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SCSL-04-14-AR73B-663

(18855 - 18943)

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

Before: Justice George Gelaga King, Presiding
Justice Geoffrey Robertson
Justice Emmanuel Ayoola
Justice Renate Winter
Justice Raja Fernando

Registrar: Mr. Lovemore G. Munlo SC

Date filed: 13 July 2006

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

Case No. SCSL-04-14-AR73(B)

PUBLIC

PROSECUTION RESPONSE TO FOFANA NOTICE OF APPEAL OF THE SUBPOENA DECISION AND SUBMISSIONS IN SUPPORT THEREOF

Office of the Prosecutor:
Mr. Christopher Staker
Mr. Joseph F. Kamara
Ms. Nina Jørgensen

Court Appointed Defence Counsel for Norman
Dr. Bu-Buakei Jabbi
Mr. John Wesley Hall, Jr.
Mr. Alusine Sani Sesay

Court Appointed Defence Counsel for Fofana
Mr. Victor Koppe
Mr. Arrow J. Bockarie
Mr. Michiel Pestman

Court Appointed Defence Counsel for Kondewa
Mr. Charles Margai
Mr. Yada Williams
Mr. Ansu Lansana
Ms. Susan Wright

I. INTRODUCTION

1. The Prosecution files this Response to the "Fofana Notice of Appeal of the Subpoena Decision and Submissions in Support Thereof" ("**Fofana Appeal**"), filed on behalf of the Second Accused ("**Defence**") on 6 July 2006.[1]
2. The Defence appeals against the Trial Chamber's 14 June 2006 decision, denying a Defence motion for the issuance of a subpoena to H.E. Alhaji Dr Ahmad Tejan Kabbah, President of the Republic of Sierra Leone ("**Impugned Decision**").[2] The Impugned Decision has attached to it a separate concurring opinion by Justice Itoe ("**Separate Concurring Opinion**") and a dissenting opinion by Justice Thompson ("**Dissenting Opinion**").
3. The Trial Chamber granted the Defence leave to appeal against the Impugned Decision on 28 June 2006 ("**Decision on Leave to Appeal**").[3]
4. The original motion requesting the issuance of a subpoena ("**Motion**") was filed on 15 December 2005,[4] with the Prosecution response, response of the Attorney-General, and Defence reply filed on 13 January 2006[5], 23 January 2006[6] and 18 January 2006[7] respectively. An oral hearing was held on 14 February 2006.[8]

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[1] *Prosecutor v Norman, Fofana, Kondewa*, SCSL-2004-14-T-648, "Fofana Notice of Appeal of the Subpoena Decision and Submissions in Support Thereof", 6 July 2006 ("Appeal").

[2] *Prosecutor v Norman, Fofana, Kondewa*, SCSL-2004-14-T-617, "Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena ad Testificandum to H. E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone", 14 June 2006 ("**Impugned Decision**"), and "Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe on the Chamber Majority Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena ad Testificandum to H. E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone", 14 June 2006 ("**Separate Concurring Opinion**"), and "Dissenting Opinion of Hon. Justice Bankole Thompson on Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena ad Testificandum to H. E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone", 14 June 2006 ("**Dissenting Opinion**").

[3] *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-15-T-643, "Decision on Motions by the First and Second Accused for Leave to Appeal the Chamber's Decision on their Motions for the Issuance of a Subpoena to the President of the Republic of Sierra Leone", 28 June 2006 ("**Decision on Leave to Appeal**").

[4] *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-522, "Fofana Motion for Issuance of a Subpoena Ad Testificandum to President Ahmed Tejan Kabbah", 15 December 2005 ("**Motion**").

[5] *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-528, "Prosecution Response to Fofana Motion for Issuance of a Subpoena ad Testificandum to President Ahmad Tejan Kabbah", 13 January 2006 ("**Response to Motion**").

[6] *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-541, "The Response of the Attorney-General and Minister of Justice to the Applications Made by Moinina Fofana and Samuel Hinga Norman for the Issuance of a Subpoena ad Testificandum to President Alhaji Dr Ahmad Tejan Kabbah", 23 January 2006.

