in short Law".[6] Such principles "are not so much generalisations reached by application of comparative law ... as particularizations of a common underlying sense of what is just in the circumstances".[7] They "are, in substance, an expression of what has been described as socially realisable morality".[8]

261. An influential consideration lies in the nature of international law itself. As was once submitted by Paul Reuter, international law is "nécessairement simple et un peu rustique".[9] The observation recalls Hall's famous footnote that "there is no place for the refinements of the courts in the rough jurisprudence of nations".[10] I take that to mean not that refinements may not be necessary, but that they are not to

[6] Bin Cheng, *op. cit.*, p. 24.
[7] Rosenne, *op. cit.*, p.1605.
[8] Sir Hersch Lauterpacht, *op. cit.*, p. 172.
[9] *1959 I.C.J. Pleadings, Temple of Preah Vihear*, Vol. II, p. 85.
[10] W.E.Hall, *A Treatise on International Law*, 8th edn. (Oxford, 1924), p.395, footnote 2.

be found ready-made. The system must work with the equipment that it has: needed refinements must be added by prudent interpretation of basic principles. This has to be kept in mind in considering the operation of a general principle. Because such a principle is broad, the necessity for interpreting it whenever it is applied is inescapable. But the function of interpretation is limited; if it exceeds the proper needs of the case, the spectre of an imperial judiciary arises. On the international plane, that is even more unacceptable than it is on the national.

262. As mentioned above, the search for the correct interpretation of a general principle may involve consultation of the experience of other jurists faced with a similar problem, the object being the scientific one of learning from their responses to an equivalent situation. The consultation is not made for the purpose of determining whether a new norm of customary international law has emerged; if this were the object, there would be the ponderous necessity of executing a more systematic survey.

263. Further, and perhaps more importantly, there could be a difference in results flowing from the employment of different methods of search. Conceivably, the question whether there has emerged a new norm of customary international law setting a standard as to how a general principle is to be applied could draw the answer that no such customary norm has emerged, with the result that (on the assumption that the emergence of such a norm is necessary) the general principle could not be applied. Indeed, if that approach were taken to other general principles (such as that, for example, relating to good faith), it might be found that, for similar reasons, they were largely inoperable - in which case, there would be little value in speaking of a general principle as something which could by itself produce a concrete result. A more satisfactory position is that the court is under an obligation to apply a general principle in any event, it being however useful for it to see if judicial experience elsewhere assists it in deciding how the principle is to be interpreted in relation to the particular circumstances before it.

264. In sum, courts of law often undertake the task of interpreting a principle in the light of judicial experience elsewhere before applying the principle to the particular problem calling for solution. A court may (as has happened) select an interpretation even if it is at variance with that in some legal systems. So may a

Chamber of the Tribunal. Naturally, in doing so, it would be good sense for it to give weight to views more generally favoured. But numbers do not always add up to wisdom; and so, like a municipal court, a Chamber of the Tribunal could strike out in a new direction. Why does it have this freedom? Because it is only consulting the experience of others, and not limited by a standard set by a norm of customary international law.

*

265. As to the way in which the principle of impartiality works, the Appeals Chamber correctly notes that the principle prohibits not only actual bias but also an appearance of bias. If (difficult as this may be) actual bias is proved, that is of course an end to the case. But what is the position where the allegation is that, although subjectively there was no bias, objectively there was an appearance of it? How is such an allegation to be evaluated?

266. The problem is alleviated to the extent that it is settled that an appearance of bias exists where the judge is party to the cause, or where he has a proprietary or financial interest in it, or a non-pecuniary interest in its outcome of the kind explained in *Pinochet (No. 2)*.[11] Possibly, although these circumstances may be so, the judge could subjectively be still free of bias. But that is not the point; it is the objective appearance of the thing which matters. And it is accepted that, if any of those things is proved, that is conclusive of there being an inadmissible appearance of bias. The judge stands disqualified without the need for further inquiry; proof of the reaction of others is not required. But what where none of those matters can be proved? Other circumstances may suggest an appearance of bias. By what standard are such circumstances to be assessed?

267. The standard has to be effective for the purpose of giving meaning to the principle which it seeks to apply. So, the principle may be recalled. It has been variously put. In Louis Renault's memorable aphorism, "Il ne suffit pas que la justice soit juste, encore faut-il qu'elle le paraisse".[12] With little change, the

[11] [1999] 1 All ER 577, HL, at pp. 586-589 of the speech of Lord Browne-Wilkinson.
[12] See *La Juridiction internationale permanente, Colloque de Lyon* (Paris, 1987), p. 6.

remark was later repeated by President Jules Basdevant[13] stating, "Il ne suffit pas que la justice soit juste, il faut encore qu'elle le paraisse". The phrase corresponds to, and, in Renault's formulation, ante-dates, Lord Hewart's oft-cited dictum that it "is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done".[14]

268. However, as it has been rightly said, the continued citation of Lord Hewart's statement "in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done".[15] The suspicions of an overly sensitive and uninformed observer are not determinative. On the other hand, it would not be correct to tilt to the other extreme and say that the principle is breached only if, from the point of view of the court considering the matter, there is a real danger of bias. The litmus test of what is acceptable and what is not is the need to maintain public confidence in the integrity of the system under which justice is administered. Public confidence need not be disturbed by the reactions of the hypersensitive and the uninformed, but there are cases in which it can be shaken by an appearance of bias even though, from the point of view of a court considering the matter, it may not be thought that there was a real danger of that disposition.

269. What is the test to be used in locating the point at which public confidence in the administration of justice would be shaken? The test, as indicated by the general tendency of the jurisprudence, is to ask whether a fair-minded and informed member of the public would reasonably apprehend bias in all the circumstances of the case. To that question, the evidence in this matter returns a negative answer.

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

---

[13] President Jules Basdevant, *Discours prononcé pour le cinquantième anniversaire de la première conférence de la paix*, La Haye, 1949.
[14] *R. v. Sussex JJ., ex parte McCarthy* [1924] 1 K.B. 256, at p. 259.

Mohamed Shahabuddeen

Dated this twenty-first day of July 2000
At The Hague
The Netherlands

[SEAL OF THE TRIBUNAL]

[15] *R. v. Camborne JJ., ex parte Pearce* [1955] 1 Q.B. 41, at p. 52.

IX. X. DECLARATION OF JUDGE LAL CHAND VOHRAH 597

THE RELATIVE SERIOUSNESS OF CRIMES AGAINST HUMANITY VIS-À-VIS WAR CRIMES

1. I am in full agreement with the findings of the Judgement and its disposition except for the determination made in paragraph 243.[1] As much as I appreciate the cold logic of the *Tadic* Sentencing Appeals Judgement drawing no distinction between crimes against humanity and war crimes,[2] I have the following observations to make.

2. When I sat as a member of the Appeals Chamber in the *Erdemovic* case, I was part of the majority that agreed with the original Sentencing Judgement in *Tadic*.[3] *Erdemovic*, in extending the view expressed in *Tadic*, held that all things being equal, crimes against humanity are intrinsically more serious than war crimes, and this distinction should ordinarily be reflected in the sentencing.[4] I still subscribe to that view despite recent jurisprudence, including that advanced in the present Judgement, that stipulates an opposing view. Hence this Declaration to reinforce and develop my previous position on this issue.

3. In the post World War II trial at Nuremberg, there was no apparent distinction between the seriousness of a war crime and a crime against humanity in the Judgement of the International Military Tribunal, largely because these two crimes were considered jointly, not separately, in the Judgement. However, there was something of a distinction between crimes against peace – which was referred to as "the supreme crime" – and the other crimes within the jurisdiction of the Tribunal. The IMT Judgement stated: "The charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; *it is the supreme international*

---

[1] *Furundžija Judgement*, para. 243, stating "The Appeals Chamber will follow its decision in the *Tadic* Sentencing Appeals Judgment on the question of relative gravity as between crimes against humanity and war crimes."
[2] *Prosecutor v. Duško Tadic*, Judgement in Sentencing Appeals, Case No. IT-94-1-A and IT-94-1-A*bis*, App. Ch., 26 January 2000, at para. 69.
[3] *Prosecutor v. Duško Tadic*, Sentencing Judgment, Case No. IT-94-1-T, T. Ch. II, 14 July 1997, para. 73 ("A prohibited act committed as part of a crime against humanity . . . is, all else being equal, a more serious offence than an ordinary war crime. This follows from the requirement that crimes against humanity be committed on a widespread or systematic scale, the quantity of the crimes having a qualitative impact on the nature of the offence which is seen as a crime against more than just the victims themselves but against humanity as a whole.")
[4] See *Prosecutor v. Dražen Erdemovic*, Judgement, Joint Separate Opinion of Judge McDonald and Judge Vohrah, Case No. IT-96-22-A, App. Ch., 7 October 1997, para. 20 ("[A] ll things being equal, a punishable offence, if charged and

crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."[5] Although all things were not equal, and some persons found guilty by the Tribunal played a greater role in perpetrating or responsibility for crimes than others and the sentences appropriately reflected this role, as a general rule, most persons convicted by the IMT of crimes against peace were sentenced to death by hanging or life imprisonment, and thus attracted a harsher sentence than those convicted solely of war crimes and crimes against humanity.[6]

4. As noted by Judge Cassese, "one cannot say that a certain class of international crimes encompasses facts that are more serious than those prohibited under a different criminal provision. *In abstracto* all international crimes are serious offences and no hierarchy of gravity may *a priori* be established between them."[7] However, he goes on to emphasize that it is an entirely different matter when all things are equal, as the issue then becomes "whether the very same fact imputed to an accused, if characterised as a war crime, may be regarded as more or less serious than if it is instead defined as a crime against humanity."[8]

5. While all crimes cannot be placed on a continuum of seriousness or within a hierarchy of gravity, there are certain crimes that will always be regarded as the worst crimes it is possible to commit, and these include genocide and crimes against humanity. These crimes are considered the "crime of crimes"[9] primarily because they are committed against a group as such or are committed generally against a large number of people, and often committed on discriminatory grounds. Indeed, if the majority's view that war crimes and crimes against humanity are *prima facie* indistinguishable as to inherent gravity, that principle would seemingly apply to there also being no hierarchical difference between war crimes and crimes against peace or between war crimes and genocide. I find this

---

proven as a crime against humanity, is more serious and should ordinarily entail a heavier penalty than if it were proceeded upon on the basis that it were a war crime." [emphasis in original]).

[5] 1 Trial of the Major War Criminals before the International Military Tribunal, Nurenberg, 14 November 1945 – 1 October 1946, Judgement (1947) at p.186 [emphasis added].

[6] More precisely, of the 19 persons found guilty by the IMT, twelve were sentenced to death. Of these twelve, seven were convicted of Counts I and II for Common Plan or Conspiracy to commit a crime against peace (Count 1) or Crimes against Peace (Count II); thus only five received a death sentence when convicted solely for War Crimes (Count III) and/or Crimes against Humanity (Count IV). Of the twelve persons convicted of Counts I or II, seven were given a death sentence, three were sentenced to life imprisonment, and two received a term of 10 years' or 15 years' imprisonment; of the 12 persons convicted of crimes including Count II, seven received sentences of death, three received life sentences, and two received a term of years (thus, there is no major discrepancy between sentencing on Counts I and II, although only 8 were convicted of both).

[7] *Prosecutor v. Duško Tadic*, Judgement in Sentencing Appeals, Separate Opinion of Judge Cassese, Case No. IT-94-1-A and IT-94-1-A*bis*, App. Ch., 26 January 2000, para. 7.

[8] *Ibid.* at para. 10 [emphasis in original].

[9] See discussion in *Prosecutor v. Jean Kambanda*, Judgement and Sentence, Case No. ICTR-97-23-S, T.Ch. I, 4 September 1998, at paras. 10-33, and as highlighted in this Declaration, *infra*. Also note that in the debates on Security Council Resolution 955, establishing the ICTR, the representative of Rwanda referred to genocide as "the crime of crimes." See UN Doc. S/PV.3453, 8 November 1994.

position to be inherently flawed, as it fails to take into account *inter alia* the broader nature of the crimes or the different interests the prohibitions of the crimes are intended to protect.

6. Naturally, a Chamber must look at the individual circumstances of each case and the convicted person's degree of culpability in determining a sentence, and in many circumstances when all things are not equal, a war crime might warrant a heavier penalty than a crime against humanity or genocide. For example, a war crime of wilful killing would likely warrant a heavier penalty than an unsuccessful attempt to commit genocide, and a war crime of torture might warrant a longer sentence than an inhumane act constituting a crime against humanity. It is important to re-emphasize that in such instances, all things are *not* equal. When all things *are* equal – for the same act, a person is convicted of torture as a war crime or is convicted of a torture as a crime against humanity – although the injury to the individual tortured may be the same, the injury to society would necessarily be greater if a crime against humanity has occurred. This extended injury should ordinarily be reflected in the sentence.

7. In addition, in my view, it appears to be inherently incompatible for the Chamber to hold that as a general rule, crimes involving death are more serious than crimes not involving death, while at the same time holding that there is no hierarchy of crimes, all things being equal.[10] Some crimes are considered worse than death, such as breaking a person's spirit, torturing a person physically while permitting that person to live thereafter in constant pain or humiliation, or destroying a person mentally, which may each be more destructive in the long term than outright execution. There is in my view an irreconcilable contradiction in holding on the one hand that all things being equal there is no inherent distinction between war crimes and crimes against humanity, including in the imposition of sentences, yet holding on the other hand that crimes resulting in death deserve more severe punishment than crimes not resulting in death.

8. Genocide is committed with the intent to destroy more than an individual, but an individual as part of a protected group as such; crimes against humanity are committed through means of a widespread or systematic attack against a civilian population; war crimes are crimes committed with a nexus to an armed conflict. If acts constituting genocide or crimes against humanity are committed in the context of and with a nexus to an armed conflict, and thus also constitute war crimes, then for it to be held that the additional elements required for constituting genocide or crimes against humanity and the fact that a broader society is affected by such crimes do not deserve to be reflected in the sentence of a person convicted of these crimes, amounts to a failure to

[10] See Legal Findings in Ground Five of the present Judgement.

take into consideration the exceptionally egregious nature of genocide and crimes against humanity. While this statement is not intended to minimize the heinousness of war crimes, it is intended to reflect the broader context of and additional elements required to prove crimes against humanity and genocide. If all things being equal war crimes are not considered more serious and not penalized more harshly, a prosecutor would not go to the trouble to prove the additional elements required to establish genocide and crimes against humanity. There is undoubtedly a greater stigma attached to a conviction for genocide or crimes against humanity as opposed to a war crime. As has been reflected in several judgements, genocide was committed in Rwanda. To infer that this crime is not necessarily more serious than a war crime undermines the integrity of the convictions of genocide and crimes against humanity in the Tribunals and the gravity of the enormous harm caused by the Rwandan genocide during which nearly one million people were slaughtered.

9. In the *Kambanda* case before the ICTR, the Trial Chamber noted that the Statute did not rank the various crimes within the jurisdiction of the Tribunal or the sentences to be imposed and therefore, theoretically, there was no distinction between the crimes. However, it then emphasized that in imposing the sentence, the Trial Chamber should take into account "such factors as the gravity of the offence."[11] The Chamber went on to insist: "The Chamber has no doubt that despite the gravity of the violations of Article 3 common to the Geneva Conventions and of the Additional Protocol II thereto, they are considered as lesser crimes than genocide or crimes against humanity."[12] Although it had no difficulty in holding that war crimes were not as serious as genocide and crimes against humanity, the Chamber found it "more difficult . . . to rank genocide and crimes against humanity in terms of their respective gravity."[13] It opined that "genocide constitutes the crime of crimes, which must be taken into account when deciding the sentence."[14] Picking out genocide and crimes against humanity as the most serious crimes, the *Kambanda* Trial Chamber determined that "precisely on account of their extreme gravity, crimes against humanity and genocide must be punished appropriately."[15]

10. As *Blaškic* recognized, the *Kambanda* Trial Chamber considered war crimes as "crimes of a lesser seriousness" in relation to genocide and crimes against humanity, and noted that this view

---

[11] *Prosecutor v. Jean Kambanda*, Judgement and Sentence, Case No. ICTR-97-23-S, T.Ch. I, 4 September 1998, at paras. 12-13. The Chamber also recalled that in determination of sentences, it had to take into account a number of factors, pursuant to the Statute and Rules, such as "gravity of the offence, the individual circumstances of the accused, [and] the existence of any aggravating or mitigating circumstances". *Ibid.*, para. 29.

[12] *Ibid.*, para. 14.

[13] *Ibid.*

[14] *Ibid.*, para. 16. The Chamber also referred to genocide and crimes against humanity as crimes "which are particularly revolting to the collective conscience alone". *Ibid.*, para. 33. See also para. 14, stating that genocide and crimes against humanity "are crimes which particularly shock the collective conscience."

[15] *Ibid.*, para. 17.

was followed in subsequent cases, which thereby established a "genuine hierarchy of crimes and this has been used in determining sentences" in the ICTR.[16] After reviewing the case law of the ICTY in relation to establishing a hierarchy of crimes at the sentencing phase, including the differing opinions on the issue set down in the *Tadic* and *Erdemovic* cases, the *Blaškic* Chamber stated that "it appears that the case-law of the Tribunal is not fixed. The Trial Chamber will therefore confine itself to assessing seriousness based on the circumstances of the case."[17]

11. For the reasons cited above and in my previous decisions, and those articulated by Judge Cassese in *Tadic*,[18] I find myself still of the view that when all things are equal, a person convicted of a crime against humanity commits a more serious crime than a person convicted of a war crime and ordinarily this additional gravity requires that the person convicted of a crime against humanity should receive a longer sentence than a person convicted of the same act as a war crime. This view would naturally include genocide which, also considered a crime against humanity, is similarly inherently more serious than a war crime; all things being equal, it should be recognized and punished as such. This should not be taken to support the Appellant's argument in the present case that his sentence for war crimes should be reduced. If the Appellant had been charged with and convicted of a crime against humanity for the same acts, all things being equal, my view is simply that a conviction for crimes against humanity should warrant a higher sentence than a conviction for war crimes.

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

Judge Lal Chand Vohrah

Dated this twenty-first day of July 2000
At The Hague,
The Netherlands

[SEAL OF THE TRIBUNAL]

[16] *Prosecutor v. Tihomir Blaškic*, Judgement, Case No. IT-95-14-T, T. Ch. I, 3 March 2000, at para. 800.
[17] *Ibid.*, paras. 801-802.
[18] *Tadic*, Judgement in Sentencing Appeals, Separate Opinion of Judge Cassese, *supra* note 7.

XI. DECLARATION OF JUDGE PATRICK ROBINSON

270. This Declaration is not prompted by disagreement with the Chamber's Judgement; rather, its purpose is to comment on the question of a methodology and technique for the interpretation and application of the Tribunal's Statute and Rules.

271. In relation to the fourth ground of appeal, the provisions for interpretation and application are Articles 13 and 21 of the Statute and Rule 15(A), which provide:

> **Article 13**
>
> 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.
>
> ...
>
> **Article 21**
>
> ....
>
> 2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing . . .
>
> **Rule 15**
>
> (A) A Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case.

272. Where the meaning of a provision is plain, no problem arises. But where the meaning is ambiguous, the methodology and technique in interpretation may be crucial and decisive. The meaning of Rule 15 is not plain. In such a case, it is important to ascertain whether there is a rule of customary international law that impacts upon the interpretation and application of the provision.

273. The Report of the Secretary-General[1] stresses the need for the Tribunal to apply rules of customary international law to determine the criminality of conduct so as to avoid conflict with the principle, *nullum crimen sine lege*. But the Tribunal would, in any event, be obliged to apply customary international law, since under Article 1 of the Statute, it is empowered to prosecute persons for serious violations of international humanitarian law, an integral component of which is customary international law.[2] The other component is, of course, conventional international law.

---

[1] Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993) S/25704 ("Report of the Secretary-General") para. 34.

[2] The question of applicable law is explicitly dealt with, (and in a hierarchical manner), in Article 21 of the Statute establishing the International Criminal Court. See Rome Statute of the International Criminal Court, adopted at Rome

274. If there is in general a need to ascertain whether a rule of customary international law impacts on the interpretation of the Statute and Rules, it is all the more important to conduct that exercise in relation to the construction of those provisions which concern the fundamental rights of the accused,[3] because over time, and particularly, in the post-war era, many such rules have developed, and now abound in that area.

275. If there is a relevant rule of customary international law, due account must be taken of it, for more than likely, it will control the interpretation and application of the particular provision. Article 31(3)(c) of the Vienna Convention on the Law of Treaties provides that:

> 3. There shall be taken into account, together with the context:
>
> ...
>
> (c) any relevant rules of international law applicable in the relations between the parties.[4]

276. Significantly, the paragraph "in the light of the general rules of international law in force at the time of its conclusion", which was in the International Law Commission's 1964 Draft Articles on the Law of Treaties, was amended by the deletion of the words "in force at the time of its conclusion" so as to take account of "the effect of an evolution of the law on an interpretation of legal terms in a treaty".[5] Therefore, the relevant rule of international law need not have been in force at the time of the conclusion of the treaty being interpreted; it need only be in force at the time of the interpretation of the treaty.

277. If there is no relevant rule of customary international law, the relevant provision in the Statute or the Rules will be interpreted in accordance with the other elements of Article 31 of the Vienna Convention, that is, good faith, textuality, contextuality (note that the Vienna Convention treats relevant rules of international law in connection with the context) and teleology.

278. Three points need to be highlighted in relation to the interpretation of the Statute and Rules.

---

on 17 July 1998, A/CONF.183/9. Although the Tribunal's Statute does not have such a provision, the regime of its applicable law would be roughly the same. Article 21(1)(b) of the Rome Statute provides that "the Court shall apply . . . in the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict."

[3] Article 21 of the Statute lists the rights of the accused; the list is not exhaustive. The accused is entitled to what the Secretary General calls the "internationally recognized standards." Report of the Secretary-General, para. 106.

[4] The Tribunal has on several occasions had recourse to the general rule of interpretation in Article 31(1) of the Vienna Convention on the Law of Treaties for the purpose of interpreting the Statute. Article 31(1) provides that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The Appeals Chamber has held that "Although the Statute is not a treaty, it is a *sui generis* international legal instrument resembling a treaty." *Joseph Kanyabashi v. The Prosecutor*, Case No. ICTR-96-15-A, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, 3 June 1999, para. 15.

[5] See paragraph 16 of the Commentary of the International Law Commission on Article 27 of the Draft Articles on the Law of Treaties, I.L.C.Y.B. (1966), Book IX, Vol. II, pp. 222.

279. A relevant rule of customary international law does not necessarily control interpretation. For the Statute may itself derogate from customary international law, as it does in Article 29 by obliging States to co-operate with the Tribunal and to comply with requests and orders from the Tribunal for assistance in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.[6] This derogation from the customary principle of sovereignty has been highlighted in the *Blaski}* Decision.[7]

280. Secondly, in interpreting the Statute and Rules due account must be taken of the influence of context and purpose on the ordinary meaning to be given to a particular provision. Contextual interpretation calls for account to be taken of the international character of the Tribunal, in contradistinction to national courts from whose jurisdictions many of the provisions in the Statute and Rules are drawn. However, contextual interpretation highlighting this difference should not be taken too far, at any rate, not so far as to nullify fundamental rights which an accused has under customary international law. Teleological interpretation calls for account to be taken of the fundamental purpose of the Statute, to ensure fair and expeditious trials of persons charged with violations of international humanitarian law so as to contribute to the restoration and maintenance of peace in the former Yugoslavia.[8]

281. Thirdly, in seeking to ascertain whether there is a relevant rule of customary international law, the Tribunal, being a court, albeit an international one, would no doubt be influenced by the decisions of other courts and tribunals. Decisions of national courts are, of course, not binding on the Tribunal. However, it is accepted that such decisions may, if they are sufficiently uniform, provide evidence of international custom. [9] It is perfectly proper, therefore, to examine national decisions on a particular question in order to ascertain the existence of international custom. The Tribunal should not be shy to embark on this exercise, which need not involve an examination of decisions from every country. A global search, in the sense of an examination of the practice of every state, has never been a requirement in seeking to ascertain international custom, because what one is looking for is a sufficiently widespread practice of states accompanied by *opinio juris*. [10]

---

[6] Article 29(1) of the Statute.
[7] *Prosecutor v. Tihomir Bla{ki}*, Case No. IT-95-14-AR108 *bis*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, para. 26.
[8] Report of the Secretary-General, para. 26.
[9] Brownlie, Principles of Public International Law (5th ed. 1998), p. 5. As Oppenheim comments: "Decisions of municipal courts . . . are not a source of law in the sense that they directly bind the state from whose courts they emanate. But the cumulative effect of uniform decisions of national courts is to afford evidence of international custom (although the weight to be attached to that evidence will vary with the status of the courts and the intrinsic merits of the decisions). *Oppenheim's International Law*, Vol. 1 (9th ed., 1997), p. 41.
[10] Article 38 of the Statute of the International Court of Justice requires the Court to apply "international custom, as evidence of a general practice accepted as law. . .".

282. In ground four of this appeal, the Appellant challenges the impartiality of Judge Mumba. The impartiality of judges is required by Articles 13(1) and 21 of the Statute. It is beyond dispute that the impartiality of judges is a requirement of customary international law. The provisions in the Statute reflect this requirement. The Judgement does not highlight in explicit terms the customary character of this requirement. It is apparently taken for granted. The Chamber does, however, conclude that the "fundamental human right of an accused to be tried before an independent and impartial tribunal is generally recognised as being an integral component of the requirement that an accused should have a fair trial."[11]

283. The Judgement cites provisions from other human rights instruments to support that conclusion.[12] I would have been more content with a specific identification of the customary character of the principle of judicial impartiality. Consequently, although that customary character is self-evident, I very much regret that the Chamber felt that it "need look no further than Article 13(1) of the Statute for the source of that requirement."[13]

284. However, the real issue raised by the ground of appeal is the significance of Rule 15, which seeks to give effect to the customary requirement of judicial impartiality. The question which the Chamber had to resolve was the standard to be employed in determining a breach of that customary requirement. In my view, the Chamber should have sought to ascertain whether any rule of customary international law had developed in relation to that standard.

285. Although the Judgement examines provisions in the European Convention on Human Rights, decisions of the European Court of Human Rights, decisions from some common law countries - the United Kingdom, Australia, South Africa and the United States[14]- and observes the "trend in civil law jurisdictions",[15] it does not do so for the purpose of ascertaining whether there is any relevant rule of customary international law.

286. The finding which the Chamber makes based upon this examination, is that "there is a general rule that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias."[16] That finding, however, was not sufficient to resolve the issues raised by the interpretation of Rule 15, for it left unanswered the further question as to the sub-standard or criterion to be employed for determining when, objectively, there is an appearance of bias. The Appeals Chamber considered

[11] This Judgement, para. 177.
[12] *Ibid.*, p. 54, n. 241.
[13] *Ibid.*, para. 177.
[14] *Ibid.*, paras. 181 – 187.
[15] *Ibid.*, para. 188.
[16] *Ibid.*, para. 189.

that "the following principles should direct it in interpreting and applying the impartiality requirement of the Statute":[17]

> A. A Judge is not impartial if it is shown that actual bias exists.
>
> B. There is an unacceptable appearance of bias if:
>
> i) a Judge is a party to the cause, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or
>
> ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[18]

287. The Judgement, although not explicitly following the path that I would have wished it to take, has come very close to doing so, and, perhaps, may be understood by some as having done so.

288. The Chamber's examination of decisions of national courts and international tribunals is very much akin to the approach advocated in this Declaration, and could provide a sufficient foundation for a determination as to whether a rule of custom had emerged as to the standard for determining a breach of the customary requirement of impartiality. I arrive at this conclusion bearing in mind that a global search is not required to establish customary international law, and that the decisions of national courts cited reflect the position, not only in those countries, but in many others.

289. It would not be too bold to characterise the Chamber's finding – "that there is a general rule that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias"[19] – as reflecting a customary standard for determining whether there is a breach of the principle of judicial impartiality.

290. This finding is consistent with the general principle that justice must not only be done, but that it must also be seen to be done.[20] It may be that there is implicit in the Chamber's characterisation of its finding as "a general rule" a recognition that it has a customary basis.

291. The question arises as to whether the principles which the Chamber draws from its finding of the general rule could be said to reflect customary international law. As to the first, that a judge is not impartial if actual bias is shown, there is no controversy, and I would characterise that

---

[17] *Ibid.*
[18] *Ibid.*
[19] *Ibid.*
[20] Lord Hewart CJ in *R. v. Sussex Justices ex parte McCarthy* [1924] 1 KB 256 at p. 259.

principle as reflecting international custom. The real difficulty however is with the second, that is, where there is an unacceptable appearance of bias. Here, it would require some boldness to say that a customary rule has emerged, not in relation to the principle itself – an unacceptable appearance of bias – but, rather in relation to what constitutes, or the indicia of, an unacceptable appearance of bias, and more so, in relation to the second of those indicia - where the circumstances lead a reasonable observer, properly informed, to reasonably apprehend bias. But I agree, nonetheless, with the conclusion drawn by the Chamber that Rule 15 should be interpreted in the light of those indicia.

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

Patrick Lipton Robinson

Dated this twenty-first day of July 2000
At The Hague,
The Netherlands.

[SEAL OF THE TRIBUNAL]

608

Annex A – Glossary of Terms

Aleksovski Appeals Judgement	*Prosecutor v. Zlatko Aleksovski,* Case No. IT-95-14/1-A, Judgement, 24 Mar. 2000.
Amended Indictment	*Prosecutor v. Anto Furund`ija,* Case No. IT-95-17/1-PT, Amended Indictment, 2 June 1998.
Appellant	Anto Furund`ija.
Appellant's Amended Brief	*Prosecutor v. Anto Furund`ija,* Case No. IT-95-17/1-A, Defendant's Amended Appellate Brief [Public Version], 23 June 2000.
Appellant's Reply	*Prosecutor v. Anto Furund`ija,* Case No. IT-95-17/1-A, Appellant's Reply Brief [Public Version], 23 June 2000.
Bungalow	A well-known hostelry in the village of Nadioci, Central Bosnia.
^elebi}i Judgement	*Prosecutor v. Zejnil Delali} et al.,* Case No. IT-96-21-T, Judgement, 16 Nov. 1998.
Confidential Decision	*Prosecutor v. Anto Furund`ija,* Case No. IT-95-17/1-T, Confidential Decision, 15 June 1998.
Defence	Defence for Anto Furund`ija.
Eur. Ct. H. R.	Prior to 1996, the official publication of the Registry of the European Court of Human Rights was entitled "Publications of the European Court of Human Rights." Thereafter, the title was changed to "Reports of Judgments and Decisions."
European Convention on Human Rights	European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950.
First *Erdemovi}* Sentencing Judgement	*Prosecutor v. Dra`en Erdemovi},* Case No. IT-96-22-T, Sentencing Judgement, 29 Nov. 1996.
HVO	Croatian Defence Council.
Holiday Cottage	Building adjacent to the Bungalow - living quarters of the Jokers.
ICCPR	International Covenant on Civil and Political Rights, 1966.
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law

	Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.
Indictment	*Prosecutor v. Anto Furund`ija*, Case No. IT-95-17/1-T, Indictment, 2 Nov. 1995.
International Tribunal or ICTY	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.
Jokers	A special unit of the military police of the HVO.
Judgement	*Prosecutor v. Anto Furund`ija*, Case No. IT-95-17/1-T, Judgement, 10 Dec. 1998.
Kupreški} Judgement	*Prosecutor v. Zoran Kupreški} et al*, Case No. IT-95-16-T, Judgement, 14 Jan. 2000.
Large Room	A room in the Holiday Cottage where the events alleged in paragraph 25 of the Amended Indictment occurred.
Pantry	A room in the Holiday Cottage where the events alleged in paragraph 26 of the Amended Indictment occurred.
Prosecutor or Respondent	Office of the Prosecutor.
Prosecutor's Response	*Prosecutor v. Anto Furund`ija*, Case No. IT-95-17/1-A, Prosecution Submission of Public Version of Confidential Respondent's Brief of the Prosecution dated 30 September 1999, 28 June 2000.
PTSD	Post-Traumatic Stress Disorder.
Re-opened proceedings	Post-trial proceedings commencing on 9 November 1998, pursuant to the Trial Chamber's Decision of 16 July 1998. These proceedings ended on 12 November 1998.
Rome Statute	Rome Statute of the International Criminal Court, adopted at Rome on 17 July 1998, U.N. Doc. A/CONF. 183/9.
Rules	Rules of Procedure and Evidence of the International Tribunal.
Report of the Secretary-General	Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993.

610

Second *Erdemovi}* Sentencing Judgement	*Prosecutor v. Dra`en Erdemovi}*, Case No. IT-96-22-T*bis*, Sentencing Judgement, 5 Mar. 1998.
SFRY	Socialist Federal Republic of Yugoslavia.
Statute	Statute of the International Tribunal.
T. (2 March 2000)	Transcript of hearing on appeal in *Prosecutor v. Anto Furund`ija*, Case No. IT-95-17/1-A. All transcript page numbers referred to in the course of this Judgement are from the unofficial, uncorrected version of the English transcript. Minor differences may therefore exist between the pagination therein and that of the final English transcript released to the public.
Tadi} Appeals Judgement	*Prosecutor v. Du{ko Tadi}*, Case No. IT-94-1-A, Judgement, 15 July 1999.
Tadi} Sentencing Judgment	*Prosecutor v. Duško Tadic*, Case No. IT-94-1-T, Sentencing Judgment, 14 July 1997.
Tadi} Sentencing Appeals Judgement	*Prosecutor v. Du{ko Tadi}*, Case No. IT-94-1-A and IT-94-1-A*bis*, Judgement in Sentencing Appeals, 26 Jan. 2000.

ANNEX 13

612

ICTR-97-19-AR72
7-4-2000
(1481 - 1406)

1481
HHm

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

UNITED NATIONS
NATIONS UNIES

IN THE APPEALS CHAMBER

Before: Judge Claude JORDA, Presiding
Judge Lal Chand VOHRAH
Judge Mohamed SHAHABUDDEEN
Judge Rafael NIETO-NAVIA
Judge Fausto POCAR

Registrar: Mr Agwu U OKALI

Order of: 31 March 2000

Jean Bosco BARAYAGWIZA
v
THE PROSECUTOR

Case No: ICTR-97-19-AR72

DECISION

(PROSECUTOR'S REQUEST FOR REVIEW OR RECONSIDERATION)

Counsel for Jean Bosco Barayagwiza

Ms Carmelle Marchessault
Mr David Danielson

Counsel for the Prosecutor

Ms Carla Del Ponte
Mr Bernard Muna
Mr Mohamed Othman
Mr Upawansa Yapa
Mr Sankara Menon
Mr Norman Farrell
Mr Mathias Marcussen

613
1489

I. INTRODUCTION

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January and 31 December 1994 ("the Appeals Chamber" and "the Tribunal" respectively) is seised of the "Prosecutor's Motion for Review or Reconsideration of the Appeals Chamber's Decision Rendered on 3 November 1999, in Jean-Bosco Barayagwiza v. the Prosecutor and Request for Stay of Execution" filed by the Prosecutor on 1 December 1999 ("the Motion for Review").

2. The decision sought to be reviewed was issued by the Appeals Chamber on 3 November 1999 ("the Decision"). In the Decision, the Appeals Chamber allowed the appeal of Jean-Bosco Barayagwiza ("the Appellant") against the decision of Trial Chamber II which had rejected his preliminary motion challenging the legality of his arrest and detention. In allowing the appeal, the Appeals Chamber dismissed the indictment against the Appellant with prejudice to the Prosecutor and directed the Appellant's immediate release. Furthermore, a majority of the Appeals Chamber (Judge Shahabuddeen dissenting) directed the Registrar to make the necessary arrangements for the delivery of the Appellant to the authorities of Cameroon, from whence he had been originally transferred to the Tribunal's Detention Centre.

3. The Decision was stayed by Order of the Appeals Chamber[1] in light of the Motion for Review. The Appellant is therefore still in the custody of the Tribunal.

[1] The Decision was first stayed for 7 days pending the filing of the Prosecutor's Motion by the Order of 25 November 1999. By Order of 8 December 1999 the stay was continued pending further order.

614

1489

II. PROCEDURAL HISTORY

4. The Appellant himself was the first to file an application for review of the Decision. On 5 November 1999 he requested the Appeals Chamber to review item 4 of the disposition in the Decision, which directed the Registrar to make the necessary arrangements for his delivery to the Cameroonian authorities.[2] The Prosecutor responded to the application, asking to be heard on the same point[3], and in response to this the Appellant withdrew his request.[4]

5. Following this series of pleadings, the Government of Rwanda filed a request for leave to appear as *amicus curiae* before the Chamber in order to be heard on the issue of the Appellant's delivery to the authorities of Cameroon.[5] This request was made pursuant to Rule 74 of the Rules of Procedure and Evidence of the Tribunal ("the Rules").

6. On 19 November 1999 the Prosecutor filed a "Notice of Intention to File Request for Review of Decision of the Appeals Chamber of 3 November 1999" ("the Prosecutor's Notice of Intention")[6], informing the Chamber of her intention to file her own request for review of the Decision pursuant to Article 25 of the Statute of the Tribunal, and in the alternative, a "motion for reconsideration". On 25 November, the Appeals Chamber issued an Order staying execution of the Decision for 7 days pending the filing of the Prosecutor's Motion for Review. The Appeals Chamber also ordered that that the direction in the Decision that the Appellant be immediately released was to be read subject to the direction to the Registrar to arrange his delivery to the authorities of Cameroon. On the same day, the Chamber received the Appellant's objections to the Prosecutor's Notice of Intention.[7]

---

[2] *Notice of Review and Stay of Dispositive Order No.4 of the Decision of the Appeals Chamber dated 3rd November 1999*

[3] *Prosecutor's Response to Appellant's Notice of Review and Stay of Dispositive Order No. 4 of the Appeals Chamber Decision rendered on 3 November 1999, in Jean-Bosco Barayagwiza v. the Prosecutor*, filed on 13 November 1999.

[4] *Withdrawal of the Defence's "Notice of Review and Stay of Dispositive Order No.4 of the Decision of the Appeals Chamber dated 3rd November 1999", dated on 5th November 1999*, filed on 18 November 1999.

[5] *Request by the Government of the Republic of Rwanda for Leave to Appear as Amicus Curiae pursuant to Rule 74*, filed on 19 November 1999.

[6] *Notice of Intention to File Request for Review of Decision of the Appeals Chamber of 3 November 1999 (Rule 120 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda)*

[7] *Extremely Urgent Appellant's Response to the Prosecutor "Notice of Intention to File Request for Review of Decision of the Appeals Chamber of 3 November 1999"*, filed on 24 November 1999.

7. The Prosecutor's Motion for Review was filed within the 7 day time limit, on 1 December 1999. Annexes to that Motion were filed the following day.[8] On 8 December 1999 the Appeals Chamber issued an Order continuing the stay ordered on 25 November 1999 and setting a schedule for the filing of further submissions by the parties. The Prosecutor was given 7 days to file copies of any statements relating to new facts which she had not yet filed. This deadline was not complied with, but additional statements were filed on 16 February 2000, along with an application for the extension of the time-limit.[9] The Appellant objected to this application.[10]

8. The Order of 8 December 1999 further provided that that the Chamber would hear oral argument on the Prosecutor's Motion for Review, and that the Government of Rwanda might appear at the hearing as *amicus curiae* with respect to the modalities of the release of the Appellant, if that question were reached. The Government of Rwanda filed a memorial on this point on 15 February 2000.[11]

9. On 10 December 1999 the Appellant filed four motions: challenging the jurisdiction of the Appeals Chamber to entertain the review proceedings; opposing the request of the Government of Rwanda to appear as *amicus curiae*; asking for clarification of the Order of 8 December and requesting leave to make oral submissions during the hearing on the

---

[8] A corrigendum to the motion was filed on 20 December 1999. Corrigenda to the annexes were filed on 13 January and 7 February 2000.

[9] *Prosecutor's Motion for Extension of Time to File New Facts*, corrected on 17 February 2000. The Registrar submitted a *Memorandum to the Appeals Chamber from the Registrar, pursuant to rule 33(B), with regard to the Prosecutor's motion for extension of time limit to file new facts* on 21 February 2000, and the Prosecutor filed a *Supplement to "Prosecutor's motion for extension of time to file new facts" in response to memorandum to the Appeals Chamber from the Registrar pursuant to rule 33(B)* on 22 February 2000.

[10] *Extremely urgent appellant's argument in response to the Prosecutor's 16 February 2000 motion to submit new facts in support of motion for review or reconsideration of 3 November 1999 decision*, filed on 28 February 2000. The *Prosecutor's reply to the "extremely urgent appellant's argument in response to the Prosecutor's 16 February 2000 motion to submit new facts in support of motion for review or reconsideration of 3 November decision* was then filed on 7 March 2000.

[11] *Memorial amicus curiae of the Government of the Republic of Rwanda pursuant to Rule 74 of the Rules of Procedure and Evidence.*

616
1477

Prosecutor's Motion for Review.[12] The Prosecutor filed her response to these motions on 3 February 2000.[13]

10. On 17 December 1999, the Appeals Chamber issued a Scheduling Order[14] clarifying the time-limits set in its previous Order of 8 December 1999 and on 6 January 2000 the Appellant filed his response to the Prosecutor's Motion for Review.

11. Meanwhile, the Appellant had requested the withdrawal of his assigned counsel, Mr. J.P.L. Nyaberi, by letter of 16 December 1999. The Registrar denied his request on 5 January 2000, and this decision was confirmed by the President of the Tribunal on 19 January 2000.[15] The Appellant then filed a motion before the Appeals Chamber insisting on the withdrawal of assigned counsel, and the assignment of new counsel and co-counsel to represent him with regard to the Prosecutor's Motion for Review.[16] The Appeals Chamber granted his request by Order of 31 January 2000. In view of the change of counsel, the Appellant was given until 17 February 2000 to file a new response to the Prosecutor's Motion for Review, such response to replace the earlier response of 6 January 2000. The Prosecutor was given four further days to reply to any new response submitted. Both these documents were duly filed.[17]

12. The oral hearing on the Prosecutor's Motion for Review took place in Arusha on 22 February 2000.

---

[12] *Extremely Urgent Motion of the Defence Challenging the Jurisdiction of the Appeals Chamber to Entertain the Review Proceedings; Extremely Urgent Motion of the Defence in Opposition to the Request by the Government of the Republic of Rwanda for Leave to Appear as Amicus Curiae Pursuant to Rule 74; Extremely Urgent Motion of the Defence for the Clarification and Interpretation of the Appeals Chamber Order of 8 December 1999; Extremely Urgent Motion of the Defence for the Appellant to Give Oral Testimony During the Hearing of the Review on Facts of his Illegal Detention as Proved in the Decision of 3rd November 1999.*

[13] *The Prosecutor's Consolidated Response to Four Defence Motins Filed on 10 December 1999, Following the Order of the Appeals Chamber dated 8 December 1999.*

[14] Filed on 21 December 1999

[15] *Decision on Review in Terms of Article 19(E) of the Directive on Assignment of Defence Counsel*

[16] Requête en extreme urgence en vue du retrait du conseil J.P. Lumumba Nyaberi de la défense de Jean-Bosco Bnarayagwiza (art.20.4,d du Statut; art.45, 45bis, 73, 107 du Règlement), filed on 26 January 2000.

[17] *Appellants' response to Prosecutor's motion for review or reconsideration of the Appeals Chamber decision rendered on 3 November 1999 in Jean-Bosco Barayagwiza v. the Prosecutor and request for stay of execution,* and *Prosecutor's reply to the appellant's response to the Prosecutor's motion for review or reconsideration of the Appeals Chamber decision rendered on 3 November 2999 in Jean-Bosco Barayagwiza v. the Prosecutor and request for stay of execution,* respectively.

617
1476

III. APPLICABLE PROVISIONS

A. The Statute

Article 25: 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 for Rwanda an application for review of the judgement.

B. The Rules

Rule 120: Request for Review

Where a new fact has been discovered which was not known to the moving party at the tine of the proceedings before a 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, if it can be reconstituted or, failing that, to the appropriate Chamber of the Tribunal for review of the judgement.

Rule 121: Preliminary Examination

If the Chamber which ruled on the matter decides that the new fact, if it had been proven, could have been a decisive factor in reaching a decision, the Chamber shall review the judgement, and pronounce a further judgement after hearing the parties.

618

1475

IV. SUBMISSIONS OF THE PARTIES

A. The Prosecution Case

13. The Prosecutor relies on Article 25 of the Statute and Rules 120 and 121 of the Rules as the legal basis for the Motion for Review[18]. The Prosecutor bases the Motion for Review primarily on its claimed discovery of new facts[19]. She states that by virtue of Article 25, there are two basic conditions for an Appeals Chamber to reopen and review its decision, namely the discovery of new facts which were unknown at the time of the original proceedings and which could have been a decisive factor in reaching the original decision[20]. The Prosecutor states that the new facts she relies upon affect the totality of the Decision and open it up for review and reconsideration in its entirety.[21]

14. The Prosecutor opposes the submission by the Defence (paragraph 27 below), that Article 25 can only be invoked following a conviction. The Prosecutor submits that the wording "persons convicted... or from the Prosecutor" provides that both parties can bring a request for review under Article 25, and not that such a right only arises on conviction. The Prosecutor submits that there is no requirement that a motion for review can only be brought after final judgement.[22]

15. The "new facts" which the Prosecutor seeks to introduce and rely on in the Motion for Review fall, according to her, into two categories: new facts which were not known or could not have been known to the Prosecutor at the time of the argument before the Appeals Chamber; and facts which although they "may have possibly been discovered by the Prosecutor" at the time, are, she submits, new, as they could not have been known to be part of the factual dispute or relevant to the issues subsequently determined by the Appeals

---

[18] *Prosecutor's Motion for Review or Reconsideration of the Appeals Chamber Decision Rendered on 3 November 1999, in Jean-Bosco Barayagwiza v. The Prosecutor and Request for Stay of Execution*, filed on 1 December 1999 at § 1.

[19] *Brief in Support of the Prosecutor's Motion for Review of the Appeals Chamber Decision rendered on 3 November 1999 in Jean-Bosco Barayagwiza v. The Prosecutor Following the Orders of the Appeals Chamber dated 25 November 1999*, at §§ 45 and 46.

[20] *Ibid.*, at § 48.

[21] *Ibid.*, at § 46.