[7] *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-533, "Reply to Prosecution Response to Fofana Motion for Issuance of a Subpoena ad Testificandum to President Ahmed Tejan Kabbah", 18 January 2006 ("**Reply to Motion**").

[8] *Prosecutor v Norman, Fofana, Kondewa*, Trial Transcript, 14 February 2006.

5. The Prosecution submits that the Appeal should be denied, for the reasons given below.

II. URGENCY OF THE APPEAL

6. The Prosecution would request that the Appeals Chamber deal with the Appeal as a matter of urgency, in view of the present stage of the proceedings before the Trial Chamber. After the parties have completed the presentation of all of their evidence, the case cannot be closed unless and until this appeal has been decided.

III. STANDARD OF REVIEW ON APPEAL

7. Under the Statute and Rules of the Special Court, an appeal may be allowed on the basis of:
   (1) an error on a question of law invalidating the decision,
   (2) an error of fact which has occasioned a miscarriage of justice, and/or
   (3) a procedural error.[9]
8. The standard of review to be applied by the Appeals Chamber in an appeal against a decision of the Trial Chamber is different for each of these different types of alleged errors. These standards are now well-established in the case law of the ICTY and ICTR.
9. Where the appellant alleges an **error of law**, the Appeals Chamber, as the final arbiter of the law of the Court, must determine whether such an error of substantive or procedural law was in fact made.[10] In other words, the Appeals Chamber accords no particular deference to the findings of law made by the Trial Chamber. However, not every error of law leads to a reversal or revision of a decision of a Trial Chamber: the Appeals Chamber is empowered only to reverse or revise a Trial Chamber's decision when there is an error of law "invalidating the decision".[11]
10. Where the appellant alleges an **error of fact**, the Appeals Chamber will not conduct an independent assessment of the evidence admitted at trial, or undertake a *de novo* review of the evidence.[12] It is established that:

> ... the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a

[9] See Article 20 of the Special Court Statute and Rule 106 of the Rules of Procedure and Evidence.
[10] *Prosecutor v. Kunarac et al.*, IT-96-23 and IT-96-23/1-A, Judgement, Appeals Chamber, 12 June 2002 ("*Kunarac* Appeal Judgement"), para. 38.
[11] *Kunarac* Appeal Judgement, para. 38.
[12] *Prosecutor v. Delalić et al. (Čelebići case), Judgement*, IT-96-21-A, Appeals Chamber, 20 February 2001, paras. 203–204.

> margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is 'wholly erroneous' may the Appeals Chamber substitute its own finding for that of the Trial Chamber. It must be borne in mind that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.[13]

11. In the case of an alleged **procedural error**, it is necessary to distinguish between cases where it is alleged that there has been a non-compliance with a *mandatory procedural requirement* of the Statute and the Rules, and cases where it is alleged that the Trial Chamber has erroneously exercised a *discretionary power*. Errors of the former type will not necessarily invalidate the Trial Chamber's decision, if there has been no prejudice to the Defence.[14] In cases where it is alleged that the Trial Chamber has erroneously exercised its discretion, the issue on appeal is not whether the decision is correct, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision. Provided that the Trial Chamber has properly exercised its discretion, its decision will not be disturbed on appeal, even though the Appeals Chamber itself may have exercised the discretion differently.[15] The test for determining whether the Trial Chamber has erred in the exercise of a discretion is whether the Trial Chamber "has misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion, or that it has given weight to extraneous or irrelevant considerations, or that it has failed to give weight or sufficient weight to relevant considerations, or that it has made an error as to the facts upon which it has exercised its