[22] Transcript of Hearing in Arusha on 22 February 2000 ("Transcript") at pages 248 *et seq.* See also, *Prosecutor's Reply to the Appellant's Response to the Prosecutor's Motion for Review or Reconsideration of the Appeals Chamber Decision Rendered on 3 November 1999 in Jean-Bosco Barayagwiza v. The Prosecutor and Request for Stay of Execution* (" Reply"), filed on 21 February 2000, at §§ 5-15

619

1474

Chamber.[23] The Prosecutor in this submission relies on Rules 121, 107, 115, 117, and 5 of the Rules and Article 14 of the Statute. The Prosecutor submits that the determination of whether something is a new fact, is a mixed question of both fact and law that requires the Appeals Chamber to apply the law as it exists to the facts to determine whether the standard has been met. It does not mean that a fact which occurred prior to the trial cannot be a new fact, or a "fact not discoverable through due diligence."[24]

16. The Prosecutor alleges that numerous factual issues were raised for the first time on appeal by the Appeals Chamber, *proprio motu*, without a full hearing or adjudication of the facts by the Trial Chamber,[25] and contends that the Prosecutor cannot be faulted for failing to comprehend the full nature of the facts required by the Appeals Chamber. Indeed, the Prosecutor alleges that the questions raised did not correspond in full to the subsequent factual determinations by the Appeals Chamber and that at no time was the Prosecutor asked to address the factual basis of the application of the abuse of process doctrine relied upon by the Appeals Chamber in the Decision[26]. The Prosecutor further submits that application of this doctrine involved consideration of the public interest in proceeding to trial and therefore facts relevant to the interests of international justice are new facts on the review.[27] The Prosecutor alleges that she was not provided with the opportunity to present such facts before the Appeals Chamber.[28]

17. In application of the doctrine of abuse of process, the Prosecutor submits that the remedy of dismissal with prejudice was unjustified, as the delay alleged was, contrary to the findings in the Decision, not fully attributable to the Prosecutor.[29] New facts relate to the application of this doctrine and the remedy, which was granted in the Decision.

18. The Prosecutor submits that the Appeals Chamber can also reconsider the Decision, pursuant to its inherent power as a judicial body, to vary or rescind its previous orders, maintaining that such a power is vital to the ability of a court to function properly.[30] She

---

[23] *Supra* note 19 at § 49.
[24] Transcript at page 253-256.
[25] The Prosecutor alleges that these new facts arose as a result of questions asked by the Appeals Chamber in its Scheduling Order of 3 June 1999. See supra note 19 at §§ 29, 50-54, 147 and158.
[26] *Ibid.*, §§ 54-55.
[27] *Ibid.*, § 56.
[28] *Ibid.*, at § 62.
[29] *Ibid.*, §§ 57-62. In making this submission, the Prosecutor refers to §§ 75, 76, 86, 98-100 and 106 of the Decision.
[30] *Ibid.*, §§ 63- 65.

620

1473

asserts that this inherent power has been acknowledged by both Tribunals and cites several decisions in support. The Prosecutor maintains that a judicial body can vary or rescind a previous order because of a change in circumstances and also because a reconsideration of the matter has led it to conclude that a different order would be appropriate.[31] In the view of the Prosecutor, although the jurisprudence of the Tribunal indicates that a Chamber will not reconsider its decision if there are no new facts or if the facts adduced could have been relied on previously, where there are facts or arguments of which the Chamber was not aware at the time of the original decision and which the moving party was not in a position to inform the Chamber of at the time of the original decision, a Chamber has the inherent authority to entertain a motion for reconsideration.[32] The Prosecutor asks the Appeals Chamber to exercise its inherent power where an extremely important judicial decision is made without the full benefit of legal argument on the relevant issues and on the basis of incomplete facts.[33]

19. The Prosecutor submits that although a final judgement becomes *res judicata* and subject to the principle of *non bis in idem*, the Decision was not a final judgement on the merits of the case.[34]

20. The Prosecutor submits that she could not have been reasonably expected to anticipate all the facts and arguments which turned out to be relevant and decisive to the Appeals Chamber's Decision.[35]

21. The Prosecutor submits that the new facts offered could have been decisive factors in reaching the Decision, in that had they been available in the record on appeal, they may have altered the findings of the Appeals Chamber that: (a) the period of provisional detention was impermissibly lengthy; (b) there was a violation of Rule 40*bis* through failure to charge promptly; (c) there was a violation of Rule 62 and the right to an initial appearance without delay; and (d) there was failure by the Prosecutor in her obligations to prosecute the case with due diligence. In addition, they could have altered the findings in

[31] *Ibid.*, § 66.
[32] *Ibid.*, §§ 70-73.
[33] *Ibid.*, § 85.
[34] *Ibid.*, §§ 74-80.
[35] *Ibid.*, § 84.

the Conclusion and could have been decisive factors in determination of the Appeals Chamber's remedies. [36]

22. The Prosecutor submits that the extreme measure of dismissal of the indictment with prejudice to the Prosecutor is not proportionate to the alleged violations of the Appellant's rights and is contrary to the mandate of the Tribunal to promote national reconciliation in Rwanda by conducting public trial on the merits.[37] She states that the Tribunal must take into account rules of law, the rights of the accused and particularly the interests of justice required by the victims and the international community as a whole.[38]

23. The Prosecutor alleges a violation of Rule 5, in that the Appeals Chamber exceeded its role and obtained facts which the Prosecutor alleges were outside the original trial record. The Prosecutor submits that in so doing the Appeals Chamber acted *ultra vires* the provisions of Rules 98, 115 and 117(A) with the result that the Prosecutor suffered material prejudice, the remedy for which is an order of the Appeals Chamber for review of the Decision, together with the accompanying Dispositive Orders.[39]

24. The Prosecutor submits that her ability to continue with prosecutions and investigations depends on the government of Rwanda and that, unless the Appellant is tried, the Rwandan government will no longer be "involved in any manner".[40]

25. Finally, the Prosecutor submits that review is justified on the basis of the new facts, which establish that the Prosecutor made significant efforts to transfer the Appellant, that the Prosecutor acted with due diligence and that any delays did not fundamentally compromise the rights of the Appellant and would not justify the dismissal of the indictment with prejudice to the Prosecutor.[41]

26. In terms of substantive relief, the Prosecutor requests that the Appeals Chamber either review the Decision or reconsider it in the exercise of its inherent powers, that it vacate the Decision and that it reinstate the Indictment. In the alternative, if these requests

---

[36] *Ibid.*, §§ 86,87.
[37] *Ibid.*, § 146.
[38] *Ibid.*, § 181.
[39] *Ibid.*, §§ 147-171.
[40] Transcript at pages 27 and 28.
[41] *Ibid.*, at page 122 and *supra* note 19 at § 184.

are not granted, the Prosecutor requests that the Decision dismissing the indictment is ordered to be without prejudice to the Prosecutor[42].

B. The Defence Case

27. The Appellant submits that Article 25 is only available to the parties after an accused has become a "convicted person". The Appeals Chamber does not have jurisdiction to consider the Prosecutor's Motion as the Appellant has not become a "convicted person" The Appellant submits that Rules 120 and 121 should be interpreted in accordance with this principle and maintains that both rules apply to review after trial and are therefore consistent with Article 25 which also applies to the right of review of a "convicted person"[43].

28. The Appellant submits that the Appeals Chamber does not have "inherent power" to revise a final decision. He submits that the Prosecutor is effectively asking the Appeals Chamber to amend the Statute by asking it to use its inherent power only if it concludes that Article 25 and Rule 120 do not apply. The Appellant states that the Appeals Chamber cannot on its own create law. [44]

29. The Appellant submits that the Decision was final and unappealable and that he should be released as there is no statutory authority to revise the Decision.[45]

30. The Appellant maintains that the Prosecutor has ignored the legal requirements for the introduction of new facts and has adduced no new facts to justify a review of the Decision. Despite the attachments provided by the Prosecutor and held out to be new facts, the Appellant submits that the Prosecutor has failed to produce any evidence to support the two-fold requirement in the Rules that the new fact should not have been known to the moving party and could not have been discovered through the exercise of due diligence.[46]

---

[42] *Supra* note 18 at § 7.
[43] *Appellant's Response to Prosecutor's Motion for Review or Reconsideration of the Appeals Chamber Decision rendered on 3 November 1999 in Jean-Bosco Barayagwiza v. The Prosecutor and Request for Stay of Execution* ("Appellant's Response") filed on 17th February 2000, at §§ 1-12. Transcript at page 129 *et seq.* and pages 227-230.
[44] Appellant's Response at §§ 13 – 16. Transcript at page 139 *et seq.*
[45] Appellant's Response at.§§ 17-24.
[46] *Ibid.*, § 28.

31. The Appellant submits that the Appeals Chamber should reject the request of the Prosecutor to classify the "old facts" as "new facts" as an attempt to invent a new definition limited to the facts of this case. The Appellant maintains that the Decision was correct in its findings and is fully supported by the Record.

32. The Appellant maintains that the Prosecutor's contention that the applicability of the abuse of process doctrine was not communicated to it before the Decision is groundless. The Appellant alleges that this issue was fully set out in his motion filed on 24 February 1998 and that when an issue has been properly raised by a party in criminal proceedings, the party who chooses to ignore the points raised by the other does so at its own peril.[47]

33. In relation to the submissions by the Prosecutor that the Decision of the Appeals Chamber was wrong in light of UN Resolution 955's goal of achieving national reconciliation for Rwanda, the Appellant urges the Appeals Chamber "to forcefully reject the notion that the human rights of a person accused of a serious crime, under the rubric of achieving national reconciliation, should be less than those available to an accused charged with a less serious one".[48]

[47] *Ibid.*, §§ 45-49.
[48] *Ibid.*, §§ 51-53.

V. THE MOTION BEFORE THE CHAMBER

34. Before proceeding to consider the Motion for Review, the Chamber notes that during the hearing on 22 February 2000 in Arusha, Prosecutor Ms Carla Del Ponte, made a statement regarding the reaction of the government of Rwanda to the Decision. She stated that: "The government of Rwanda reacted very seriously in a tough manner to the decision of 3 November 1999."[49] Later, the Attorney General of Rwanda appearing as representative of the Rwandan Government, in his submissions as "amicus curiae' to the Appeals Chamber, openly threatened the non co-operation of the peoples of Rwanda with the Tribunal if faced with an unfavourable Decision by the Appeals Chamber on the Motion for Review.[50] The Appeals Chamber wishes to stress that the Tribunal is an independent body, whose decisions are based solely on justice and law. If its decision in any case should be followed by non-cooperation, that consequence would be a matter for the Security Council.[51]

35. The Chamber notes also that, during the hearing on her Motion for Review, the Prosecutor based her arguments on the alleged guilt of the Appellant, and stated she was prepared to demonstrate this before the Chamber. The forcefulness with which she expressed her position compels us to reaffirm that it is for the Trial Chamber to adjudicate on the guilt of an accused, in accordance with the fundamental principle of the presumption of innocence, as incorporated in Article 3 of the Statute of the Tribunal.

36. The Motion for Review provides the Chamber with two alternative courses. First, it seeks a review of the Decision pursuant to Article 25 of said Statute. Further, failing this, it seeks that the Chamber reconsider the Decision by virtue of the power vested in it as a judicial body. We shall begin with the sought review.

---

[49] Transcript, pages 26-28.

[50] *Ibid.*, pages 290 and 291 : The Attorney General representing the government of Rwanda referred to the "terrible consequences which a decision to release the appellant without a prospect of prosecution by this Tribunal or some other jurisdiction will give rise to. Such a decision will encourage impunity and hamper the efforts of Rwanda to maintain peace and stability and promote unity and reconciliation. A decision of this nature will cost the Tribunal heavily in terms of the support and goodwill of the people of Rwanda."

[51] Rule 7*bis* of the Rules. See also: Prosecutor v. Tihomir Blaškić, *Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, Case no. IT-95-14-AR108 bis, 29 October 1997 at §§ 26 and 33; Prosecutor v. Dusko Tadic, *Judgement*, Case no. IT-94-1-A, 15 July 1999 at §51.

625

1468

A. REVIEW

1. General considerations

37. The mechanism provided in the Statute and Rules for application to a Chamber for review of a previous decision is not a novel concept invented specifically for the purposes of this Tribunal. In fact, it is a facility available both on an international level and indeed in many national jurisdictions, although often with differences in the criteria for a review to take place.

38. Article 61 of the Statute of the International Court of Justice is such a provision and provides the Court with the power to revise judgements on the discovery of a fact, of a decisive nature which was unknown to the court and party claiming revision when the judgement was given, provided this was not due to negligence [52]. Similarly Article 4 of Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) provides for the reopening of cases if there is *inter alia*, "evidence of new or newly discovered facts"[53]. Finally, on this subject, the International Law Commission has stated that such a provision was a "necessary guarantee against the possibility of factual error relating to material not available to the accused and therefore not brought to the attention of the Court at the time of the initial trial or of any appeal. "[54]

39. In national jurisdictions, the facility for review exists in different forms, either specifically as a right to review a decision of a court, or by virtue of an alternative route which achieves the same result. Legislation providing a specific right to review is most prevalent in civil law jurisdictions, although again, the exact criteria to be fulfilled before a

---

[52] *Statute of the International Court of Justice as annexed to the Charter of the United Nations*, 26th June 1945, I.C.J. Acts and Documents No. 5 ("ICJ Statute"). See *Application for Revision and Interpretation of the Judgement of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/LibyanArab Jamahiriya)* 1985 (ICJ) Rep 192.

[53] 22 November 1984, 24 ILM 435 at 436.

[54] *Report of the International Law Commission on the work of its 46th session*. Official Records, 49th Session. Supplement number No.10 (A/49/10) at page 128. It should also be noted that the International Covenant on Civil and Political Rights (ICCPR) (1966) also refers to the discovery of "new or newly discovered facts" in Article 14. However it relates primarily to the right to compensation in the event that these new facts (together with other criteria) mean that a conviction is reversed or an accused pardoned.

court will undertake a review can differ from that provided in the legislation for this Tribunal[55].

40. These provisions are pointed out simply as being illustrative of the fact that, although the precise terms may differ, review of decisions is not a unique idea and the mechanism which has brought this matter once more before the Appeals Chamber is, in its origins, drawn from a variety of sources.

41. Returning to the procedure in hand, it is clear from the Statute and the Rules[56] that, in order for a Chamber to carry out a review, it must be satisfied that four criteria have been met. There must be a new fact; this new fact must not have been known by the moving party at the time of the original proceedings; the lack of discovery of the new fact must not have been through the lack of due diligence on the part of the moving party; and it must be shown that the new fact could have been a decisive factor in reaching the original decision.

42. The Appeals Chamber of the International Tribunal for the former Yugoslavia has highlighted the distinction, which should be made between genuinely new facts which may justify review and additional evidence of a fact [57]. In considering the application of Rule 119 of the Rules of the International Tribunal for the former Yugoslavia (which mirrors Rule 120 of the Rules), the Appeals Chamber held that:

> 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...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".[58]

Further, the Appeals Chamber stated that-

---

[55] E.g. in Belgium Article 443 *et seq.* of the Code d'Instruction Criminelle provides for "Demandes en Révision"; In Sweden, Chapter 58 of Part 7 of the Swedish Code of Judicial Procedure (which came into force on 1 January 1948, provision cited as per amendments of the Code as of 1 January 1999) provides for the right of review; In France, Article 622 *et seq.* of the Code de Procédure Pénale (as amended by the law of 23 June 1989) provides for "Démandes en Révision"; In Germany, Section 359 *et seq.* of the German Code of Criminal Procedure 1987 (as amended) provides for "re-opening"; In Italy, Articles 629-647 of the *Codice de Procedura Penale* provides for review; and in Spain Article 954 of *La Ley de Enjuiciamiento Criminal* provides for "Revision".

[56] Article 25, Rules 120 and 121.

[57] Prosecutor v. Duško Tadić, *Decision on Appellant's Motion for the extension of the time-limit and admission of additional evidence*, Case no, IT-94-1-A, 15th October 1998.

[58] *Ibid.*, at 30.

> 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.[59]

43. The Appeals Chamber would also point out at this stage, that although the substantive issue differed, in *Prosecutor v. Dražen Erdemović*,[60] the Appeals Chamber undertook to warn both parties that "[t]he 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". The Appeals Chamber confirms that it notes and adopts both this observation and the test established in *Prosecutor v. Duško Tadić* in consideration of the matter before it now.

44. The Appeals Chamber notes the submissions made by both parties on the criteria, and the differences which emerge. In particular it notes the fact that the Prosecutor places the new facts she submits into two categories (paragraph 15 above), the Appellant in turn asking the Appeals Chamber to reject this submission as an attempt by the Prosecutor to classify "old facts" as "new facts" (paragraph 31 above). In considering the "new facts" submitted by the Prosecutor, the Appeals Chamber applies the test outlined above and confirms that it considers, as was submitted by the Prosecutor, that a "new fact" cannot be considered as failing to satisfy the criteria simply because it occurred before the trial. What is crucial is satisfaction of the criteria which the Appeals Chamber has established will apply. If a "new" fact satisfies these criteria, and could have been a decisive factor in reaching the decision, the Appeals Chamber can review the Decision.

2. Admissibility

45. The Appellant pleads that the Prosecutor's Motion for Review is inadmissible, because by virtue of Article 25 of the Statute only the Prosecutor or a convicted person may seise the Tribunal with a motion for review of the sentence. In the Appellant's view, the reference to a convicted person means that this article applies only after a conviction has been delivered. According to the counsel of the Appellant:

> Rule 120 of the Rules of Procedure and Evidence is not intended for revision or review before conviction, but after ... a proper trial.[61]

---

[59] *Ibid.*, at 32.
[60] *Judgement*, Case no IT-96-22-A, 7 October 1997 at § 15.
[61] Transcript of the hearing of 22 February 2000 ("transcript"), p.134.

As there was no trial in this case, there is no basis for seeking a review.

46. The Prosecutor responds that the reference to "the convicted person or the Prosecutor" in the said article serves solely to spell out that either of the two parties may seek review, not that there must have been a conviction before the article could apply. If a decision could be reviewed only following a conviction, no injustice stemming from an unwarranted acquittal could ever be redressed. In support of her interpretation, the Prosecutor compares Article 25 with Article 24, which also refers to persons convicted and to the Prosecutor being entitled to lodge appeals. She argued that it was common ground that the Prosecutor could appeal against a decision of acquittal, which would not be the case if the interpretation submitted by the Appellant was accepted.

47. Both Article 24 (which relates to appellate proceedings) and Article 25 of the Statute, expressly refer to a convicted person. However, Rule 72D and consistent decisions of both Tribunals [62] demonstrate that a right of appeal is also available in *inter alia* the case of dismissal of preliminary motions brought before a Trial Chamber, which raised an objection based on lack of jurisdiction.[63] Such appeals are on interlocutory matters and therefore by definition do not involve a remedy available only following conviction. Accordingly, it is the Appeals Chamber's view that the intention was not to interpret the Rules restrictively in the sense suggested by the Appellant, such that availability of the right to apply for review is only triggered on conviction of the accused; the Appeals Chamber will not accept the narrow interpretation of the Rules submitted by the Appellant. If the Appellant were correct that there could be no review unless there has been a conviction, it would follow that there could be no appeal from acquittal for the same reason. Appeals from acquittals have been allowed before the Appeals Chamber of the ICTY. The Appellant's logic is not therefore correct. Furthermore, in this case, the Appellant himself had recourse to the mechanism of interlocutory appeals which would not have been successful had the Chamber accepted the arguments he is now putting forward.

48. The Appeals Chamber accordingly subscribes to the Prosecutor's reasoning. Inclusion of the reference to the "Prosecutor" and the " convicted person" in the wording of

---

[62] i.e. the International Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

[63] Rule 72(D) of the Rules. See also the additional provisions for appeal provided in Rules 65(D), 77D and 91(C) of the Rules, and in Rules 72, 73, 77(J), 65(D), 91(C) of the Rules of Procedure and Evidence of the ICTY, as pointed out in the Reply at §§ 11.

629

1464

the article indicates that each of the parties may seek review of a decision, not that the provision is to apply only after a conviction has been delivered.

49. The Chamber considers it important to note that only a final judgement may be reviewed pursuant to Article 25 of the Statute and to Rule 120[64]. The parties submitted pleadings on the final or non-final nature of the Decision in connection with the request for reconsideration. The Chamber would point out that a final judgement in the sense of the above-mentioned articles is one which terminates the proceedings; only such a decision may be subject to review. Clearly, the Decision of 3 November 1999 belongs to that category, since it dismissed the indictment against the Appellant and terminated the proceedings.

50. The Appeals Chamber therefore has jurisdiction to review its Decision pursuant to Article 25 of the Statute and to Rule 120.

3. Merits

51. With respect to this Motion for Review, the Appeals Chamber begins by confirming its Decision of 3 November 1999 on the basis of the facts it was founded on. As a judgement by the Appeals Chamber, the Decision may be altered only if new facts are discovered which were not known at the time of the trial or appeal proceedings and which could have been a decisive factor in the decision. Pursuant to Article 25 of the Statute, in such an event the parties may submit to the Tribunal an application for review of the judgement, as in the instant case before the Chamber.

52. The Appeals Chamber confirms that in considering the facts submitted to it by the Prosecutor as "new facts", it applies the criteria drawn from the relevant provisions of the Statute and Rules as laid down above. The Chamber considers first whether the Prosecutor submitted new facts which were not known at the time of the proceedings before the Chamber, and which could have been a decisive factor in the decision, pursuant to Article 25 of the Statute. It then considers the condition introduced by Rule 120, that the new facts not be known to the party concerned or not be discoverable due diligence notwithstanding. If the Chamber is satisfied, it accordingly reviews its decision in the light of such new facts.

---

[64] In this respect, the Appeals Chamber does not agree with the *Decision on the Alternative Request for Renewed Consideration of Delalić's Motion for an Adjournment until 22 June or Request for Issue of Subpoenas to Individuals and Requests for Assistance to the Government of Bosnia and Herzegovina* (IT-96-

53. In considering these issues, the Appellant's detention may be divided into three periods. The first, namely the period where the Appellant was subject to the extradition procedure, starts with his arrest by the Cameroonian authorities on 15 April 1996 and ends on 21 February 1997 with the decision of the Court of Appeal of the Centre of Cameroon rejecting the request for extradition from the Rwandan government. The second, the period relating to the transfer decision, runs from the Rule 40 request for the Appellant's provisional detention, through his transfer to the Tribunal's detention unit on 19 November 1997. The third period begins with the arrival of the Appellant at the detention unit on 19 November 1997 and ends with his initial appearance on 23 February 1998.

(a) First period (15.4.1996 – 21.2.1997)

54. The Appeals Chamber considers that several elements submitted by the Prosecutor in support of her Motion for Review are evidence rather than facts. The elements presented in relation to the first period consist of transcripts of proceedings before the Cameroonian courts: on 28 March 1996 ; 29 March 1996 ; 17 April 1996 and 3 May 1996.[65] It is manifest from the transcript of 3 May 1996 that the Tribunal's request was discussed[66] at that hearing. The Appellant addressed the court and opposed Rwanda's request for extradition, stating that, « c'est le tribunal international qui est compétent »[67]. The Appeals Chamber considers that it may accordingly be presumed that the Appellant was informed of the nature of the crimes he was wanted for by the Prosecutor. This was a new fact for the Appeals Chamber. The Decision is based on the fact that:

> l'Appelant a été détenu pendant une durée totale de 11 mois avant d'être informé de la nature générale des chefs d'accusation que le Procureur avait retenus contre lui. [68]

The information now before the Chamber demonstrates that, on the contrary, the Appellant knew the general nature of the charges against him by 3 May 1996 at the latest. He thus spent at most 18 days in detention without being informed of the reasons therefor.

21-T, 22 June 1998), which suggests that interlocutory decisions can be subject to review. The Appeals Chamber confirms that the law is as stated above.

[65] Annexes 8, 9 and 11 to the Motion for Review.

[66] On page 3 of the transcript of 3 May, the Public Prosecutor explains that he is waiting for "the Tribunal to send us the relevant documentation (« *que le Tribunal International nous procure les documents* »).

55. The Appeals Chamber considers that such a time period violates the Appellant's right to be informed without delay of the charges against him. However, this violation is patently of a different order than the one identified in the Decision whereby the Appellant was without any information for 11 months.

(b) Second period (21.2.1997 – 19.11.1997)

56. With respect to the second period, the one relative to the transfer decision, several elements are submitted to the Chamber's scrutiny as new facts. They consist of Annexes 1 to 7, 10 and 12 to the Motion for Review. The Chamber considers the following to be material:

1. The report by Judge Mballe of the Supreme Court of Cameroon.[69] In his report, Justice Mballe explains that the request by the Prosecutor pursuant to Article 40 *bis* was transmitted immediately to the President of the Republic for him to sign a legislative decree authorising the accused's transfer. As he sees it, if the legislative decree could be signed only on 21 October 1997 that was due to the pressure exerted by the Rwandan authorities on Cameroon for the extradition of detainees to Kigali. He adds that in any event this semi-political semi-judicial extradition procedure was not the one that should have been followed.

2. A statement by David Scheffer, ambassador-at-large for war crimes issues, of the United States.[70] Mr. Scheffer described his involvement in the Appellant's case between September and November 1997. In his statement, Mr. Scheffer explains that the signing of the Presidential legislative decree was delayed owing to the elections scheduled for October 1997, and that Mr. Bernard Muna of the Prosecutor's Office asked Mr. Scheffer to intervene to speed up the transfer. He went on to say that, subsequent to that request, the United States Embassy made several representations to the Government of Cameroon in this regard between September and November 1997. Mr. Scheffer says he also wrote to the Government on 13 September 1997 and that around 24 October 1997

---

[67] Page 4 of the transcript.
[68] Decision, §85.
[69] Annexe N°1 de la Demande en révision.
[70] Filed on 10 December 1999.

the Cameroonian authorities notified the United States Embassy of their willingness to effect the transfer.

57. In the Appeals Chamber's view a relevant new fact emerges from this information. In its Decision, the Chamber determined on the basis of the evidence adduced at the time that "Cameroon was willing to transfer the Appellant"[71], as there was no proof to the contrary. The above information however goes to show that Cameroon had not been prepared to effect its transfer before 24 October 1997. This fact is new. The request pursuant to Article 40 bis had been wrongly subject to an extradition process, when under Article 28 of the Statute all States had an obligation to co-operate with the Tribunal. The President of Cameroon had elections forthcoming, which could not prompt him to accede to such a request. And it was the involvement of the United States, in the person of Mr. Scheffer, which in the end led to the transfer.

58. The new fact, that Cameroon was not prepared to transfer the Appellant prior to the date on which he was actually delivered to the Tribunal's detention unit, would have had a significant impact on the Decision had it been known at the time, given that, in the Decision, the Appeals Chamber drew its conclusions with regard to the Prosecutor's negligence in part from the fact that nothing prevented the transfer of the Appellant save the Prosecutor's failure to act:

> It is also clear from the record that the Prosecutor made no efforts to have the Appellant transferred to the Tribunal's detention unit until after he filed the *writ of habeas corpus*. **Similarly, the Prosecutor has made no showing that such efforts would have been futile. There is nothing in the record that indicates that Cameroon was not willing to transfer the Appellant.** Rather it appears that the Appellant was simply forgotten about.[72]

The Appeals Chamber considered that the human rights of the Appellant were violated by the Prosecutor during his detention in Cameroon. However, the new facts show that, during this second period, the violations were not attributable to the Prosecutor.

(c) Third period (19.11.1997 – 23.2.1998)

59. In her Motion for Review, the Prosecutor submitted few elements relating to the third period, that is the detention in Arusha. However, on 16 February 2000 she lodged

[71] Decision, §59.
[72] Decision, §96 (emphasis added).

additional material in this regard, along with a motion for deferring the time-limits imposed for her to submit new facts. Having examined the Prosecutor's request and the Registrar's memorandum relative thereto as well as the Appellant's written response lodged on 28 February 2000[73], the Appeals Chamber decides to accept this additional information.

60. The material submitted by the Prosecutor consists of a letter to the Registrar dated 11 February 2000, and annexes thereto. A relevant fact emerges from it. The letter and its annexes indicate that Mr. Nyaberi, counsel for the defence, entered into talks with the Registrar in order to set a date for the initial appearance. Several provisional dates were discussed. Problems arose with regard to the availability of judges and of defence counsel. Annex C to the Registrar's letter indicates that Mr. Nyaberi assented to the initial appearance taking place on 3 February 1997. This was not challenged by the defence at the hearing.

61. The assent of the defence counsel to deferring the initial appearance until 3 February 1997 is a new fact for the Appeals Chamber. During the proceedings before the Chamber, only the judicial recess was offered by way of explanation for the 96-day period which elapsed between the Appellant's transfer and his initial appearance, and this was rejected by the Chamber. There was no suggestion whatsoever that the Appellant had assented to any part of that schedule.

> There is no evidence that the Appellant was afforded an opportunity to appear before an independent Judge during the period of the provisional detention and the Appellant contends that he was denied this opportunity.[74]

62. The decision by the Appeals Chamber in respect of the period of detention in Arusha is based on a 96-day lapse between the Appellant's transfer and his initial appearance. The new fact relative hereto, the defence counsel's agreeing to a hearing being held on 3 February 1997, reduces that lapse to 20 days - from 3 to 23 February. The Chamber considers that this is still a substantial delay and that the Appellant's rights have still been violated. However, the Appeals Chamber finds that the period during which these violations took place is less extensive than it appeared at the time of the Decision.

---

[73] The President of the Appeals Chamber authorised the filing of this document during the hearing of 22 February, see page 57 of the transcript.
[74] Decision, §69.

(d) Were the new facts known to the Prosecutor?

63. Rule 120 introduces a condition which is not stated in Article 25 of the Statute which addresses motions for review. According to Rule 120 a party may submit a motion for review to the Chamber only if the new fact "was not known **to the moving party** at the time of the proceedings before a Chamber, **and could not have been discovered through the exercise of due diligence**" (emphasis added).

64. The new facts identified in the first two periods were not known to the Chamber at the time of its Decision but they may have been known to the Prosecutor or at least they could have been discovered. With respect to the second period, the Prosecutor was not unaware that Cameroon was unwilling to transfer the Appellant, especially as it was her deputy, Mr. Muna, who sought Mr. Scheffer's intervention to facilitate the process. But evidently it was not known to the Chamber at the time of the Appeal proceedings. On the contrary, the elements before the Chamber led it to the opposite finding, which was an important factor in its conclusion that "the Prosecutor has failed with respect to her obligation to prosecute the case with due diligence."[75]

65. In the wholly exceptional circumstances of this case, and in the face of a possible miscarriage of justice, the Chamber construes the condition laid down in Rule 120, that the fact be unknown to the moving party at the time of the proceedings before a Chamber, and not discoverable through the exercise of due diligence, as directory in nature. In adopting such a position, the Chamber has regard to the circumstance that the Statute itself does not speak to this issue.

66. There is precedent for taking such an approach. Other reviewing courts, presented with facts which would clearly have altered an earlier decision, have felt bound by the interests of justice to take these into account, even when the usual requirements of due diligence and unavailability were not strictly satisfied. While it is not in the interests of justice that parties be encouraged to proceed in a less than diligent manner, "courts cannot close their eyes to injustice on account of the facility of abuse"[76].

---

[75] Decision, §101.

[76] Berggren v Mutual Life Insurance Co., 231 Mass. at 177. The full passage reads:
"The mischief naturally flowing from retrials based upon the discovery of alleged new evidence leads to the establishment of a somewhat stringent practice against granting such motions unless upon a survey of the

67. The Court of Appeal of England and Wales had to consider a situation not unlike that currently before the Appeals Chamber in the matter of *Hunt and Another v Atkin*.[77] In that case, a punitive order was made against a firm of solicitors for having taken a certain course of action. It emerged that the solicitors were in possession of information that justified their actions to a certain extent, and which they had failed to produce on an earlier occasion, despite enquiries from the court. As in the current matter, the moving party (the solicitors) claimed that the court's enquiries had been unclear, and that they had not fully understood the nature of the evidence to be presented. The Judge approached the question as follows:

> I hope I can be forgiven for taking a very simplistic view of this situation. What I think I have to ask myself is this: if these solicitors ... had produced a proper affidavit on the last occasion containing the information which is now given to me ...would I have made the order in relation to costs that I did make? It is a very simplistic approach, but I think it is probably necessary in this situation.

He concluded that he would not have made the same order, and so allowed the fresh evidence and ordered a retrial. The Court of Appeal upheld his decision.

68. Faced with a similar problem, the Supreme Court of Canada has held that the requirements of due diligence and unavailability are to be applied less strictly in criminal than in civil cases. In the leading case of *McMartin v The Queen*, the court held, *per* Ritchie J, that:

> In all the circumstance, if the evidence is considered to be of sufficient strength that it might reasonably affect the verdict of the jury, I do not think it should be excluded on the ground that reasonable diligence was not exercised to obtain it at or before the trial.[78]

69. The Appeals Chamber does not cite these examples as authority for its actions in the strict sense. The International Tribunal is a unique institution, governed by its own Statute and by the provisions of customary international law, where these can be discerned. However, the Chamber notes that the problems posed by the Request for Review have been considered by other jurisdictions, and that the approach adopted by the Appeals Chamber here is not unfamiliar to those separate and independent systems. To reject the facts

---

whole case a miscarriage of justice is likely to result if a new trial is denied. This is the fundamental test, in aid of which most if not all the rules upon the matter from time to time alluded to have been formulated. Ease in obtaining new trials would offer temptations to the securing of fresh evidence to supply former deficiencies. But courts cannot close their eyes to injustice on account of facility of abuse'."

[77] Court of Appeal (Civil Division) 6 May 1964.

presented by the Prosecutor, in the light of their impact on the Decision, would indeed be to close ones eyes to reality.

70. With regard to the third period, the Appeals Chamber remarks that, although a set of the elements submitted by the Prosecutor on 16 February 2000 were available to her prior to that date, according to the Registrar's memorandum, Annex C was not one of them. It must be deduced that the fact that the defence counsel had given his consent was known to the Prosecutor at the time of the proceedings before the Appeals Chamber.

4. Conclusion

71. The Chamber notes that the remedy it ordered for the violations the Appellant was subject to is based on a cumulation of elements:

> ... the fundamental rights of the Appellant were repeatedly violated. What may be worse, it appears that the Prosecutor's failure to prosecute this case was tantamount to negligence. We find this conduct to be egregious and, in light of the numerous violations, conclude that the only remedy for such prosecutorial inaction and the resultant denial of his rights is to release the Appellant and dismiss the charges against him.[79]

The new facts diminish the role played by the failings of the Prosecutor as well as the intensity of the violation of the rights of the Appellant. The cumulative effect of these elements being thus reduced, the reparation ordered by the Appeals Chamber now appears disproportionate in relation to the events. The new facts being therefore facts which could have been decisive in the Decision, in particular as regards the remedy it orders, that remedy must be modified.

72. The Prosecutor has submitted that it has suffered "material prejudice" from the non compliance by the Appeals Chamber with the Rules and that consequently it is entitled to relief as provided in Rule 5. As the Appeals Chamber believes that this issue is not relevant to the Motion for Review and as the Appeals Chamber has in any event decided to review its Decision, it will not consider this issue further.

---

[78] (1964) 1 CCC 142, 46 DLR (2d) 372.
[79] Decision, §106.

B. RECONSIDERATION

73. The essential basis on which the Prosecutor sought a reconsideration of the previous Decision, as distinguished from a review, was that she was not given a proper hearing on the issues passed on in that Decision. The Appeals Chamber finds no merit in the contention and accordingly rejects the request for reconsideration.

VI. CONCLUSION

74. The Appeals Chamber reviews its Decision in the light of the new facts presented by the Prosecutor. It confirms that the Appellant's rights were violated, and that all violations demand a remedy. However, the violations suffered by the Appellant and the omissions of the Prosecutor are not the same as those which emerged from the facts on which the Decision is founded. Accordingly, the remedy ordered by the Chamber in the Decision, which consisted in the dismissal of the indictment and the release of the Appellant, must be altered.

VII. DISPOSITION

75. For these reasons, the APPEALS CHAMBER reviews its Decision of 3 November 1999 and replaces its Disposition with the following:

1) ALLOWS the Appeal having regard to the violation of the rights of the Appellant to the extent indicated above;

2) REJECTS the application by the Appellant to be released;

3) DECIDES that for the violation of his rights the Appellant is entitled to a remedy, to be fixed at the time of judgement at first instance, as follows:

   a) If the Appellant is found not guilty, he shall receive financial compensation;

   b) If the Appellant is found guilty, his sentence shall be reduced to take account of the violation of his rights.

Judge Vohrah and Judge Nieto-Navia append Declarations to this Decision.

Judge Shahabuddeen appends a Separate Opinion to this Decision.

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

_____s/._____	_____s/._____	_____s/._____
Claude Jorda, Presiding	Lal Chand Vohrah	Mohamed Shahabuddeen

_____s/._____	_____s/._____
Rafael Nieto-Navia	Fausto Pocar

Dated this thirty-first day of March 2000
At The Hague,
The Netherlands

[Seal of the Tribunal]

1453

640

DECLARATION OF JUDGE LAL CHAND VOHRAH

1. I would like to reiterate that I fully agree with the conclusions of the Appeals Chamber in the present decision and with the disposition that follows this Review. This agreement, however, calls for a few observations on my part. In the original decision the Appeals Chamber invoked the abuse of process doctrine. In the light of the facts which where then before it, the Chamber found that to proceed with the trial of the Appellant in the face of the egregious violations of his rights would be unjust to him and injurious to the integrity of the judicial process of the Tribunal. Consequently, the Appeals Chamber decided that the proceedings against the Appellant should be discontinued.

2. In its previous decision, the Appeals Chamber proceeded on the basis of, *inter alia*, its finding that the Prosecutor was responsible for the delays of which the Appellant complained. In this Review a different picture has been shown by the disclosure of new facts which now diminish substantially the blameworthiness attributed to the Prosecutor on the ground of lack of diligence, and the seriousness of the violations suffered by the Appellant. Had the Appeals Chamber been apprised of these facts on appeal, the original decision would have been different and the abuse of process doctrine would not have been called in aid and applied with all the vigour that was implicit in the "with prejudice" order that was made.

3. I must say that I have had the benefit of reading the Declaration in draft of my brother Judge Nieto-Navia and would like to state that I subscribe fully to the views he has expressed therein on the overriding principle relating to the independence of the judiciary (in the light of the considerations which the Prosecutor and the Representative of the Government of Rwanda as amicus curiae have, perhaps unwittingly, asked the Appeals Chamber to take into account), and on the principles of human rights.

4. In conclusion, I am satisfied that there are new facts which now require that the previous decision be modified in the way stated in the disposition of the present decision.

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

S/.

Lal Chand Vohrah

Dated this 31st day of March 2000
At The Hague,
The Netherlands.

[Seal of the Tribunal]

DECLARATION OF JUDGE RAFAEL NIETO-NAVIA

1. It is necessary to consider the role of the Tribunal in the context of its mandate in Rwanda as dispenser of justice and the effect, if any, of politics on its work in prosecuting those responsible for genocide and other serious violations of international humanitarian law.

2. This issue was raised specifically during the oral hearing on this matter, in Arusha, on 22 February 2000 by the Chief Prosecutor. It is expedient to set out the relevant section:

> "Let me just say a few words with respect to the government of Rwanda. The government of Rwanda reacted very seriously in a tough manner to the decision of 3 November 1999. It was a politically motivated decision, which is understandable. It can only be understood if one is cognisant with the situation, if one is aware of what happened in Rwanda in 1994. I also notice that, well, it was the Prosecutor that had no visa to travel to Rwanda. It was the Prosecutor who was unable to go to her office in Kigali. It was the Prosecutor who could not be received by the Rwandan authorities. In November, after your decision, there was no co-operation, no collaboration with the office of the Prosecutor. In other words, justice, as dispensed by this Tribunal was paralysed. It was the trial of Baglishima which had to be adjourned because the Rwandan government did not allow 16 witnesses to appear before this Court. In other words, they were not allowed to leave the territory of Rwanda. Fortunately, things have improved currently, and we again enjoy the support of the government. Why? Because we were able to show our good will, our willingness to continue with our work based on the mandate entrusted to us. However, your Honours, due account has to be taken of that fact. Whether we want it or not, we must come to terms with the fact that our ability to continue with our prosecution and investigations depend on the government of Rwanda. That is the reality that we face. What is the reality? Either Barayagwiza can be tried by this Tribunal, in the alternative; or the only other solution that you have is for Barayagwiza to be handed over to the state of Rwanda to his natural judge, judex naturalis. Otherwise I am afraid, as we say in Italian, possiamo chiudere la baracca. In other words we can as well put the key to that door, close the door and then open that of the prison. And in that case the Rwandan government will not be involved in any manner"[1]

3. The Prosecutor maintained that after the Decision in the instant case was rendered by the Appeals Chamber on 3 November 1999 (hereinafter "the Decision"), justice before the International Criminal Tribunal for Rwanda was effectively suspended as a result of action taken by the Rwandan government, who reacted essentially to what they viewed as an adverse decision of the Appeals Chamber.

[1] Transcript of the hearing on 22 February 2000, (the 'Transcript'), pp. 26-28.

1450
643

4. It would be naïve to assert that the Tribunal does not depend on the co-operation of States for it to fulfil its duties. Indeed the Appeals Chamber itself has held that

> "The International Tribunal must turn to States if it is effectively to investigate crimes, collect evidence, summon witnesses and have indictees arrested and surrendered to the International Tribunal."[2]

Without State co-operation, the work of the Tribunal would be rendered impossible.

5. In order to cater for this, and aware of the need to ensure effective and ongoing co-operation, Article 28 of the Statute compels States to co-operate with the Tribunal "in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law"[3]. This is a general obligation incumbent on all States but the Rwandan government is specially obliged, because the Tribunal was established "for the sole purpose of prosecuting persons responsible for genocide and other serious violations of International Humanitarian Law committed in the territory of Rwanda"[4]. In addition, being the territory in which most of the crimes alleged took place, the co-operation of the Rwandan government with the Tribunal in fulfilment of their obligations as prescribed by Article 28, is paramount.

6. This obligation of the Rwandan government is absolute. It is an obligation which cannot be overridden in particular circumstances by considerations of convenience or politics.

7. In my view, the Appeals Chamber, although mindful of this essential need for co-operation by the Rwandan government, is also mindful of the role the Tribunal plays in this process and therefore I refute most strenuously the suggestion that in reaching decisions, political considerations should play a persuasive or governing role, in order to assuage States and ensure co-operation to achieve the long-term goals of the Tribunal. On the contrary, in no circumstances would such considerations cause the Tribunal to compromise

---

[2] Prosecutor v. Tihomir Blaškić, *Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, Case no. IT-95-14-*AR108bis*, 29 October 1997, §26.

[3] Article 28.1. *Security Council Resolution 955 (1994) (S/RES/955) (1994)* § 2, also states that "all states shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chaber under Article 28 of the Statute, and requests States to keep the Secretary-General informed of such measures."

its judicial independence and integrity. This is a Tribunal whose decisions must be taken, solely with the intention of both implementing the law and guaranteeing justice to the case before it, not as a result of political pressure and threats to withhold co-operation being exerted by an angry government.

8. Faced with non co-operation by a State and having exhausted the facilities available to it to ensure co-operation, a clear mechanism has been provided in the Statute and Rules[5] whereby the Tribunal may make a finding concerning the particular State's failure to observe the provisions of the Statute or the Rules and thereafter may report this finding to the Security Council.[6] It then falls to the Security Council to determine appropriate action to take against the State in question.[7] The involvement of the Tribunal will cease at the point of referral to the Security Council and indeed its position is safeguarded further by the stipulation, as has been held, that "the finding by the International Tribunal must not include any recommendations or suggestions as to the course of action the Security Council may wish to take as a consequence of that finding."[8]. This mechanism ensures that clear separation in roles is maintained and more importantly that the independence of the Tribunal cannot be called into question. Its mandate is the prosecution of those responsible for serious violations of international humanitarian law[9] and it must do so in an impartial and unbiased fashion. It must not qualify this independence under any circumstances.

9. The concept of "the separation of powers" plays a central role in national jurisdictions. This concept ensures that a clear division is maintained between the functions of the legislature, judiciary and executive and provides that "one branch is not permitted to encroach on the domain or exercise the powers of another branch." [10] It ensures that the judiciary maintains a role apart from political considerations and safeguards its independence.

---

[4] *Security Council Resolution 955 (1994) (S/RES/955)(1994)* § 1.
[5] *E.g.*, Rule 54 includes the power to issue orders, summonses, subpoenas, warrants and transfer orders. *See* Prosecutor v. Duško Tadić, *Judgement*, Case no. IT-94-1-A, 15 July 1999, § 52.
[6] Rule *7bis* of the Rules. *Supra* note 2 at 26 and 33. Also, Prosecutor v. Duško Tadić, *Judgement*, Case no. IT-94-1-A, 15 July 1999 § 51.
[7] Such failure by States to comply with their obligations under the Statute, have been referred to the Security Council on several occasions to date *(Supra.* note 2, § 34).
[8] *Supra.* note 2 § 36.
[9] Article 1 of the Statute.
[10] *Blacks Law Dictionary*, 6th edition, West Publishing Co, 1990, p. 1365.

10. As a result, the judiciary holds a privileged position in national jurisdictions and is subjected to unceasing public scrutiny of its activities. This however is accepted as being a necessary component of its existence so that public confidence in the system can be maintained.

11. In consideration of this issue, I note the importance accorded to the principle by the United Nations, in appointing a Special Rapporteur on the Independence of Judges and Lawyers and by the General Assembly, in the promulgation of the 1985 UN Basic Principles on the Independence of the Judiciary.[11] The Principles as a whole are of the utmost importance, but it serves now to highlight the following provisions:

> "1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the laws of the country. It is the duty of all government and other institutions to respect and observe the independence of the judiciary;
>
> 2. The judiciary shall decide matters before it impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.[12]"

The principle of the independence of the judiciary is overriding and should at all times take precedence faced with any conflict, political pressures or interference. The proposition put forward by the Prosecutor that political considerations can play a role in the Appeals Chamber's decision making and actions is not acceptable.

12. Indeed it is important to note the remark made by Robert H. Jackson, Chief of Counsel for the United States at the International Military Tribunal, sitting at Nuremberg, in his opening speech before the Tribunal on 21 November 1945:

---

[11] *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Milan, 26 August - 6 September 1985: Report prepared by the Secretariat Chap.IV, sect. B, as referred to in GA Resolution A/RES/40/146 of 13 December 1985 *"Human Rights in the Administration of Justice"*. The Resolution was also pointed out by the Appellant in the Oral Hearing on 22 February 2000 and recorded at page 213 of the Transcript.