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[13] *Prosecutor v. Kupreskic et al.*, IT-95-16-A, Appeal Judgement, Appeals Chamber, 23 October 2001 ("*Kupreskic* Appeal Judgement"), paras. 30–32; see also *Kunarac* Appeal Judgement, paras. 39–42; *Prosecutor v. Delalic et al. (Celebici* case*)*, IT-96-21-A*bis*, Judgement on Sentence Appeal, Appeals Chamber, 8 April 2003 ("*Celebici* Sentencing Appeal Judgement"), paras. 54–60; *Prosecutor v. Bagilishema,* ICTR-95-1A-A, Judgement (Reasons), Appeals Chamber, 13 December 2002 (3 July 2002) ("*Bagilishema* Appeal Judgement"), paras. 11–14; *Nderubumwe Rutaganda v. Prosecutor,* ICTR-96-3-A, Judgement, Appeals Chamber, 26 May 2003 ("*Rutaganda* Appeal Judgement"), paras. 22–23; *Prosecutor v. Krnojelac,* IT-97-25-A, Judgement, Appeals Chamber, 17 September 2003 ("*Krnojelac* Appeal Judgement"), paras. 11–12; *Prosecutor* v. *Vasiljevic,* IT-98-32-A, Judgement, Appeals Chamber, 25 February 2004 ("*Vasiljevic* Appeal Judgement"), para. 7; *Prosecutor v. Tadic,* IT-94-1-A, Judgement, Appeals Chamber, 15 July 1999 ("*Tadic* Appeal Judgement"), para. 64; reaffirmed in *Prosecutor v. Aleksovski,* IT-95-14/1-A, Judgement, 24 March 2000 ("Aleksovski Appeal Jugement") , para. 63.

[14] See, e.g., *Celebici* Appeal Judgement, paras. 630–639. See also *Prosecutor v. Krstic,* IT-98-33-A, Judgement, Appeals Chamber, 19 April 2004, paras. 187–188 (holding that the prosecution's failure to comply with its disclosure obligations did not warrant a retrial where no prejudice to the accused was established).

[15] See, e.g., *Prosecutor v. Milosevic,* IT-02-54-AR73, "Reasons for Refusal of Leave to Appeal from Decision to Impose Time Limit", Appeals Chamber, 16 May 2002, para. 14; *Bagosora et al. v. Prosecutor,* ICTR-98-41-A, "Decision: Interlocutory Appeal from Refusal to Reconsider Decisions Relating to Protective Measures and Application for a Declaration of "Lack of Jurisdiction", Appeals Chamber, 2 May 2002, para. 10.

discretion".[16]. In simple terms, the question is whether the exercise of the discretion was "reasonably open" to the Trial Chamber,[17] or whether, conversely, the Trial Chamber "abused its discretion".[18]

12. The Prosecution submits that the power of a Trial Chamber to issue a subpoena is a ***discretionary*** power.[19] The question of the limits of the power of the Trial Chamber to issue a subpoena is a question of law, subject to the standard of review in paragraph 9 above. How the Trial Chamber exercises its power within those limits is a matter within the discretion of the Trial Chamber. Accordingly, any appeal against the exercise of such discretion is subject to the standard of review in paragraph 11 above. In any such appeal, the question on appeal is not whether the requested subpoena should or should not be granted. The question is whether the decision of the Trial Chamber to dismiss or allow a motion for a subpoena was a decision that was reasonably open to the Trial Chamber on the basis of the material then before it, or whether the Trial Chamber abused its discretion in the sense described above.

IV. PRINCIPLES OF PRECEDENT

13. The principles of precedent are also well-established in the case law of the ICTR and ICTY. Although Appeals Chambers of those Tribunals are not strictly bound by their

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[16] *Prosecutor v Milosevic,* IT-99-37-AR73, "Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder", Appeals Chamber, 18 April 2002, para. 5. See also *Prosecutor v Milosevic,* Case No. IT-02-54-AR73.6, "Decision on the Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case", Appeals Chamber, 20 January 2004, para. 7; *Prosecutor v Bizimungu,* ICTR-99-50-AR50, "Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment", Appeals Chamber, 12 Feb. 2004, para. 11; *Prosecutor v Karemera,* ICTR-98-44-AR73, "Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File Amended Indictment", Appeals Chamber, 19 December 2003, para. 9.

[17] *Celebici* Appeal Judgement, paras. 274–275 (see also para. 292, finding that the decision of the Trial Chamber not to exercise its discretion to grant an application was "open" to the Trial Chamber).