[12] *Ibid.*, § 1, 2. Note also, the UN 1990 Basic Principles on the Role of Lawyers adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, at its meeting in Havana, Cuba from 27 August to 7 September 1990. The General Assembly has welcomed these principles and invites governments to respect them and to take them into account within the framework of their national legislation and practice (A/RES/45/166 of 18 December 1990).

> "The United States believed that the law has long afforded standards by which a juridical hearing could be conducted to make sure that we punish only the right men and for the right reasons"[13]

13. Political reasons are not the right reasons. The Tribunal is endowed with a Statute, which ensures that trials take place by means of a transparent process, wherein widely accepted international standards of criminal law are applied. Central to this process is the maintenance of human rights standards of the highest level, to ensure that the basic Rule of Law is upheld.

14. The basic human right of an accused to be tried before an independent and impartial tribunal is recognised also in the major human rights treaties and is one to which the Tribunal accords the utmost importance.[14] Indeed the Appeals Chamber in a case before the ICTY, held in consideration of its function that:

> "For a Tribunal such as this one to be established according to the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognised human rights instruments"[15]

15. It must not be forgotten that the Rwandan government itself has recognised the importance of impartial justice. In requesting the establishment of a Tribunal by the international community, the Rwandan government stated that it supported an international tribunal because of its desire to avoid "any suspicion of its wanting to organise speedy vengeful justice".[16] Accordingly, this Tribunal's fundamental aim is to vindicate the highest standards of international criminal justice, in providing an impartial and equitable system of justice.

---

[13] *The Trial of German Major War Criminals by the International Military Tribunal sitting at Nuremberg Germany (commencing 20 November 1945) Opening Speeches of the Chief Prosecutors.* Published under the Authority of H.M. Attorney-General By His Majesty's Stationery Office, London: 1946. pp. 36 and 37.

[14] Article 14 (1) of the *International Covenant of Civil and Political Rights,1966* ("ICCPR") provides, *inter alia,* that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". Similarly, Article 6(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950) ("ECHR"), protects the right to a fair trial and requires, *inter alia,* that cases be heard by an "independent and impartial tribunal established by law," and Article 8(1) of the *American Convention on Human Rights* (1969) ("ACHR") provides that "[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law."

[15] Prosecutor v. Duško Tadić, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction,* Case no. IT-94-1-AR72, 2 October 1995, § 45.

[16] UN Doc. S/PV.3453 (1994) at 14.

16. But now the government of Rwanda has suggested that the Tribunal should convict all the indictees who come before it. It is wrong. The accused can be acquitted if the Trial Chamber is not satisfied that guilt has been proven beyond a reasonable doubt.[17] Alternatively, the accused can be released on procedural grounds, as was the case in the Decision. In the application of impartial justice the role of the Tribunal is not simply to convict all those who appear before it, but to consider a case upholding the fundamental principles of human rights.

17. By virtue of Resolution 955 of 1994, the Security Council stated:

> "Convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace",[18]

This was subsequently reiterated by Resolution 1165 of 1998, when the Security Council stated that it "remain[ed] convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law will contribute to the process of national reconciliation and to the restoration and maintenance of peace in Rwanda and in the region"[19]. This aim can only be achieved by an independent Tribunal, mindful of the task entrusted to it by the international community.

18. Both Tribunals, ICTY and ICTR, find themselves in the midst of very emotive atmospheres and are charged with the duty to maintain their independence and transparency, as expected by the international community, preserving the norms of international human rights. The international community needs to be sure that justice is being served but that it is being served through the application of their Rules and Statutes, which are applied in a consistent and unbiased manner. I recall the words of the Zimbabwean Court in the Mlambo case, as cited in the Decision:

> "The charges against the applicant are far from trivial and there can be no doubt that it would be in the best interests of society to proceed with the trial of those who are

[17] Rule 87(A) of the Rules of Procedure and Evidence.
[18] *Supra* note 4.
[19] *Security Council Resolution 1165 (1998) (S/RES/1165) (1998).*

> charged with the commission of serious crimes. Yet that trial can only be undertaken if the guarantee under.... the Constitution has not been infringed."[20]

Difficult as this may be for some to understand, these are the principles which govern proceedings before this Tribunal at all times, even if application of these principles on occasion renders results which for some, are hard to swallow.

. . .

19. I wish to draw attention to the matter of r*es judicata,* which was referred to by both the Appellant and the Prosecutor in their written briefs[21]. I wish to briefly discuss the applicability of this principle to the case in hand, noting that the Appeals Chamber has now reviewed its Decision.

20. The principle of *res judicata* is well settled in international law as being one of those "general principles of law recognized by civilised nations", referred to in Article 38 of the Statutes of the Permanent Court of International Justice ("PCIJ") and the International Court of Justice ("ICJ").[22] As such, it is a principle which should be applied by the Tribunal. The principle can be enunciated as meaning that, once a case has been decided by a final and valid judgement rendered by a competent tribunal, the same issue may not be disputed again between the same parties before a court of law[23].

---

[20] Jean-Bosco Barayagwiza v. The Prosecutor, *Decision*, Case no. ICTR-97-19-AR72, 3 November 1999 (the 'Decision'), § 111.

[21] *Brief in Support of the Prosecutor's Motion for Review or Reconsideration of the Appeals Chamber Decision Rendered on 3 November 1999 in Jean-Bosco Barayagwiza v. The Prosecutor following the Orders of the Appeals Chamber Dated 25 November 1999*, § 74. *Appellant's Response to Prosecutor's Motion for Review or Reconsideration of the Appeals Chamber Decision Rendered on 3 November 1999 in Jean-Bosco Barayagwiza v. The Prosecutor and Request for Stay of Execution*, § 17. *Prosecutor's Reply to the Appellant's Response to the Prosecutor's Motion for Review or Reconsideration of the Appeals Chamber Decision Rendered on 3 November 1999 in Jean-Bosco Barayagwiza v. The Prosecutor and Request for Stay of Execution*, § 21.

[22] *See* Judge Anzilotti's dissenting opinion in the *Chorzow Factory Case* (Interpretation), PCIJ Series A (1927), 13 at 27. *See* also PCIJ, Advisory Committee of Jurists: *Procès-verbaux of the Proceedings of the Committee, June 16-July 24, 1920, with Annexes*, The Hague, 1920, pp. 315-316.

[23] *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*, ICJ Reports 1954, p. 47.

21. The rationale behind the principle is that security is required in juridical relations. The determinative and obligatory character of a judgement prevents the parties from contemplating the possibility of not complying with the decision or alternatively from seeking the same or another court to decide in a different manner. At the same time it is understood that only final judgements are considered *res judicata*, as judgements of lower courts can generally take advantage of appellate proceedings.

22. The impact of the Appeals Chamber Decision is twofold. On the one hand the Appeals Chamber decided to allow an appeal[24] against a decision of Trial Chamber II[25] which dismissed a preliminary objection by the accused based on lack of personal jurisdiction, on the grounds *inter alia*, that the fundamental human rights of the accused to a fair and expeditious trial were violated as a result of his arrest and long detention in Cameroon before being transferred to the U.N. Detention Facilities in Arusha. On the other hand, the Decision "DISMISSE[D] THE INDICTMENT with prejudice to the Prosecutor."[26] This rendered the Decision final and definitive, as stated by the Appeals Chamber in its decision today.[27]

23. The International Court of Justice has held:

> "It is contended that the question of the Applicants' legal right or interest was settled by the [1962][28] Judgement and cannot now be reopened. As regards the issue of preclusion, the Court finds it unnecessary to pronounce on various issues which have been raised in this connection, such as whether a decision on a preliminary objection constitutes a *res judicata* in the proper sense of that term, –whether it ranks as a "decision" for the purposes of Article 59 of the Court's Statute, or as "final" within the meaning of Article 60. The essential point is that a decision on a preliminary objection can never be preclusive of a matter appertaining to its merits, whether or not it has in fact been dealt with in connection with the preliminary objection". [29]

24. In domestic jurisdictions a preliminary objection on lack of competence, raised by a party before a court does not prevent the matter being brought before the competent court. However, some decisions on preliminary points which are primarily within the competence

---

[24] *Supra* note 20, § 113(1).
[25] 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-97-19-1, 17 November 1998, and Prosecutor v. Barayagwiza, *Corrigendum*, Case No. ICTR-97-19-1, 24 November 1998.
[26] *Supra* note 20, § 113(2).
[27] § 49.
[28] *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa) Preliminary Objections*, ICJ Reports. 1962, p. 319.
[29] *South West Africa, Second phase, Judgement,* ICJ Reports. 1966, p. 6 at § 59.

of the court acquire the force of *res judicata* on the question decided and the court is bound by its own decisions.[30]

25. In this Tribunal, Article 25 of the Statute opens up the possibility for review of "final" decisions, if certain criteria are satisfied. The Appeals Chamber has clearly explained this in its decision today. It is clear to me that if the Statute provides for a "final" decision to be reviewed, when a Chamber acts pursuant to this provision, the principle of *res judicata* does not apply.

26. Some common law systems consider that dismissal of an indictment with prejudice bars the right to bring an action again on the same issue and is, therefore, *res judicata*.[31] The instant case has not been litigated on the merits. What seems to be "final" is the issue of the prejudice to the Prosecutor, because the Prosecutor was barred from bringing the case before the Tribunal again. As I understood it, the Decision considered the finding of "prejudice to the Prosecutor" as a form of punishment due to the violations of fundamental human rights committed by the Prosecutor against the Appellant.[32]

27. If the new facts brought before the Appeals Chamber under Article 25 mean that the Prosecutor is responsible for less extensive violations (as accepted by the Appeals Chamber today),[33] she cannot be punished because of them, the dismissal cannot be with prejudice to her and hence the Decision must be amended. That is what we are deciding today.

28. Human rights treaties provide that when a state[34] violates fundamental human rights, it is obliged to ensure that appropriate domestic remedies are in place to put an end to such

---

[30] The distinction in the civil law systems between *peremptory* (which put an end to the procedure) and *dilatory* (which simply delay the procedure) preliminary objections is very useful.

[31] This concept is unknown to civil law systems.

[32] *Supra* note 20, § 76.

[33] § 72.

[34] In these treaties, the "subject-parties" are always States. *See* Article 2.1 ICCPR; Article 1 ECHR; Article 1.1 ACHR. The Inter-American Court of Human Rights held that "as far as concerns the human rights protected by the Convention, the jurisdiction of the organs established thereunder refer exclusively to the international responsibility of States and not to that of individuals" (*International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Articles 1 and 2 of the American Convention on Human Rights)*, Advisory Opinion OC-14/94 of December 9, 1994, Series A No. 14, § 56.

violations and in certain circumstances to provide for fair compensation to the injured party.[35]

29. Although the Tribunal is not a State, it is following such a precedent to compensate the Appellant for the violation of his human rights. As it is impossible to turn back the clock, I think that the remedy decided by the Appeals Chamber fulfills the international requirements.

* * *

30. Finally, I wish to emphasise that the Appeals Chamber made its Decision, based on certain facts which were presented before it at that time. The new facts which are before the Appeals Chamber now, change its position. If these facts which the Appeals Chamber has concluded to be new facts and which are discussed in today's decision, had been before the Appeals Chamber when considering the Decision, it is my opinion that the Appeals Chamber would have reached a different decision at that time.

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

s/.
Rafael Nieto-Navia

Dated this 31st day of March 2000
At The Hague,
The Netherlands.

[35] Article 50. ECHR; Article 63.1, ACHR. International jurisprudence has considered a "general concept of law" that violations of international obligations which cause harm deserve adequate reparation (*Factory at Chorzów, Jurisdiction*, Judgement No. 8, 1927, P.C.I.J., Series A, No. 9, p.21; *Factory at Chorzów, Merits*, Judgement No. 13, 1928, P.C.I.J., Series A, No. 17, p. 29.

SEPARATE OPINION OF JUDGE SHAHABUDDEEN

1. This is an important case: it is not every day that a court overturns its previous decision to liberate an indicted person. This is what happens now. New facts justify and require that result. But possible implications for the working of the infant criminal justice system of the international community need to be borne in mind. Because of this, and also because I agreed with the previous decision, I believe that I should explain why I support the present decision to cancel out the principal effect of the former.

(i) The limits of the present hearing

2. Except on one point, I was not able to agree with the grounds on which the previous decision rested. However, the points on which I differed are not now open for discussion. This is because the present motion of the Prosecutor has to be dealt with by way of review and not by way of reconsideration. Under review, the motion has to be approached on the footing that the earlier findings of the Appeals Chamber stand, save to the extent to which it can be seen that those findings would themselves have been different had certain new facts been available to the Appeals Chamber when the original decision was made; under that procedure, it is not therefore possible to challenge the previous holdings of the Appeals Chamber as incorrect on the basis on which they were made. By contrast, under reconsideration, the appeal would have been reopened, with the result that that kind of challenge would have been possible, as I apprehend is desired by the prosecution. To cover all the requests made by the prosecution, it is thus necessary to say a word on its motion for reconsideration. I agree that the motion should not be granted. These are my reasons:

3. Decisions rendered within the International Criminal Tribunal for the former Yugoslavia ("ICTY") on the competence of a Chamber to reconsider a decided point vary from the exercise of a relatively free power of reconsideration to a denial of any such power based on the statement, made in *Kordić*, "that motions to reconsider are not provided for in the Rules and do not form part of the procedures of the International

Tribunal".[1] Where the decisions suggest a relatively free power of reconsideration, they concern something in the nature of an operationally passing position taken in the course of continuing proceedings; in such situations the Chamber remains seised of the matter and competent, not acting capriciously but observing due caution, to revise its position on the way to rendering the ultimate decision. In situations of more lasting consequence, it appears to me that the absence of rules does not conclude the issue as to how a judicial body should behave where complaint is made that its previous decision was fundamentally flawed, and more particularly where that body is a court of last resort, as is the Appeals Chamber. Not surprisingly, in *^elebići* the Appeals Chamber of the ICTY introduced a qualification in stating that "in the absence of particular circumstances justifying a Trial Chamber or the Appeals Chamber to reconsider one of its decisions, motions for reconsideration do not form part of the procedure of the International Tribunal".[2] The first branch of that statement is important, including its non-reproduction of the *Kordić* words "that motions to reconsider are not provided for in the Rules": the implication of the omission seems to be that the fact that the Rules do not so provide is not by itself determinative of the issue whether or not the power of reconsideration exists in "particular circumstances". Alternatively, the omitted words were not intended to deny the inherent jurisdiction of a judicial body to reconsider its decision in "particular circumstances".

4. Circumscribed as they evidently are, it is hard, and perhaps not in the interest of the policy of the law, to attempt exhaustively to define "particular circumstances" which might justify reconsideration. It is clear, however, that such circumstances include a case in which the decision, though apparently *res judicata*, is void, and therefore non-existent

---

[1] *Kordić*, IT-95-14/2-PT, 15 February 1999. And see similarly *Kovačević*, IT-97-24-PT, 30 June 1998.
[2] Order of the Appeals Chamber on Hazim Delić's Emergency Motion to Reconsider Denial of Request for Provisional Release, IT-96-21-A, 1 June 1999.

in law, for the reason that a procedural irregularity has caused a failure of natural justice.[3] An aspect of that position was put this way by the presiding member of the Appellate Committee of the British House of Lords:

> In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. In *Cassell & Co Ltd v. Broome (No.2)* [1972] 2 All ER 849, [1972] AC 1136 your Lordships varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on the point.
>
> However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong.[4]

5. I understand this to mean that, certainly in the case of a court of last resort, there is inherent jurisdiction to reopen an appeal if a party had been "subjected to an unfair procedure". I see no reason why the principle involved does not apply to criminal matters if a useful purpose can be served, particularly where, as here, the decision in question has not been acted upon.

6. I have referred to unfairness in procedure because it appears to me that this is the criterion which is attracted by the posture of the Prosecutor's case. Was there such unfairness?

7. Whether a party was or was not "subjected to an unfair procedure" is a matter of substance, not technicality. If the party did not understand that an issue would be considered (which is the Prosecutor's contention), that could found a claim that it was disadvantaged. But, provided that that was understood and that there was opportunity to

---

[3] See, in English law, *Halsbury's Laws of England*, 4th edn., vol. 26, pp 279-280, para. 556, where mention is made of other situations in which a decision may be set aside and the proceedings reopened.

respond, I do not see that the procedure was unfair merely because a Chamber considered an issue not raised by the parties. The interests involved are not merely those of the parties; certainly, they are not interests submitted by them to adjudication on a consensual jurisdictional basis; they include the interests of the international community and are intended to be considered by a court exercising compulsory jurisdiction. In *Erdemović*[5] the Appeals Chamber raised, considered and decided issues not presented by the parties, observing that there was "nothing in the Statute or the Rules, nor in practices of international institutions or national judicial systems, which would confine its consideration of the appeal to the issues raised formally by the parties".[6]

8. Further, a Chamber need not echo arguments addressed to it; its reasoning may be its own.[7] When the present matter is examined, all that appears is that the Appeals Chamber in some cases used arguments other than those presented to it. The basic issue was one on which the parties had an opportunity to present their positions, namely, whether the rights of the appellant had been violated by undue delay so as to lead to lack of jurisdiction. For the reasons given below, I am satisfied that there is not any substance in the contention of the prosecution that it had no notice that certain questions would be determined. It is more to the point to say that the prosecution did not avail itself of opportunities to present its position on certain matters; in particular, it did not assist either the Trial Chamber or the Appeals Chamber with relevant material at the time when that assistance should have been given.

---

[4] *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 2)*, [1999] 1 All ER 577, HL, at pp. 585-586, per Lord Browne-Wilkinson.
[5] IT-96-22-A, 7 October 1997, para. 16.
[6] With respect, this can benefit from qualification in the case of the International Court of Justice. That court would be acting *ultra petita* if it decided issues (as distinguished from arguments concerning an issue) not presented by the parties, since the jurisdiction is consensual. See Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. II (Cambridge, 1986), p. 531.

9. In short, there was no unfairness in procedure in this case. Accordingly, the previous decision of the Appeals Chamber cannot be set aside and the appeal reopened. It is thus not possible to accede to the Prosecutor's proposition, among others, that that decision was wrong when made and should for that reason be now changed.[8]

10. For the reasons given in today's judgment, the procedure of review is nevertheless available.[9] As mentioned above, the possibility of revision which this opens up is however limited to consideration of the question whether the same decision would have been rendered if certain new facts had been at the disposal of the Appeals Chamber, and, if not, what is the decision which would then have been given.

(ii) The Prosecutor's complaint that she had no notice of the intention of the Appeals Chamber to deal with the question of the legality of the detention between transfer and initial appearance

11. Before moving on, I shall pause over the question, alluded to above, as to whether the prosecution availed itself of opportunities to present its position on certain points. The question may be considered illustratively in relation to the issue of detention between the appellant's transfer from Cameroon to the Tribunal's detention unit in Arusha and his initial appearance before a Trial Chamber, extending from 19 November 1997 to 23 February 1998. The prosecution takes the position, which it stresses, that it had no opportunity to address this issue because it did not know that the Appeals Chamber would be dealing with it. That, if correct, is a sufficiently weighty matter to justify

---

[7] See the *"Lotus", (1927), PCIJ, Series A, No. 10,* p. 31; *Fisheries, ICJ Reports 1951,* p. 116, at p. 126; *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, ICJ Reports 1974,* p. 3, at pp. 9-10, para. 17. As to a distinction between issues and arguments, see Fitzmaurice, *supra.*
[8] Transcript, Appeals Chamber, 22 February 2000, p. 13.
[9] See also *Zejnil Delalić*, IT-96-21-T, 22 June 1998, paras. 38-40, which would seem, however, to apply the idea of review to an ordinary interlocutory decision even if it does not put an end to the case.

reconsideration, as it would show that the prosecution was subjected to an unfair procedure in the Appeals Chamber. So it should be examined.

12. The prosecution submitted that the issue of delay between transfer and initial appearance was not argued by the appellant in the course of the oral proceedings in the Trial Chamber and was not included in his grounds of appeal. Although, as will be seen, the appellant did include a claim on the point in his motion, I had earlier made a similar observation, noting that, in the Trial Chamber, "no issue was presented as to delay between transfer and initial appearance",[10] that the "Trial Chamber was not given any reason to believe that there was such an issue", and, in respect of the appeal proceedings, that it "does not appear that the Prosecutor thought that she was being called upon to meet an argument about delay between transfer and initial appearance".[11] But it seems to me that, apart from the action of the appellant, account has to be taken of the action of the Appeals Chamber and that the position changed with the issuing by the latter of its scheduling order of 3 June 1999; that order, referred to below, clearly raised the matter. After the order was made, the appellant went back to the claim which he had originally raised; equally, the prosecution gave its reaction. Thus, in the event, the Appeals Chamber did not pass on the matter without affording an opportunity to the Prosecutor to address the point.

13. To fill out this brief picture, it is right to consider the factual basis of the proposition that the appellant did include a claim on the point in his motion. As I noted

---

[10] Possibly, there was a misunderstanding as to the need for specific argument in the Trial Chamber, for the Presiding Judge said, as he properly could, "We have read the motion and the documents that have been attached to it so we have a general idea of what it is, so, counsel, if you may introduce your motion to highlight what you consider to be important issues that should get the Trial Chamber's attention". (See transcript, Trial Chamber, 11 September 1998, p. 4, Presiding Judge Sekule). Thus defence counsel was not expected to deal with each and every aspect of his written motion. He contended himself with speaking merely of "continued provisional detention" (ibid., pp. 12 and 14), and with referring to the "summary on the detention times" as set out in annexure DM2 to his motion and as explained below (ibid., p. 39).

[11] Separate opinion, 3 November 1999, p. 3, cited in part in the Brief in Support of the Prosecutor's Motion for Review, 1 December 1999, p. 8, para. 51.

at page 1 of a separate opinion appended to the decision of the Appeals Chamber of 3 November 1999, in paragraphs 2 and 9 of the motion the appellant complained of "continued provisional detention". Viewing the time when that complaint was made (three months after the transfer), he was thus also complaining of the detention following on his transfer, inclusive of delay between transfer and initial appearance. In fact, as I also pointed out, annexure DM2 to his motion spoke of "**98 days** of detention after transfer and before initial appearance" (original emphasis, but actually 96 days). Further, in paragraph 11 of his brief in support of that motion he referred to Articles 7, 8, 9 and 10 of the Universal Declaration of Human Rights, relating *inter alia* to protection of the law and to freedom from arbitrary arrest and detention. More particularly, he also referred to Article 9 of the International Covenant on Civil and Political Rights ("ICCPR"), stating that this required that "the accused should be brought before the court without delay". That was obviously a reference to paragraph 3 of Article 9 of the ICCPR which stipulates that "[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release". It follows that, in his motion, the appellant did make a complaint on the matter to the Trial Chamber.

14. Now, how did the prosecution react to the appellant's complaint? The complaint having been made in the motion, and the motion being heard seven months after it was brought, it seems to me that, by the time when the motion was heard, the prosecution should have been in possession of all material relevant to the issue whether there was undue delay between transfer and initial appearance; it also had an opportunity at that stage to present all of that material together with supporting arguments. The record shows that it did not do so.

15. In the Trial Chamber, the prosecution did not file a response to the appellant's motion in which the appellant complained of delay between transfer and initial appearance. Indeed, some part of the oral hearing before the Trial Chamber on 11 September 1998 was taken up with this very fact - that the prosecution had not submitted a reply, with the consequential difficulty, about which the appellant

remonstrated, that he did not know exactly what issues the prosecution intended to challenge at the hearing before the Trial Chamber. In the words then used by his counsel, "... in an adversarial system we should not leave leeway for ambush".[12] In his reply, counsel for the prosecution simply said, "We didn't do it in this case and I have no explanation for that. ... we don't have an explanation for why we haven't followed our *usual practice*".[13] In turn, the Presiding Judge, though not sanctioning the prosecution, noted that what was done was contrary to the established procedure.[14] At the oral hearing before the Appeals Chamber on 22 February 2000, counsel for the prosecution took the position that there was no rule requiring the prosecution to file a response.[15] Counsel for the prosecution before the Trial Chamber had earlier made the same point.[16] They were both right. But that circumstance was not determinative. As the Presiding Judge of the Trial Chamber had made clear, it was the practice to file a response; and, as counsel for the prosecution later conceded at the oral hearing before the Appeals Chamber on 22 February 2000, the Presiding Judge "did draw the conclusion that [what was done] was contrary ... to the practice of the Tribunal".[17] Indeed, at the hearing before the Trial Chamber on 11 September 1998, counsel for the prosecution accepted, as has been seen, that the failure of the prosecution to submit a written reply was contrary to the "usual practice" of the prosecution itself.

16. The failure of the prosecution to respond to the appellant's complaint of undue delay between transfer and initial appearance did not of course remove the complaint. The dismissal of the appellant's motion included dismissal of that complaint. The complaint and its dismissal formed part of the record before the Appeals Chamber. This being so, it appears to me that at this stage the question of substance is whether the

---

[12] Transcript, Trial Chamber, 11 September 1998, p. 5.
[13] Ibid., p. 8, emphasis added.
[14] Ibid., p. 9.
[15] Transcript, Appeals Chamber, 22 February 2000, p. 105.
[16] Transcript, Trial Chamber, 11 September 1998, p. 8.

Prosecutor knew that the Appeals Chamber intended to deal with the complaint, and, if so, whether the Prosecutor had an opportunity to address it. The answer to both questions is in the affirmative. This results from the Appeals Chamber's scheduling order of 3 June 1999, referred to above.

17. That order required the parties "to address the following questions and provide the Appeals Chamber with all relevant documentation: ....4). The reason for any delay between the transfer of the Appellant to the Tribunal and his initial appearance". The requisition was made on the stated basis that the Appeals Chamber needed "additional information to decide the appeal". At the oral hearing in the Appeals Chamber on 22 February 2000, a question from the bench to counsel for the Prosecutor was this: "Did the prosecution understand from that, that the Appeals Chamber was proposing to consider reasons for any delay between transfer of the Appellant and his initial appearance?".[18] Counsel for the Prosecutor correctly answered in the affirmative. He also agreed that the prosecution did not object to the competence of the Appeals Chamber to consider the matter and did not ask for more time to respond to the request by the Appeals Chamber for additional information.[19] In fact, in paragraphs 17-20 of its response of 21 June 1999, the prosecution sought to explain the delay in so far as it then said that it could, stating that it had no influence over the scheduling of the initial appearance of accused persons, that these matters lay with the Trial Chambers and the Registrar, that assignment of defence counsel was made only on 5 December 1997, and that there was a judicial holiday from 15 December 1997 to 15 January 1998. In stating these things (how adequate they were being a different matter), the prosecution fell to be understood as having accepted that the Appeals Chamber would be dealing one way or another with the question to which those things were a response.

---

[17] Transcript, Appeals Chamber, 22 February 2000, p. 107.

18. Focusing on the issues as she saw them, the Prosecutor, as I understood her, submitted that the Appeals Chamber was confined to the issues presented by the parties. As indicated above, that is not entirely correct. The cases show that the leading principle is that the overriding task of the Tribunal is to discover the truth. Since this has to be done judicially, limits obviously exist as to permissible methods of search; and those limits have to be respected, for the Appeals Chamber is not an overseer. It cannot gratuitously intervene whenever it feels that something wrong was done: beyond the proper appellate boundaries, the decisions of the Trial Chamber are unquestionable. However, as is shown by *Erdemović*,[20] the Appeals Chamber can raise issues whether or not presented by a party, provided, I consider, that they lie within the prescribed grounds of appeal, that they arise from the record, and that the parties are afforded an opportunity to respond. I think that this was the position in this case.

19. As has been demonstrated above, the record before the Appeals Chamber included both a claim by the appellant that there was impermissible delay between transfer and initial appearance[21] and dismissal by the Trial Chamber of the motion which included that claim. Where an issue lying within the prescribed grounds of appeal is raised on the record, the Appeals Chamber can properly require the parties to submit additional information on the point; there is not any basis for suggesting, as the Prosecutor has done, that in this case the Appeals Chamber went outside of the appropriate limits in search of evidence.

20. In conclusion, it appears to me that the substance of the matter is that the Prosecutor had notice of the intention of the Appeals Chamber to deal with the point, had

---

[18] Ibid., p. 108.
[19] Ibid.
[20] IT-96-22-A, 7 October 1997.
[21] By contrast, the appellant's motion did not, in my opinion, include a claim that there was impermissible delay in the hearing of his habeas corpus motion.

an opportunity to address the point both before the Trial Chamber and the Appeals Chamber, and did address the point in her written response to the Appeals Chamber. In particular, the Prosecutor knew that the Appeals Chamber would be passing on the point and did not object to the competence of the Appeals Chamber to do so. Her approach fell to be understood as acquiescence in such competence. I accordingly return to my previous position that it is not possible to set aside the previous decision and to reopen the appeal, and that the only way of revisiting the matter is through the more limited method of review on the basis of discovery of new facts.

(iii) The Prosecutor's argument that the Appeals Chamber did not apply the proper test for determining whether there was a breach of the appellant's rights

21. In dealing with this argument by the Prosecutor, it would be useful to distinguish between the breach of a right and the remedy for a breach. The former will be dealt with in this section; the latter in the next.

22. An opinion which I appended to the decision given on 2 July 1998 by the Appeals Chamber of the ICTY in *Prosecutor v. Kovačević* included an observation to the effect that, because of the preparatory problems involved, the jurisprudence recognises that there is "need for judicial flexibility" in applying to the prosecution of war crimes the principle that criminal proceedings should be completed within a reasonable time. The prosecution correctly submits that, in determining whether there has been a breach of that principle, a court must weigh competing interests. As it was said in one case, the court "must balance the fundamental right of the individual to a fair trial within a reasonable time against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions to be found in" the territory concerned.[22] To do this, the court "should assess such factors

---

[22] *Bell v. Director of Public Prosecutions* [1985] 1 AC 937, PC.

as the length of and reason for the delay, the defendant's assertion of his right, and prejudice to the defendant".[23] The reason for the delay could of course include the complexity of the case and the conduct of the prosecuting authorities as well as that of the court as a whole.

23. These criteria are correct; but I do not follow why it is thought that they were not applied by the Appeals Chamber. Their substance was considered in paragraphs 103-106 of the previous decision of the Appeals Chamber, footnote 268 whereof specifically referred to the leading cases of *Barker v. Wingo* and *R. v. Smith*, among others. Applying that jurisprudence in this case, it is difficult to see how the balance came out against the appellant. On the facts as they appeared to the Appeals Chamber, the delay was long; it was due to the Tribunal; no adequate reasons were given for it; the appellant repeatedly complained of it; and, there being nothing to rebut a reasonable presumption that it prejudiced his position, a fair inference could be drawn that it did.

24. The breach of the appellant's rights appears even more clearly when it is considered that the jurisprudence which produced principles about balancing competing interests developed largely, if not wholly, out of cases in which the accused was in fact brought before a judicial officer shortly after being charged, but in which, for one reason or another, the subsequent trial took a long time to approach completion. By contrast, the problem here is not that the proceedings had taken too long to complete, but that they had taken too long to begin. It is not suggested that those principles are irrelevant to the resolution of the present problem; what is suggested is that, in applying them to the present problem, the difference referred to has to be taken into account. To find a solution it is necessary to establish what is the proper judicial approach to detention in the early stages of a criminal case, and especially in the pre-arraignment phase.

---

[23] *Barker v. Wingo*, 407 US 514 (1972); and see *R. v. Smith* [1989] 2 Can. S.C.R. 1120, and *Morin v. R.* [1992] 1 S.C.R. 771.

25. The matter turns, it appears to me, on a distinction between the right of a person to a trial within a reasonable time and the right of a person to freedom from arbitrary interference with his liberty. The right to a trial within a reasonable time can be violated even if there has never been any arrest or detention; by contrast, a complaint of arbitrary interference with liberty can only be made where a person has been arrested or detained. I am not certain that the distinction was recognised by the prosecution.[24] In the view of its counsel, which he said was based on the decision of the Appeals Chamber and on other cases, the object of the Rule 62 requirement for the accused to be brought "without delay" before the Trial Chamber was to allow him "to know the formal charges against him" and to enable him "to mount a defence".[25] The submission was that, in this case, both of these purposes had been served before the initial appearance, the indictment having been given to the appellant while he was still in Cameroon. But it seems to me that, as counsel later accepted,[26] there was yet another purpose, and that that purpose could only be served if there was an initial appearance. That purpose – a fundamentally important one – was to secure to the detained person a right to be placed "without delay" within the protection of the judicial power and consequently to ensure that there was no arbitrary curtailment of his right to liberty. That purpose is a major one in the work of an institution of this kind; it is worthy of being marked.

26. For present purposes, the law seems straightforward. It is not in dispute that the controlling instruments of the Tribunal reflect the internationally recognised requirement that a detained person shall be brought "without delay" to the judiciary as required by Rule 40*bis*(J) and Rule 62 of the Tribunal's Rules of Procedure and Evidence, or "promptly" as it is said in Article 5(3) of the European Convention on Human Rights and Article 9(3) of the ICCPR, the latter being alluded to by the appellant in paragraph 11 of

---

[24] Transcript, Appeals Chamber, 22 February 2000, pp. 97-98.
[25] Ibid., pp. 72-73.
[26] Ibid., pp. 95-97.

the brief in support of his motion of 19 February 1998, as mentioned above. It will be convenient to refer to one of these provisions, namely, Article 5(3) of the European Convention on Human Rights. This provides that "[e]veryone arrested or detained in accordance with the provisions of paragraph 1.*c* of this article [relating to arrests for reasonable suspicion of having committed an offence] shall be brought promptly before a judge or other officer authorised by law to exercise judicial power ...".

27. So first, as to the purpose of these provisions. Apart from the general entitlement to a trial within a reasonable time, it is judicially recognised that the purpose is to guarantee to the arrested person a right to be brought promptly within the protection of the judiciary and to ensure that he is not arbitrarily deprived of his right to liberty.[27] The European Court of Human Rights, whose case law on the subject is persuasive, put the point by observing that the requirement of promptness "enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty.... Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5§3 [of the European Convention on Human Rights], which is intended to minimise the risk of arbitrariness. Judicial control is implied by the rule of law, 'one of the fundamental principles of a democratic society ...'".[28]

28. Second, as to the tolerable period of delay, the decision of the Appeals Chamber of 3 November 1999 correctly recognised that this is short. The work of the United Nations Human Rights Committee shows that it is about four days. In *Portorreal v. Dominican Republic*, a period of 50 hours was held to be too short to constitute delay.[29]

---

[27] Eur. Court H.R., Schiesser judgment of 4 December 1979, Series A no. 34, p. 13, para. 30.
[28] Eur. Court H.R., Brogan and Others judgment of 29 November 1988, Series A no. 145-B, p. 32, para. 58.
[29] United Nations Human Rights Committee, Communication No. 188/1984 (5 November 1987).

But a period of 35 days was considered too much in *Kelly v. Jamaica.*[30] In *Jijón v. Ecuador*[31] a five-day delay was judged to be violative of the rule.

29. The same tendency in the direction of brevity is evident in the case law of the European Court of Human Rights. In *McGoff*[32], on his extradition from the Netherlands to Sweden, the applicant was kept in custody for 15 days before he was brought to the court. That was held to be in violation of the rule. *De Jong, Baljet and van den Brink*[33] concerned judicial proceedings in the army. "[E]ven taking due account of the exigencies of military life and military justice", the European Court of Human Rights considered that a delay of seven days was too long.

30. In *Koster,*[34] which also concerned judicial proceedings in the army, a five-day delay was held to be in breach of the rule. The fact that the period included a weekend and two-yearly military manoeuvres, in which members of the court - a military court - had been participating was disregarded; in the view of the European Court of Human Rights, the rights of the accused took precedence over matters which were "foreseeable".[35] The military manoeuvres "in no way prevented the military authorities from ensuring that the Military Court was able to sit soon enough to comply with the requirements of [Article 5(3) of the European Convention on Human Rights], *if necessary on Saturday or Sunday*".[36]

---

[30] United Nations Human Rights Committee, Communication No. 253/1987 (8 April 1991).
[31] United Nations Human Rights Committee, Communication No. 277/1988 (26 March 1992).
[32] Eur. Court H.R., McGoff judgment of 26 October 1984, Series A no. 83, pp. 26-27, para. 27.
[33] Eur. Court H.R., de Jong, Baljet and van den Brink judgment of 22 May 1984, Series A no. 77, p. 25, para. 52.
[34] Eur. Court H.R., Koster judgment of 28 November 1991, Series A no. 221.
[35] Ibid., para. 25.
[36] Ibid., emphasis added.

31. No doubt, as it was said in *de Jong, Baljet and van den Brink*, "The issue of promptness must always be assessed in each case according to its special features".[37] The same thing was said in *Brogan*.[38] But this does not markedly enlarge the normal period. *Brogan* was a case of terrorism; the European Court of Human Rights was not altogether unresponsive to the implications of that fact, to which the state concerned indeed appealed.[39] Yet the Court took the view that a period of six days and sixteen and a half hours was too long; indeed, it considered that even a shorter period of four days and six hours was outside the constraints of the relevant provision. The Court began its reasoning by saying:

> No violation of Article 5§3 [of the European Convention on Human Rights] can arise if the arrested person is released 'promptly' before any judicial control of his detention would have been feasible ... If the arrested person is not released promptly, he is entitled to a prompt appearance before a judge or judicial officer.[40]

32. Thus, in measuring permissible delay, the Court started out by having regard to the time within which it would have been "feasible" to establish judicial control of the detention in the circumstances of the case. The idea of feasibility obviously introduced a margin of flexibility in the otherwise strict requirement of promptness. But how to fix the limits of this flexibility? The Court looked at the "object and purpose of Article 5", or, as it said, at the "aim and ... object" of the Convention", and stated that –

> the degree of flexibility attaching to the notion of 'promptness' is limited, even if the attendant circumstances can never be ignored for the purposes of the assessment under paragraph 3. Whereas promptness is to be assessed in each case according to its special features ..., the significance to be attached to those features can never be taken to the point of impairing the very essence of the right guaranteed by Article 5§3 [of the European Convention on Human Rights], that is to the point of effectively

---

[37] Eur. Court H.R., de Jong, Baljet and van den Brink judgment of 22 May 1984, Series A no. 77, p. 25, para. 52.
[38] Eur. Court H.R., Brogan and Others judgment of 29 November 1988, Series A no. 145-B, para. 59.
[39] Ibid., para. 62.
[40] Ibid., para. 58.

> negativing the State's obligation to ensure a prompt release or a prompt appearance before a judicial authority.[41]

33. In paragraph 62 of its judgment in *Brogan*, the European Court of Human Rights again mentioned that the "scope for flexibility in interpreting and applying the notion of 'promptness' is very limited". Thus, although the Court appreciated the special circumstances which terrorism represented, it said that "[t]he undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5§3".[42]

34. To refer again to *McGoff*, in that case the European Commission of Human Rights recalled that, in an earlier matter, it had expressed the view that a period of four days was acceptable; "it also accepted five days, but that was in exceptional circumstances".[43]

35. In the case at bar, counting from the time of transfer to the Tribunal's detention unit in Arusha (19 November 1997) to the date of initial appearance before a Trial Chamber (23 February 1998), the period - the Arusha period - was 96 days, or *nearly 20 times the maximum acceptable period of delay.*

36. As a matter of juristic logic, any flexibility in applying the requirements concerning time to the case of war crimes has to find its justification not in the nature of the crimes themselves, but in the difficulties of investigating, preparing and presenting cases relating to them. Consequently, that flexibility is not licence for disregarding the requirements where they can be complied with. It is only "the austerity of tabulated legalism", an idea not much favoured where, as here, a generous interpretation is called

---

[41] Ibid., para. 59.
[42] Ibid., para. 62.
[43] Eur. Court H.R., McGoff judgment of 26 October 1984, Series A no. 83, Annex, Opinion of the Commission, p. 31, para. 28.

for[44], which could lead to the view that, once a crime is categorised as a war crime, that suffices to justify the conclusion that the requirements concerning time may be safely put aside.

37. In this case, it is not easy to see what difficulty beset the authorities in bringing the appellant from the Tribunal's detention unit to the Trial Chamber. That scarcely inter-galactic passage involved no more than a fifteen minute drive by motor car on a macadamised road. To plead the character of the crimes in justification of the manifest breach of an applicable requirement which was both of overriding importance and capable of being respected with the same ease as in the ordinary case is to transform an important legal principle into a statement of affectionate aspiration.

38. On the facts as they earlier appeared to it, the Appeals Chamber could not come to any conclusion other than that the rights of the appellant in respect of the period between transfer and initial appearance had been breached, and very badly so. As today's decision finds, the new facts do not show that they were not breached. I agree, however, that the new facts show that the breach was not as serious as it at first appeared, it being now clear that defence counsel, although having opportunities, did not object and could be treated as having acquiesced in the passage of time during most of the relevant period.

(iv) Whether a breach could be remedied otherwise than by release

39. Now for the question of remedy, assuming the existence of a breach. In this respect, the prosecution argues that, if there was a breach of the appellant's rights, it was open to the Appeals Chamber to grant some form of compensatory relief short of release and that it should have done so. In support, notice may be taken of a view that, particularly though not exclusively in the case of war crimes, the remedy for a breach of

---

[44] See the criticism made by Lord Wilberforce in *Minister of Home Affairs v. Fisher* [1980] AC 319, PC, at 328 G-H.

the principle that a trial is to be held within a reasonable time may take the form of payment of monetary compensation or of adjustment of any sentence ultimately imposed, custody being meanwhile continued.[45]

40. That view is useful, although not altogether free from difficulty;[46] it is certainly not an open-ended one. If the concern of the law with the liberty of the person, as demonstrated by the above-mentioned attitude of the courts, means anything, it is necessary to contemplate a point of time at which the accused indisputably becomes entitled to release and dismissal of the indictment. In this respect, it is to be observed that, according to the European Commission of Human Rights, contrary to an opinion of the German Federal Court, in 1983 a committee of three judges of the German Constitutional Court held that "unreasonable delays of criminal proceedings might under certain circumstances only be remedied by discontinuing such proceedings".[47] As is shown by the last paragraph of the report of *Bell's* case, *supra*, the only reason why a formal order prohibiting further proceedings was not made in that case by the Privy Council was because it was understood that the practice in Jamaica was that there would be no further proceedings. Paragraph 108 of the decision of the Appeals Chamber of 3 November 1999 cites cases from other territories in which further proceedings were in fact prohibited. I find no fault with the position taken in those cases; true, those cases concerned delay in holding and completing the trial, but I do not accept that the principle on which they rest is necessarily inapplicable to extended pre-arraignment delay.

41. More importantly, the view that relief short of release is possible is subject to any statutory obligation to effect a release. In this respect, in its previous decision the

---

[45] See, inter alia, P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3rd ed. (The Hague, 1998), pp. 449-450; and see generally the cases cited therein, including *Neubeck*, D & R 41 (1985), p. 57, para. 131; *H v. Federal Republic of Germany*, D & R 41 (1985), pp. 253-254; and *Eckle*, Eur. Court H.R., Eckle judgment of 15 July 1982, Series A no.51, p. 31, para. 67.
[46] See discussion in van Dijk and van Hoop, *loc.cit.*

Appeals Chamber held that Rule 40*bis* of the Tribunal's Rules of Procedure and Evidence applied to the Cameroon period of detention. I respectfully disagreed with that view and still do, but it is the decision of the Appeals Chamber which matters; and so I proceed on the basis that the Rule applied. Now, Sub-Rule (H) of that Rule provided as follows:

> The total period of provisional detention shall in no case exceed 90 days, at the end of which, in the event that the indictment has not been confirmed and an arrest warrant signed, the suspect *shall be released* ... (emphasis added).

42. Consistently with the judicial approach to detention in the early phases of a criminal case, the object of the cited provision is to control arbitrary interference with the liberty of the person by guaranteeing him a right to be released if he is not charged within the stated time. In keeping with that object, the Rule, which has the force of law, provides its own sanction. Where that sanction comes into operation through breach of the 90-day limit set by the Rule, release is both automatic and compulsory: a court order may be made but is not necessary. The detained person has to be mandatorily released in obedience to the command of the Rule: no consideration can be given to the possibility of keeping him in custody and granting him a remedy in the form of a reduction of sentence (if any) or of payment of compensation; any discretion as to alternative forms of remedy is excluded, however serious were the allegations.

43. In effect, the premise of the conclusion reached by the Appeals Chamber that the appellant had to be released was the Chamber's interpretation, on the facts then before it, that the Rule applied to the Cameroon period of detention. These being review proceedings and not appeal proceedings, the premise would continue to apply, and so would the conclusion, unless displaced by new facts.

---

[47] *H v. Federal Republic of Germany*, application no. 10884/84, D & R, no. 41, decision of 13 December 1984, p. 253.

(v) Whether there are new facts

44. So now for the question whether there are new facts. The temptation to use national decisions in this area may be rightly restrained by the usual warnings of the dangers involved in facile transposition of municipal law concepts to the plane of international law. Such borrowings were more frequent in the early or formative stages of the general subject; now that autonomy has been achieved, there is less reason for such recourse. It is possible to argue that the current state of criminal doctrine in international law approximates to that of the larger subject at an earlier phase and that accordingly a measure of liberality in using domestic law ideas is both natural and permissible in the field of criminal law. But it is not necessary to pursue the argument further. The reason is that, altogether apart from the question whether a particular line of municipal decisions is part of the law of the Tribunal, no statutory authority needs to be cited to enable a court to benefit from the scientific value of the thinking of other jurists, provided that the court remains master of its own house. Thus, nothing prevents a judge from consulting the reasoning of judges in other jurisdictions in order to work out his own solution to an issue before him; the navigation lights offered by the reflections of the former can be welcome without being obtrusive. This is how I propose to proceed.

45. The books are full of statements, and rightly so, concerning the caution which has to be observed, as a general matter, in admitting fresh evidence. Latham CJ noted that "[t]hese are general principles which should be applied to both civil and criminal trials".[48] Accordingly, there is to be borne in mind the principle familiar in civil cases, somewhat quaintly expressed in one of them, that it is the "duty of [a party] to bring forward his

---

[48] *Green v. R.* (1939) 61 C.L.R. 167, at 175.

whole case at once, and not to bring it forward piecemeal as he found out the objections in his way".[49]

46. The prosecution advanced a claim to several new facts. Agreeably to the caution referred to, the Appeals Chamber has not placed reliance on all of them. I shall deal with two which were accepted, beginning with the statement of Ambassador Scheffer as to United States intervention with the government of Cameroon. Five questions arise in respect of that statement.