[18] *Ibid.*, para. 533 ("... the Appeals Chamber recalls that it also has the authority to intervene to exclude evidence, in circumstances where it finds that the Trial Chamber abused its discretion in admitting it"), and see also at para. 564 (finding that there was no abuse of discretion by the Trial Chamber in refusing to admit certain evidence, and in refusing to issue a subpoena that had been requested by a party at trial).

[19] *Prosecutor v. Brđanin and Talić,* IT-99-36-AR73.9, "Decision on Interlocutory Appeal", IT-99-36-AR73.9, Appeals Chamber, 11 December 2002, para. 31; *Celebici* Appeal Judgement, paras. 556-564; *Prosecutor v. Naletilić and Martinović, Judgement,* IT-98-34-A, Appeals Chamber, 3 May 2006,paras. 243-248. See also, for instance, *Prosecutor v. Bagosora et al.,* ", ICTR-98-41-T,"Decision on Prosecutor's Request for a Subpoena Regarding Witness BT", Trial Chamber, 25 August 2004, para. 5; *Prosecutor v. Halilovic,* IT-01-48-AR73, "Decision on the Issuance of Subpoenas", 21 June 2004 ("***Halilović* Appeal Decision**"), para. 6; *Prosecutor v. Milosevic,* IT-02-54-T, "Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schroeder", 9 December 2005 ("***Milošević* Trial Decision**"), para. 35.

own previous decisions, they will depart from such previous decisions only exceptionally, where there are cogent reasons in the interests of justice for so doing, and only after the most careful consideration by the Appeals Chamber.[20]

14. The Prosecution submits that although decisions of the Appeals Chambers of the ICTY and ICTR are not strictly binding on the Appeals Chamber of the Special Court, they should be accorded a similar deference where they deal with exactly the same issue as that before the Appeals Chamber of the Special Court. That is, departure from a directly applicable decision of the Appeals Chamber of the ICTY or ICTR should only occur where there are cogent reasons in the interests of justice. The reasons for this conclusion are:

(1) Article 20(3) of the Special Court's Statute expressly provides that "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".

(2) When the Special Court was established, one of the options considered was to have a common Appeals Chamber for the ICTY, ICTR and the Special Court. This would have been "a guarantee of developing a coherent body of law".[21] However, this was considered to be legally unsound and practically not feasible. The solution adopted instead, which involved the inclusion of Articles 14(1) and 20(3) in the Statute of the Special Court, was considered to be a means by which, "in practice, the same result may be achieved by linking the jurisprudence of the Special Court to that of the International Tribunals".[22]

(3) If different international criminal courts, who have very similarly worded Statutes and Rules, were to adopt significantly different approaches to the same legal issues, this would result in an inconsistency of treatment of the accused before the

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[20] *Aleksovski* Appeal Judgement, paras. 107–109 (and see the discussion at paras. 89–111 generally). See also *Prosecutor v. Furundzija,* IT-95-17/1-A, Judgement, Appeals Chamber, 21 July 2000 ("*Furundzija* Appeal Judgement"), para. 249; *Celebici* Appeal Judgement, paras. 8, 26, 54–55, 84, 117, 121, 129, 136, 150, 174; *Kupreskic* Appeal Judgement, paras. 418, 426; *Prosecutor v. Akayesu,* ICTR-96-4-A, Judgement, Appeals Chamber, 1 June 2001 ("*Akayesu* Appeal Judgement"), fn. 805; *Musema v. Prosecutor,* ICTR-96-13-A, Judgement, Appeals Chamber, 6 Nov. 2001 ("*Musema* Appeal Judgement"), para. 15.

[21] United Nations, Security Council, Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, para. 41

[22] *Ibid.*, para. 41; and see generally paras. 40-46.

different courts, notwithstanding that international criminal law is a body of law of universal international application. Such inconsistency of treatment may have the potential to undermine the credibility and prestige of international criminal justice. It might of itself also constitute a form of injustice. In the area of criminal law, consistency and predictability in the application of the law is of particular importance.