47. The first question is whether the Ambassador's statement concerns a "new fact" within the meaning of Article 25 of the Statute. It has to be recognised that there can be difficulty in drawing a clear line of separation between a new fact within the meaning of that Article of the Statute and additional evidence within the meaning of Rule 115 of the Tribunal's Rules of Procedure and Evidence. A new fact is generically in the nature of additional evidence. The differentiating specificity is this: additional evidence, though not being merely cumulative, goes to the proof of facts which were in issue at the hearing; by contrast, evidence of a new fact is evidence of a distinctly new feature which was not in issue at the trial. In this case, there has not been an issue of fact in the previous proceedings as to whether the government of the United States had intervened. True, the intervention happened before the hearing, but that does not make the fact of the intervention any the less new. As is implicitly recognised by the wording of Article 25 of the Statute and Rule 120 of the Rules of Procedure and Evidence of the Tribunal, the circumstance that a fact was in existence at the time of trial does not automatically disqualify it from being regarded as new; the newness has to be in relation to the facts previously before the court. In my opinion, Ambassador Scheffer's statement is evidence of a new fact.

---

[49] *In re New York Exchange, Limited* (1888) 39 Ch. D. 415, at 420, CA.

48. The second question is whether the new fact "could not have been discovered [at the time of the proceedings before the original Chamber] through the exercise of due diligence" within the meaning of Rule 120 of the Rules. The position of the prosecution is that it did ask Ambassador Scheffer to intervene with the government of Cameroon. This being so, it is reasonable to hold that the prosecution knew that the requested intervention was needed to end a delay caused by Cameroon, and that it was also in a position to know that the intervention had in fact taken place and that it involved the activities in question. It is therefore difficult to find that the material in question could not have been discovered with due diligence. In this respect, I agree with the appellant.

49. But, for the reasons given in today's judgment, that does not end the matter. Certainly the general rule is that " the interests of justice" will not suffice to authorise the admission of material which was available at trial, diligence being a factor in determining availability. The principle of finality supports that view. But, as has been recognised by the Appeals Chamber of the ICTY, "the principle [of finality] would not operate to prevent the admission of evidence that would assist in determining whether there could have been a miscarriage of justice".[50] As was also observed by that Chamber,[51] "the principle of finality must be balanced against the need to avoid a miscarriage of justice". I see no reason why the necessity to make that balance does not apply to a review.

50. Thus, there has to be recognition of the possibility of there being a case in which, notwithstanding the absence of diligence, the material in question is so decisive in demonstrating mistake that the court in its discretion is obliged to admit it in the upper interests of justice. This was done in one case in which an appeal court observed, "All the evidence tendered to us could have been adduced at the trial: indeed, three of the witnesses, whom we have heard... did give evidence at the trial. Nevertheless we have

---

[50] *Tadić*, IT-94-1-A, 15 October 1998, para. 72. The context suggests that the word "not" in the expression "not available" in line 8 of para. 35 of that decision was inserted *per incuriam*.
[51] Ibid., para. 35.

thought it necessary, exercising our discretion in the interests of justice, to receive" their evidence.[52] It is not the detailed underlying legislation which is important, but the principle to be discerned.

51. The principle was more recently affirmed by the Supreme Court of Canada in the case of *R v. Warsing*.[53] There the leading opinion recalled an earlier view that "the criterion of due diligence... is not applied strictly in criminal cases" and said: "It is desirable that due diligence remain only one factor and its absence, particularly in criminal cases, should be assessed in light of other circumstances. If the evidence is compelling and the interests of justice require that it be admitted then the failure to meet the test should yield to permit its admission".[54] In the same opinion, it was later affirmed that "a failure to meet the due diligence requirement should not 'override accomplishing a just result'".[55]

52. It may be thought that an analogous principle can be collected from *Aleksovski,* in which the Appeals Chamber of the ICTY held "that, in general, accused before this Tribunal have to raise all possible defences, where necessary in the alternative, during trial ..." ,[56] but stated that it "will nevertheless consider" a new defence. Clearly, if the new defence was sound in law and convincing in fact, it would have been entertained in the higher interests of justice notwithstanding the general rule.

53. Thus, having regard to the superior demands of justice, I would read the reference in Rule 120 to a new fact which "could not have been discovered through the exercise of due diligence" as directory, and not mandatory or peremptory. In this respect, it is said that the "language of a statute, however mandatory in form, may be deemed directory

---

[52] See *R v. Lattimore* (1976) 62 Cr. App. R. 53, at 56.
[53] [1998] 3 S.C.R. 579.
[54] Ibid., para. 51 of the opinion of Justices Cory, Iacobucci, Major and Binnie.
[55] Ibid., para. 56.
[56] See paragraph 51 of IT-95-14/1-A of 24 March 2000.

whenever legislative purpose can best be carried out by [adopting a directory] construction".[57] Here, the overriding purpose of the provision is to achieve justice. Justice is denied by adopting a mandatory interpretation of the text; a directory approach achieves it. This approach, it is believed, is consonant with the broad view that, as it has been said, "the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case".[58] That remark was made about rules of civil procedure, but, with proper caution, the idea inspiring it applies generally to all rules of procedure to temper any tendency to rely too confidently, or too simplistically, on the maxim *dura lex, sed lex.*[59] I do not consider that this approach necessarily collides with the general principle regulating the interpretation of penal provisions and believe that it represents the view broadly taken in all jurisdictions.

54. The question then is whether, even if there was an absence of diligence, the material in this case so compellingly demonstrates mistake as to justify its admission. Ambassador Scheffer's statement makes it clear that the delay in Cameroon was due to the workings of the decision-making process in that country, that that process was expedited only after and as a result of his and his government's intervention with the highest authorities in Cameroon, that Cameroon was otherwise not ready to effect a transfer, and that accordingly the Tribunal was not to blame for any delay, as the Appeals Chamber thought it was. Has the Appeals Chamber to close its eyes to Ambassador Scheffer's statement, showing, as it does, the existence of palpable mistake bearing on the correctness of the previous conclusion? I think not.

---

[57] 82 *Corpus Juris Secundum* (Brooklyn, 1990), pp. 871-872, stating also, at p. 869, that "a statute may be mandatory in some respects, and directory in others". And see *Craies on Statute Law*, 7th edn. (London, 1971), pp. 62, 249-250, and 260-271.
[58] *In re Coles and Ravenshear* [1907] 1 K.B. 1, at 4.

55. The third question is which Chamber should process the significance of the new fact: Is it the Appeals Chamber? Or, is it the Trial Chamber? In the *Tadić* Rule 115 application, the ICTY Appeals Chamber took the position, in paragraph 30 of its Decision of 15 October 1998, that the "proper venue for a review application is the Chamber that rendered the final judgement". Well, this is a review and it is being conducted by the Chamber which gave the final judgement - namely, the Appeals Chamber. So the case falls within the *Tadić* proposition.

56. I would, however, add this: On the basis of the statement in question, there could be argument that the Appeals Chamber cannot itself assess a new fact where the Appeals Chamber is sitting on appeal. However, it appears to me that the statement need not be construed as intended to neutralise the implication of Rule 123 of the Rules of Procedure and Evidence of the Tribunal that the Appeals Chamber may itself determine the effect of a new fact in an appeal pending before it. That Rule states: "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". The word "may" shows that the Appeals Chamber need not send the matter to the Trial Chamber but may deal with it itself. The admissibility of this course is supported by the known jurisprudence, which shows that matter in the nature of a new fact may be considered on appeal. Thus, in *R. v. Ditch* (1969) 53 Cr. App. R. 627, at p. 632, a post-trial confession by a co-accused was admitted on appeal as fresh or additional evidence, having been first heard *de bene esse* before being formally admitted.[60] Structures differ; it is the principle involved which matters. The jurisprudence referred to above in relation to mandatory and directory provisions also works to the same end. In my view, that end means this:

---

[59] Cited sometimes in legal discourse, as in *Serbian Loans*, P.C.I.J., Ser. A, No. 20-21, p. 56, dissenting opinion of Judge de Bustamante.

[60] Earlier cases suggested that this sort of evidence should be processed through the clemency machinery; but the position was changed by s. 23(2) of the Criminal Appeal Act 1968 (UK).

where the new fact is in its nature conclusive, it may be finally dealt with by the Appeals Chamber itself; a reference back to the Trial Chamber is required only where, without being conclusive, the new fact is of such strength that it might reasonably affect the verdict, whether the verdict would in fact be affected being left to the evaluation of the Trial Chamber.[61]

57. The fourth question is whether the new fact brought forward in Ambassador Scheffer's statement "could have been a decisive factor in reaching the decision", within the meaning of Article 25 of the Statute. The simple answer is "yes". As mentioned above, the decision of the Appeals Chamber proceeded on the basis that the Tribunal was responsible for the delay in Cameroon and that the latter was always ready to make a transfer. The Ambassador's statement shows that these things were not so.

58. The fifth and last question relates to a submission by the appellant that the Appeals Chamber should disregard Ambassador Scheffer's activities because he was merely prosecuting the foreign policy of his government and had no role to play in proceedings before the Tribunal. As has been noticed repeatedly, the Tribunal has no coercive machinery of its own. The Security Council sought to fill the gap by introducing a legal requirement for states to co-operate with the Tribunal. That obligation should not be construed so broadly as to constitute an unacceptable encroachment on the sovereignty of states; but it should certainly be interpreted in a manner which gives effect to the purposes of the Statute. I cannot think that anything in the purposes of the Statute prevents a state from using its good offices with another state to ensure that the needed cooperation of the latter with the Tribunal is forthcoming; on the contrary, those purposes would be consistent with that kind of *démarche*. Thus, accepting that Ambassador Scheffer was prosecuting the foreign policy of his

---

[61] See the statement in a previous case cited by Ritchie, J., in his leading opinion in *McMartin v. The Queen*, 1964 DLR LEXIS 1957, 46 DLR 2d 372. The statement related to "fresh evidence" but there is no reason why the principle involved cannot apply to new facts under the scheme of the Tribunal.

government, I cannot see that he was acting contrary to the principles of the Statute. Even if he was, I do not see that there was anything so inadmissibly incorrect in his activities as to outweigh the obvious relevance for this case of what he in fact did.

59. The statement of Judge Mballe of Cameroon is equally admissible as a new fact. It corroborates the substance of Ambassador Scheffer's statement in that it shows that, whatever was the reason, the delay was attributable to the decision-making process of the government of Cameroon; it was not the responsibility of the Tribunal or of any arm of the Tribunal.

(vi) The effect of the new facts

60. The appellant, along with others, was detained by Cameroon on an extradition request from Rwanda from 15 April 1996 to 21 February 1997. During that period of detention, he was also held by Cameroon at the request of the Prosecutor of the Tribunal for one month, from 17 April 1996 to 16 May 1996. In the words of the Appeals Chamber, on the latter day "the Prosecutor informed Cameroon that she only intended to pursue prosecutions against four of the detainees, *excluding* the Appellant".[62] Later, on "15 October 1996, responding to a letter from the Appellant complaining about his detention in Cameroon, the Prosecutor informed the Appellant that Cameroon was not holding him at her behest".[63] Today's judgment also shows that the appellant knew, at least by 3 May 1996, of the reasons for which he was held at the instance of the Prosecutor. These things being so, it appears to me that, from the point of view of proportionality, the Appeals Chamber focused on the subsequent period of detention at the request of the Tribunal, from 21 February 1997 to 19 November 1997, on which latter date the appellant was transferred from Cameroon to the Tribunal's detention unit in

---

[62] Decision of the Appeals Chamber, 3 November 1999, para. 5, original emphasis.
[63] Ibid., para. 7.

Arusha. How would the Appeals Chamber have viewed the appellant's detention during this period had it had the benefit of the new facts now available?

61. Regard being had to the jurisprudence, considered above, on the general judicial attitude to delay in the early phases of a criminal case, it is reasonable to hold that Rule 40*bis* contemplated a speedy transfer. If the transfer was effected speedily, no occasion would arise for considering whether the provision applied to extended detention in the place from which the transfer was to be made. In this case, the transfer was not effected speedily and the Appeals Chamber thought that the Tribunal (through the Prosecutor) was responsible for the delay, for which it accordingly looked for a remedy. In searching for this remedy, it is clear, from its decision read as a whole, that the central reason why it was moved to hold that the protection of that provision applied was because of its view that there was that responsibility. In this respect, I note that the appellant states that it "is the Prosecutor's failure to comply with the mandates of Rule 40 and Rule 40*bis* that compelled the Appeals Chamber to order the Appellant's release".[64] I consider that this implies that the appellant himself recognises that the real reason for the decision to release him was the finding by the Appeals Chamber that the Prosecutor (and, through her, the Tribunal) was responsible for the delay in Cameroon. It follows that if, as is shown by the statements of Ambassador Scheffer and Judge Mballe, the Tribunal was not responsible, the Appeals Chamber would not have had occasion to consider whether the provisions applied and whether the appellant should be released in accordance with Rule 40*bis*(H).

62. Thus, without disturbing the previous holding, made on the facts then known to the Appeals Chamber, that Rule 40*bis* was applicable to the Cameroon period (with which I do not agree), the conclusion is reached that, on the facts now known, the Appeals Chamber would not have held that the Rule applied to that period, with the

consequence that the Rule would not have been regarded as yielding the results which the Appeals Chamber thought it did.

63. Argument may be made on the basis of the previous holding (with which I disagreed) that Cameroon was the constructive agent of the Tribunal. On that basis, the contention could be raised that, even if the delay was caused by Cameroon and not by the Tribunal, the Tribunal was nonetheless responsible for the acts of Cameroon. However, assuming that there was constructive agency, such agency was for the limited purposes of custody pending speedy transfer. Cameroon could not be the Tribunal's constructive agent in respect of delay caused, as the new facts show, by Cameroon's acts over which the Tribunal had no control, which were not necessary for the purposes of the agency, and which in fact breached the purposes of the agency. Hence, even granted the argument of constructive agency, the new facts show that the Tribunal was not responsible for the delay as the Appeals Chamber thought it was on the basis of the facts earlier known to it.

64. There are other elements in the case, but that is the main one. Other new facts, mentioned in today's judgment, show that the violation of the appellant's rights in respect of delay between transfer and initial appearance was not as extensive as earlier thought; in any case, it did not involve the operation of a mandatory provision requiring release. The new facts also show that defence counsel acquiesced in the non-hearing of the habeas corpus motion on the ground that it had been overtaken by events. Moreover, as is also pointed out in the judgment, the matter has to be regulated by the approach taken by the Appeals Chamber in its decision of 3 November 1999. Paragraphs 106-109 of that decision made it clear that the conclusion reached was based not on a violation of any single right of the appellant but on an accumulation of violations of different rights. As

---

[64] Appellant's Response to Prosecutor's Motion for Review or Reconsideration, 17 February 2000, para.

has now been found, there are new facts which show that important rights which were thought to have been violated were not, and that accordingly there was not an accumulation of breaches. Consequently, the basis on which the Appeals Chamber ordered the appellant's release is displaced and the order for release vacated.

(vii) Conclusion

65. There are two closing reflections. One concerns the functions of the Prosecutor; the other concerns those of the Chambers.

66. As to her functions, the Prosecutor appeared to be of a mind that the independence of her office was invaded by a judicial decision that an indictment was dismissed and should not be brought back. She stated that she had "never seen" an instance of a prosecutor being prohibited by a court "from further prosecution ...".[65] In her submission, such a prohibition was at variance with her "completely independent" position and was "contrary to [her] duty as a prosecutor".[66] Different legal cultures are involved in the work of the Tribunal and it is right to try to understand those statements. It does appear to me, however, that the framework provided by the Statute of the Tribunal can be interpreted to accommodate the view of some legal systems that the independence of a prosecutor does not go so far as to preclude a court from determining that, in proper circumstances, an indicted person may be released and may not be prosecuted again for the same crime. The independence with which a function is to be exercised can be separated from the question whether the function is itself exercisable in a particular situation. A judicial determination as to whether the function may be exercised in a given situation is part of the relief that the court orders for a breach of the person's rights

---

36.
[65] Transcript, Appeals Chamber, 22 February 2000, p. 12.
[66] Ibid.

committed in the course of a previous exercise of those functions. This power of the courts has to be sparingly used; but it exists.

67. Also, the Prosecutor stated, in open court, that she had personally seen "5000 skulls" in Rwanda.[67] She said that the appellant was "responsible for the death of over ... 800,000 people in Rwanda, and the evidence is there. Irrefutable, incontrovertible, he is guilty. Give us the opportunity to bring him to justice."[68] Objecting on the basis of the presumption of innocence,[69] counsel for the appellant submitted that the Prosecutor had expressed herself in "a more aggressive manner than she should ..." and had "talked as if she was a depository of justice before" the Appeals Chamber.[70] I do not have the impression that the latter remark was entirely correct, but the differing postures did appear to throw up a question concerning the role of a prosecutor in an international criminal tribunal founded on the adversarial model. What is that role?

68. The Prosecutor of the ICTR is not required to be neutral in a case; she is a party. But she is not of course a partisan. This is why, for example, the Rules of the Tribunal require the Prosecutor to disclose to the defence all exculpatory material. The implications of that requirement suggest that, while a prosecution must be conducted vigorously, there is room for the injunction that prosecuting counsel "ought to bear themselves rather in the character of ministers of justice assisting in the administration of justice".[71] The prosecution takes the position that it would not prosecute without itself believing in guilt. The point of importance is that an assertion by the prosecution of its belief in guilt is not relevant to the proof. Judicial traditions vary and the Tribunal must seek to benefit from all of them. Taking due account of that circumstance, I nevertheless

---

[67] Ibid., p. 19.
[68] Ibid., p. 14.
[69] Ibid., p. 243.
[70] Ibid., pp. 138-139.

consider that the system of the Statute under which the Tribunal is functioning will support a distinction between an affirmation of guilt and an affirmation of preparedness to prove guilt. In this case, I would interpret what was said as intended to convey the latter meaning, but the strength with which the statements were made comes so close to the former that I consider it right to say that the framework of the Statute is sufficiently balanced and sufficiently stable not to be upset by the spirit of the injunction referred to concerning the role of a prosecutor. I believe that it is that spirit which underlies the remarks now made by the Appeals Chamber on the point.

69. As to the functions of the Chambers, whichever way it went, the decision in this case would call to mind that, on the second occasion on which *Pinochet's* case went to the British House of Lords, the presiding member of the Appellate Committee of the House noted that -

> [t]he hearing of this case ... produced an unprecedented degree of public interest not only in this country but worldwide. ... The conduct of Senator Pinochet and his regime have been highly contentious and emotive matters. ... This wide public interest was reflected in the very large number attending the hearings before the Appellate Committee including representatives of the world press. The Palace of Westminster was picketed throughout. The announcement of the final result gave rise to worldwide reactions.[72]

Naturally, however, (and as in this case), "the members of the Appellate Committee were in no doubt as to their function ...".[73]

70. Here too there has been interest worldwide, including a well-publicised suspension by Rwanda of cooperation between it and the Tribunal. On the one hand, the

---

[71] *R v Banks* [1916] 2 KB 621 at 623, per Avory J. In keeping with that view, it is indeed said that prosecuting counsel "should not regard himself as appearing for a party". See Code of Conduct of the Bar of England and Wales, para. 11(1).
[72] *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 2),* [1999] 1 All ER 577, HL, at pp. 580-581, per Lord Browne-Wilkinson.
[73] Ibid.

appellant has asked the Appeals Chamber to "disregard ... the sharp political and media reaction to the decision, particularly emanating from the Government of Rwanda".[74] On the other hand, the Prosecutor has laid stress on the necessity for securing the cooperation of Rwanda, on the seriousness of the alleged crimes and on the interest of the international community in prosecuting them.

71. These positions have to be reconciled. How? This way: the sense of the international community has to be respectfully considered by an international court which does not dwell in the clouds; but that sense has to be collected in the whole. The interest of the international community in organising prosecutions is only half of its interest. The other half is this: such prosecutions are regarded by the international community as also designed to promote reconciliation and the restoration and maintenance of peace, but this is possible only if the proceedings are seen as transparently conforming to internationally recognised tenets of justice. The Tribunal is penal; it is not simply punitive.

72. It is believed that it was for this reason that the Security Council chose a judicial method in preference to other possible methods. The choice recalls the General Assembly's support for the 1985 Milan Resolution on Basic Principles on the Independence of the Judiciary, paragraph 2 of which reads: "The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason".[75] That text, to which counsel for the appellant appealed,[76] is a distant but clear echo of the claim that the law of Rome was "of a sort that cannot be bent by influence, or broken by power, or

---

[74] Defence Reply to the Prosecutor's Motion for Review or Reconsideration, 6 January 2000, para. 53.
[75] See General Assembly Resolution 40/32 of 29 November 1985, para. 1, General Assembly Resolution 40/146 of 13 December 1985, para. 2, and Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan 26 August - 6 September 1985 (United Nations, New York, 1986), p. 60, para. 2.
[76] Transcript, Appeals Chamber, 22 February 2000, pp. 213-214.

spoilt by money". The timeless constancy of that ancient remark, cited for its substance rather than for its details, has in turn to be carried forward by a system of international humanitarian justice which was designed to function in the midst of powerful cross-currents of world opinion. Nor need this be as daunting a task as it sounds: it is easy enough if one holds on to the view that what the international community intended to institute was a system by which justice would be dispensed, not dispensed with.

73. But this view works both ways. In this case, there are new facts. These new facts both enable and require me to agree that justice itself has to regard the effect of the previous decision as now displaced; to adhere blindly to the earlier position in the light of what is now known would not be correct.

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

s/.

Mohamed Shahabuddeen

Dated this 31st day of March 2000
At The Hague
The Netherlands

688

ANNEX 14

689

HUMAN RIGHTS AND CRIMINAL JUSTICE

First Edition

by

Ben Emmerson Q.C.
of the Middle Temple, Barrister
and
Andrew Ashworth Q.C. (Hon.)
Vinerian Professor of English Law
University of Oxford

EDITORIAL ASSISTANT
Natasha Tahta
of Inner Temple, Barrister

LONDON
SWEET & MAXWELL
2001

necessary to restrict the publication of such an article for the purpose of "maintaining the authority and impartiality of the judiciary". The breadth of the margin was circumscribed by the fact that there was a substantial measure of common ground on the issue in the member states of the Council of Europe. However, the Austrian courts were entitled to guard against the risk that the public would become "accustomed to the regular spectacle of pseudo-trials in the news media [which] might in the long run have nefarious consequences for the acceptance of the courts as the proper forum for the determination of a person's guilt or innocence". Insofar as the applicant was quoting the words of the prosecutor in opening the case against the accused, he should have indicated that the words were a quotation, rather than appearing to adopt them as a statement of his own. Accordingly the Court was satisfied that the reasons given by the Austrian courts were sufficient, and that the journalist's right to freedom of expression was not—in the manner in which it was exercised—so great as to outweigh the adverse consequences for the authority of the Austrian judicial system.[94]

14–65 There appears to be no settled international consensus as to the relative weight to be attached to the competing factors at stake when it is alleged that media coverage may prejudice a fair trial. One influential decision is that of the Supreme Court of Canada in *Re Dagenais and Canadian Broadcasting Corporation*.[95] The accused, members of a Catholic order who were being tried for various offences of sexual and physical abuse against boys at a training school, sought to prevent the CBC from screening a programme that gave a fictional account of physical and sexual abuse at a Catholic institution. A publication ban was made by the courts, but the Supreme Court held that this failed to provide sufficient protection for the right of freedom of expression. The existing law of publication bans was held to go too far in protecting the right of fair trial over the right to freedom of expression, when the Charter accorded equal status to the two rights. Such a ban would only be in accordance with the Charter if there was a substantial risk to the fairness of the trial, which could not be avoided by other means (such as an adjournment, a change of venue, or strong judicial direction to jury), and if the deleterious effects of a ban were clearly outweighed by its benefits for the administration of justice.

14–66 That approach was considered but not followed by the New Zealand Court of Appeal in *Gisborne Herald v. Solicitor General*.[96] In that case a local newspaper had published details of a man recently arrested for wounding a police officer, stating that he was on bail on other charges and setting out his previous convictions. The New Zealand courts held that the newspaper was guilty of contempt, particularly because in a small community it was unlikely that people would forget what had been written. The Court of Appeal adopted the view that where freedom of expression and the right to a fair trial come into conflict it would be appropriate to curtail temporarily the former right in order to secure the latter. The alternative methods of ensuring a fair trial mentioned in the Canadian case of *Dagenais* were not considered to be adequate to guard against prejudice at the trial.

[94] Para. 56.

IV. *Protection of the Identity of Offenders*

14–66a In *Venables and Thompson v. News Group Newspapers and ors*,[97] the President of the Family Division held that the High Court had jurisdiction to grant a lifelong injunction against the world where there was compelling evidence that this was strictly necessary to protect the new identities to be given to the two juveniles convicted of the murder of James Bulger. The claimants were due to be released and there was clear evidence before the Court that attempts would be made to identify them in the community, leading to potentially fatal reprisal attacks. Whilst emphasising that the facts of the case were wholly exceptional, Butler-Sloss L.J. held that there was a positive obligation[98] on the courts, under Article 2 of the Convention, to take steps to prevent the dissemination of information which could expose their lives to unnecessary risk.

F. THE RIGHT TO AN INDEPENDENT AND IMPARTIAL TRIBUNAL

I. *General Principles*

14–67 Article 6(1) guarantees the right to trial by an independent and impartial tribunal. The concepts of independence and impartiality are closely linked, and it will often be appropriate to consider them together.[99] A tribunal must be independent of the executive, of the parties, and of the legislature.[1] In determining whether this requirement is met, regard must be had to the manner of appointment of a tribunal's members, their term of office, the existence of guarantees against outside pressures, and the question whether the body presents an appearance of independence.[2] It is doubtful whether the requirements of independence and impartiality can be waived, in view of their importance for confidence in the judicial system.[3] Thus, in *Bulut v. Austria*[4] the Court considered itself bound to examine the impartiality of a tribunal, irrespective of an alleged waiver by the applicant.[5]

14–68 Appointment by the executive or the legislature is permissible under Article 6, provided the appointees are free from influence or pressure when carrying out

January 8, 2001.

As to positive obligations generally see para. 2–53 above.

Findlay v. United Kingdom (1997) 24 E.H.R.R. 221, para. 73; *Incal v. Turkey* Judgment of June 9, 1998 (para. 65); *McGonnell v. United Kingdom* (2000) 30 E.H.R.R. 289.

Campbell and Fell v. United Kingdom (1985) 7 E.H.R.R. 165, para. 78; *Crociani and ors v. Italy* No. 8603/79 22 D.R. 147 (independence of Parliament) and *Demicoli v. Malta* (1992) 14 E.H.R.R. 47 (Comm. Rep. para. 40); *McGonnell v. United Kingdom* (2000) 30 E.H.R.R. 289.

Langborger v. Sweden (1990) 12 E.H.R.R. 416 para. 32; *Campbell and Fell v. United Kingdom* (1985) 7 E.H.R.R. 165, para. 78; *Findlay v. United Kingdom* (1997) 24 E.H.R.R. 22;. *Incal v. Turkey* (2000) 29 E.H.R.R. 449; *Piersack v. Belgium* (1983) 5 E.H.R.R. 169, para. 27; *Delcourt v. Belgium* (1979–80) 1 E.H.R.R. 355, para. 31; *Bryan v. United Kingdom* (1996) 21 E.H.R.R. 342, para. 37. As to the requirement for an appearance of independence and impartiality, see para. 14–73 below.

Oberschlick v. Austria (1995) 19 E.H.R.R. 389, para. 51 (waiver "in so far as it is permissible" must be established in unequivocal manner).

(1996) 24 E.H.R.R. 84, para. 30.

The Government's argument in this regard was also rejected in *McGonnell v. United Kingdom* (2000) 30 E.H.R.R. 289. *Cf.* the approach of the Court of Appeal to the question of waiver in *Locobail*

691

their adjudicatory role.[6] In order to establish a lack of independence in the manner of appointment, it is necessary to show that the practice of appointment as a whole was unsatisfactory, or alternatively, that the establishment of the particular court, or the appointment of the particular judge (or jury member) gave rise to a risk of undue influence over the outcome of the case.[7] A relatively short term of office has been held acceptable for unpaid judicial appointments.[8] However, a renewable four year appointment for a judge who is a member of a national security court was considered "questionable".[9] In *Starrs and Chalmers v. Procurator Fiscal*,[10] the High Court of Justiciary in Scotland held the post of temporary sheriff to be incompatible with Article 6 since the appointment was for a fixed period of 12 months, and its renewal was within the unfettered discretion of the executive. The Court considered that security of tenure was the cornerstone of judicial independence, and that such independence could be threatened not only by interference, but also by a judge being influenced, consciously or unconciously, by his hopes and fears about possible treatment by the executive in the future. In Canada there have been several challenges under the equivalent section of the Charter against part-time judges and justices of the peace, but the leading decision of the Supreme Court upholds the existing system of appointment and training and discounts fears (particularly in relation to part-time judges) about conflicts of interest arising from their other professional duties.[11]

14–69 In *Campbell and Fell v. United Kingdom*,[12] a case concerning disciplinary adjudications under the former prison visitors regime, the Court held that members of a tribunal must as a very minimum, be protected against removal *during* their term of office:

> "[T]he irremovability of judges by the executive during their term of office must in general be considered as a corollary of their independence and thus included in the guarantees of Article 6(1). However, the absence of a formal recognition of this irremovability in the law does not in itself imply lack of independence provided that it is recognised in fact and that the other necessary guarantees are present."

14–70 Independence requires that each judge and tribunal member be free from outside pressure, whether from the executive, legislature, parties to the case or other members of the court or tribunal. Thus where a tribunal's members "include a person who is in a subordinate position, in terms of his duties and the organisation of his service, *vis à vis* one of the parties, litigants may entertain a legitimate doubt about that person's independence."[13] In *Findlay v. United Kingdom*[14] the Court found that there were objectively justified doubts as to the independence and impartiality of a court martial, where a "convening officer" was responsible for arranging the court martial, and for appointing the members of the court, the

[6] *Campbell and Fell v. United Kingdom* (1985) 7 E.H.R.R. 165, para. 79; *Crociani v. Italy* No. 8603/79 22 D.R. 147.
[7] *Zand v. Austria* (1978) 15 D.R. 70 at 81 (para. 78).
[8] *Campbell and Fell v. United Kingdom* (1984) 7 E.H.R.R. 165, para. 80 (*e.g.* a term of three years for prison visitors).
[9] *Incal v. Turkey* (2000) 29 E.H.R.R. 449.
[10] *The Times*, December 17, 1999, [2000] H.R.L.R. 191; 2000 S.L.T. 42.
[11] See *Quebec (AG) v. Lippe* (1991) 64 C.C.C. (3d) 513, and other authorities discussed by D. Stuart, *Charter Justice in Canadian Criminal Law* (2nd ed., 1996), pp 349–354.
[12] (1985) 7 E.H.R.R. 165, para. 80

prosecuting and defending officers (who were all subordinate in rank, and fell within his chain of command). He also had the function of "confirming" the conviction and sentence imposed by the court.

14–71 The requirement for an impartial tribunal embodies the protection against actual and presumed bias. The Court has adopted a dual test, examining first the evidence of actual bias, and then making an objective assessment of the circumstances alleged to give rise to a risk of bias.[15] In *Hauschildt v. Denmark*[16] the Court expressed the test in these terms:

> "The existence of impartiality for the purpose of Article 6(1) must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect."[17]

14–72 The onus of establishing actual bias on the subjective test is a heavy one.[18] There is a presumption that the court has acted impartially, which must be displaced by evidence to the contrary.[19] In applying the objective test, the question is whether legitimate doubt as to the impartiality of the tribubal can be "objectively justified".[20] The Court will inquire whether the tribunal offered guarantees sufficient to exclude such a doubt,[21] or whether there are "ascertainable facts" that may raise doubts as to a tribunal's impartiality.[22] In making an assessment of a tribunal's impartiality, "even appearances may be important".[23] Where there is legitimate doubt as to a judge's impartiality, he must withdraw from the case.[24]

14–73 An appearance of independence and impartiality is important because "what is at stake is the confidence which the courts in a democratic society must inspire in the public".[25] The applicable test has been described in the following ways: whether the public is "reasonably entitled" to entertain doubts as to the independence or impartiality of the tribunal[26]; whether there are "legitimate grounds

[13] *Piersack v. Belgium* (1983) 5 E.H.R.R. 169, para. 30 applied in *Ferrantelli and Santangelo v. Italy* (1997) 23 E.H.R.R. 288, para. 56; *Bulut v. Austria* (1997) 24 E.H.R.R. 84, para. 31; *Thomann v. Switzerland* (1997) 24 E.H.R.R. 553, para. 30.
[14] (1990) 12 E.H.R.R. 266.
[15] *Ibid.*, at para. 46.
[16] The test adopted by the Court is that the members of a tribunal must be "subjectively free of personal prejudice or bias": *Findlay v. United Kingdom* (1997) 24 E.H.R.R. 221, para. 73.
[17] *Hauschildt v. Denmark* (1989) 12 E.H.R.R. 266, para. 47; *Piersack v. Belgium* (1983) 5 E.H.R.R. 169, para. 30(a); *Thomann v. Switzerland* (1997) 24 E.H.R.R. 553, para. 31.
[18] *Hauschildt v. Denmark* (1990) 12 E.H.R.R. 266, para. 48; *Ferrantelli and Santangelo v. Italy* (1997) 23 E.H.R.R. 288, para. 58; *Incal v. Turkey* Judgment June 9, 1998 (para. 71); *Castillo Agar v. Spain* (2000) 30 E.H.R.R 827, para. 46.
[19] *Piersack v. Belgium* (1983) 5 E.H.R.R. 169, para. 30; *Incal v. Turkey* (2000) 29 E.H.R.R. 449, para. 68.
[20] See for example, *Hauschildt v. Denmark* (1990) 12 E.H.R.R. 266, para. 48.
[21] *Piersack v. Belgium* (1983) 5 E.H.R.R. 169, para. 30; *Sramek v. Austria* (1985) 7 E.H.R.R. 35, para. 42; *Findlay v. United Kingdom* (1997) 24 E.H.R.R. 221, para. 76.
[22] *Hauschildt v. Denmark* (1990) 12 E.H.R.R. 266, paras 46, 48; *Castillo Algar v. Spain* Judgment September 28, 1998, para. 45. As to the test to be applied in English law, see *Locobail (UK) Ltd v. Bayfield Properties Ltd and anor.* [2000] 1 All E.R. 65 (C.A.) (guidance on judicial impartiality).
[23] *Incal v. Turkey* (2000) 29 E.H.R.R. 449, para. 71; *Fey v. Austria* (1993) 16 E.H.R.R. 387, para. 30

691

for fearing" that the tribunal is not independent or impartial[27]; whether "there ar ascertainable facts that may raise doubts" as to independence or impartiality[28]; whether such doubts can be "objectively justified".[29]

14–74 The fact that a trial judge or appeal judge has made pre-trial decisions in a ca including those concerning detention on remand, cannot in itself be held t justify fears as to the judge's impartiality, since:

> "[Q]uestions which the judge has to answer when taking such pre-trial decisions are no the same as those which are decisive for his final judgment. When taking a decision o detention on remand and other pre-trial decisions of this kind the judge summarily assesses the available data in order to ascertain whether *prima facie* the police have grounds for their suspicion; when giving judgment at the conclusion of the trial he must assess whether the evidence that has been produced and debated in court suffices fo finding the accused guilty. Suspicion and formal finding of guilt are not to be treated a being the same."[30]

14–75 Where however, the issues determined at the pre-trial stage are closely related to those which arise at a final determination, the court's impartiality is capable of appearing open to doubt.[31] While it is not contrary to Article 6(1) for the sam judge to take part in different proceedings against several persons accused of th same offence,[32] the position is otherwise where the judge has previously expressed views suggesting that he has formed an opinion as to the accused' guilt.[33]

14–76 There is no general rule resulting from the obligation to be impartial that superior court which sets aside a decision of an inferior tribunal is bound to send the case back to a differently constituted bench.[34] The same principle applie where the first trial was held *in absentia* since:

> "[J]udges who retry in the defendant's presence a case that they have first had to try *absentia* on the basis of the evidence that they had available to them at the time are in no way bound by their first decision. They undertake a fresh consideration of the whol case; all the issues raised by the case remain open and this time are examined i adversarial proceedings with the benefit of the more comprehensive information th may be obtained from the appearance of the defendant in person . . . [I]f a court had alter its composition each time that it accepted an application for a retrial from a perso who had been convicted in his absence, such person would be placed at an advanta in relation to defendants who appeared at the opening of their trial, because this wou

[27] *Langborger v. Sweden* (1990) 12 E.H.R.R. 416, para. 35; *Procola v. Luxembourg* (1996) E.H.R.R. 193, para. 45; *McGonnell v. United Kingdom* (2000) 30 E.H.R.R. 289.
[28] *Castillo Algar v. Spain* (2000) 30 E.H.R.R. 827.
[29] *Hauschildt v. Denmark* (1990) 12 E.H.R.R. 266, para. 48.
[30] *Hauschildt v. Denmark* (1990) 12 E.H.R.R. 266, para. 50. See also *Bulut v. Austria* (1997) E.H.R.R. 84, paras 33–34 (role of judge in pre-trial proceedings restricted to questioning of t witnesses, but no assessment as to applicant's involvement in offence—no objective justification lack of impartiality); *Sainte-Marie v. France* (1993) 16 E.H.R.R. 116, paras 32–34; *Fey v. Aus* (1993) 16 E.H.R.R. 387, paras 31–33; *Padovani v. Italy* Judgment February 26, 1993, para. *Nortier v. Netherlands* (1994) 17 E.H.R.R. 273, paras 33–35.
[31] *Hauschildt v. Denmark* (1990) 12 E.H.R.R. 266, paras 51–52.
[32] *Ferrantelli and Santangelo v. Italy* (1997) 23 E.H.R.R. 288 (Comm. Rep.) para. 57.
[33] *Ferrantelli and Santangelo v. Italy* (1997) 23 E.H.R.R. 288, paras 59–60.

enable the former to obtain a second hearing of their case by different judges at the same level of jurisdiction."[35]

14–77 Where a trial judge was previously the head of the section of the public prosecutor's department which had investigated the applicant's case and commenced proceedings against him, the Court, not surprisingly, held that the impartiality of the 'tribunal' which had to determine the merits . . . was capable of appearing open to doubt".[36] It was not necessary for the applicant to establish that the judge had been directly involved in the case:

> "In order that the courts inspire the confidence which is indispensable, account must also be taken of questions of internal organisation. If an individual, after holding in the public prosecutor's department an office whose nature is such that he may have to deal with a given matter in the course of his duties, subsequently sits in the same case as a judge, the public are entitled to fear that he does not offer sufficient guarantees of impartiality."[37]

14–78 However, the court considered that;

> "[I]t would be going too far . . . to maintain that former judicial officers in the public prosecutor's department were unable to sit on the bench in every case that had been examined initially by that department, even though they had never had to deal with the case themselves. So radical a solution, based on an inflexible and formalistic conception of the unity and indivisibility of the public prosecutor's department would erect a virtually impenetrable barrier between that department and the bench. It would lead to an upheaval in the judicial system of several Contracting States where transfers from one of those offices to the other are a frequent occurrence. Above all, the mere fact that a judge was once a member of the public prosecutor's department is not a reason for fearing that he lacks impartiality".[38]

14–79 Where a judge has a financial or personal interest in the case, a party is objectively justified in fearing lack of impartiality.[39] Any direct involvement in the passage of legislation or the enactment of executive rules is likely to be sufficient to cast doubt on the judicial impartiality of a person subsequently called upon to determine a dispute as to the existence of reasons for permitting variation from the legislation or rules at issue. In *McGonnell v. United Kingdom*[40] the Bailiff of Guernsey, when sitting in his judicial capacity, was held not to be "independent" since he had performed a presiding role in the local legislature when it adopted the measure in dispute. In the light of the *McGonnell* decision, it is open to doubt whether the Lord Chancellor, or any senior judge, who has participated in Parliamentary debates on a Bill, can subsequently sit on an appeal in which the interpretation or application of the resulting legislation is in issue.

Thomann v. Switzerland (1997) 24 E.H.R.R. 553 at 556–557 (paras 35–36).
Piersack v. Belgium (1983) 5 E.H.R.R. 169 at 181, para. 31.
Piersack v. Belgium (1983) 5 E.H.R.R. 169 at 180 (para. 30(d)).
Piersack v. Belgium (1983) 5 E.H.R.R. 169 at 179 (para. 30(d)).
See Demicoli v. Malta (1992) 14 E.H.R.R. 47 (paras 36–42) (members of the House of Representatives who were the subject of alleged offence of breach of parliamentary privilege were among those who sat in Judgment); *Langborger v. Sweden* (1990) 12 E.H.R.R. 416, para. 35 (lay members of tribunal adjudicating on deletion of clause in tenancy agreement were nominated by organisations having an interest in the clause's continued existence)

14–80 The test of judicial bias in domestic law has recently been revisited by the House of Lords and by the Court of Appeal. In *R. v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No.2)*,[41] the House of Lords held that Lord Hoffman's connection with Amnesty International, which had intervened in the appeal, violated the principle that a person may not be a judge in his own cause. That principle goes wider than financial interests, and encompasses the promotion of a cause in which the judge is involved with one of the parties. Following the *Pinochet* ruling there was a sharp increase in the number of applications for recusal, and in *Locobail (UK) Ltd v. Bayfield Properties Ltd and another* the Court of Appeal gave guidance, in a series of linked appeals, on the approach to be adopted where it is alleged that a judge has a personal interest in the outcome of the proceedings.[42] Referring to Article 6, the Court of Appeal held that the right to a fair hearing by an impartial tribunal was fundamental. This pointed to a rule of automatic disqualification when a judge had a direct pecuniary or proprietary interest in the subject-matter of a proceeding, however small,[43] and where the matter at issue was concerned with the promotion of a cause and the judge is involved with one of the parties seeking to promote the cause.[44] In other cases, there was no rule of automatic disqualification. The question was whether a reasonable, objective and informed person, would on the correct facts, reasonably apprehend that the judge will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel.[45] The religion, ethnic or national origin, gender, age, class, means or sexual orientation of a tribunal member could not conceivably form the basis of a sound objection. Nor could an objection generally be based on matters of social, educational, service or employment background or history, nor that of the tribunal member's family. Other factors which would generally be irrelevant were previous political associations, previous judicial decisions, extra-judicial comment, previous instructions to act for or against any party, solicitor or advocate engaged in the case, or membership of the same Inn of Court, circuit, local Law Society or chambers. By contrast a real danger of bias might arise from personal friendship or animosity between the tribunal member and any other person involved in the case, or a close acquaintance (especially where credibility is in issue). It would generally be appropriate for a tribunal member to recuse himself if, in a previous case, he had rejected the evidence of a witness in such outspoken terms as to throw doubt on his ability to approach that witness's evidence in subsequent proceedings with an open mind, if he had expressed views on any question at issue in the case in such strong and unbalanced terms as to throw doubt on his ability to try the case with an objective

[41] [2000] 1 A.C. 119; see also the High Court of Australia in *Webb v. R.* (1994) 181 C.L.R. 41, where the test was whether the judge's interests or affiliations would give rise to a suspicion, in a fair-minded and informed member of the public, that the judge might be biased.

[42] [2000] 1 All E.R. 65 (C.A.). As to police disciplinary proceedings, see *Regina (Bennion) v. Chief Constable of Merseyside Police, The Times*, June 12, 2001 (no breach of Article 6 where the Chief Constable adjudicated on disciplinary proceedings under Regulation 13(1) of the Police (Disciplinary) Regulations 1985, despite the fact that the officer being disciplined had brought a sex discrimination claim against the relevant force in which the chief constable was cited as defendant. The disciplinary function of a chief constable was to be distinguished from that of a judge.

[43] See *Dimes v. The Proprietors of the Grand Junction Canal* (1852) 3 H.L. Cas 759.

[44] *R. v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No.2)* [1999]

mind; or if, for any reason, there were real grounds to doubt his ability to ignore extraneous considerations, prejudices and predilections, and bring an objective mind to bear on the issues. In any case of doubt, that doubt was to be resolved in favour of recusal. If an appropriate disclosure has been made to the parties, and no objection is taken, the party affected will be taken to have waived his right to complain (other than in cases requiring automatic disqualification).[46]

II. *Jury Bias*

14–81 The requirement of independence and impartiality applies equally to juries.[47] Article 6(1) imposes an obligation on every court to check whether, as constituted, it is an "impartial tribunal" within the meaning of that provision when there is an allegation of bias that does not immediately appear manifestly devoid of merit.[48] The test applied in Strasbourg appears to coincide, in broad terms, with the rule established by the House of Lords in *R. v. Gough*.[49] Prior to *Gough* there was inconsistent domestic authority as to whether the test was one of actual bias (which was the test applied to jurors) or appearance of bias (which was the test applied to magistrates). The House of Lords ruled that the same test should apply to both. The court should inquire into the circumstances, and then ask itself whether there was "a real danger" of bias on the part of the relevant member of the tribunal in the sense that he might unfairly regard with favour or disfavour the case of one of the parties. Stating the test in terms of "real danger" rather than "real likelihood" was intended to ensure that the court is thinking in terms of possibility rather than probability.

14–82 The standard adopted in Strasbourg appears to have strengthened over the years, consistent with the Court's emphasis on the increasing sensitivity of the public to an appearance of fairness. In *X v. Norway*[50] the Commission declared inadmissible a complaint that a jury member was the godchild of an interested party. Similarly, in *X v. Austria*[51] a complaint that the jury foreman was employed by the organisation which owned the shop where a robbery had taken place was also rejected by the Commission. But in *Holm v. Sweden*[52] the Court found a violation of Article 6(1) where a number of jury members were also members of a political party that owned a publishing company which was one of the defendants in the case. In *Pullar v. United Kingdom*,[53] a Scottish case, the defendant discovered after his conviction that one of the jurors who had tried him was an employee of the principal prosecution witness, and was acquainted with another of the prosecution witnesses. Surprisingly, the Court held, by five votes to four, that there was no evidence of prejudice to the defence, and no violation of Article 6(1). The fact that the juror would have been discharged if the trial court had been

[46] This approach to waiver does not appear to sit comfortably with the approach of the European Court of Human Rights: see para. 14–67 above.

[47] *Pullar v. United Kingdom* (1996) 22 E.H.R.R. 391, para. 30.

[48] *Remli v. France* (1996) 22 E.H.R.R. 253, paras 46–48.

[49] [1993] A.C. 646; For analysis, see I. Bing, "Curing Bias in Criminal Trials," [1998] Crim. L.R. 148. In *Weeks and Porter v. Magill* [2000] 2 W.L.R. 1420 (C.A.) Schiemann L.J. observed that "[t]he Convention caselaw does not suggest that the test in *R. v. Gough* is either wrong or inadequate".

[50] (1970) 35 C.D. 37 at 49.

[51] (1978) 13 D.R. 38.