(4) Deference by one international criminal court to decisions of the Appeals Chamber of other international criminal courts where they are directly on point economises judicial resources. In the absence of such deference, issues that are well settled in one international criminal court would need to be reargued afresh before every new international criminal court. One of the functions of courts is to establish legal certainty, by clarifying the law through authoritative precedents. The development of international criminal law as a coherent body of law would be undermined if every international criminal court went its own way.

15. For the same reasons, it is to be hoped that the ICTY and ICTR would adopt a similar approach to previous decisions of the Appeals Chamber of the Special Court.

16. This is not to suggest that the Special Court should "slavishly" follow the ICTY and ICTR in minute details of practice (a matter to which paragraph 9 of the Defence Appeal refers). However, it is to say that on important issues of principle, the case law of the ICTY, ICTR and the Special Court should remain coherent. The limits of a Trial Chamber's discretion in determining whether or not to grant a subpoena is an important issue of principle, rather than a minute detail of practice.

V. THE DEFENCE'S FIRST GROUND OF APPEAL

17. The Defence's first ground of appeal is that:

> The Trial Chamber applied an unduly restrictive standard for the issuance of a subpoena pursuant to Rule 54 of the Rules of Procedure and Evidence ["**Rules**"], such that one of Mr. Fofana's fundamental rights under the Statute has been unnecessarily limited by considerations not wholly applicable to this tribunal.

18. Rule 54 of the Special Court's Rules states:

> At the request of either party or of its own motion, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

19. The Trial Chamber found that the words "necessary" and "purposes" in this Rule had the effect of imposing two requirements for the issuance of a subpoena. According to the Trial Chamber:

    (1) In determining whether a requested subpoena is "**necessary**" within the meaning of Rule 54, the Trial Chamber will consider factors such as "the usefulness of the information for the applicant, the overall necessity of the information in ensuring the trial is informed and fair ... [and whether] the information sought to be obtained is obtainable through other means.[23] To establish that a requested subpoena is "necessary", the applicant must demonstrate "a reasonable basis for the belief that the prospective witness is likely to give information that will materially assist the applicant's case with regards to clearly identified issues".[24]

    (2) In determining whether a requested subpoena is for the "**purposes**" of an investigation or trial within the meaning of Rule 54, the applicant must demonstrate "a reasonable basis for the belief that the information to be provided by a prospective witness is likely to be of material assistance to the applicant's case, or that there is at least a good chance that it would be of material assistance to the applicant's case, in relation to clearly identified issues relevant to the ... trial".[25]

20. The wording of Rule 54 of the Special Court's Rules is essentially identical to that of Rule 54 of the Rules of the ICTY and ICTR. The Trial Chamber was accordingly guided by the jurisprudence of the Appeals Chamber of the ICTY.[26]

21. **Paragraphs 10 and 11 of the Fofana Appeal** seek to argue that the there is a divergence in the relevant case law of the ICTY and ICTR, and that the Trial Chamber should have adopted the approach of the ICTR, on the basis that it is "more in harmony with the purpose of this Court". A number of points need to be made in response to this

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[23] Impugned Decision, para. 30.
[24] Ibid., para. 31.
[25] Ibid., para. 29.
[26] Ibid., paras. 26-31, referring generally to *Prosecutor v. Krstić* ("***Krstić* Appeal Decision**"), IT-98-33-A, "Decision on Application for Subpoenas", 1 July 2003, and *Prosecutor v. Halilović*, IT-01-48-AR73, "Decision on the Issuance of Subpoenas", 21 June 2004 ("***Halilović* Appeal Decision**"). The Dissenting Opinion distinguishes the ICTY Trial Chamber decision in *Prosecutor v. Milosevic*, IT-02-54-T, "Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schroeder", 9 December 2005 ("***Milošević* Trial Decision**").

argument.

22. First, the decisions of the ICTY that were relied upon in the Impugned Decision were decisions of the *Appeals Chamber* of that Tribunal, which should, for the reasons given in paragraphs 13-16 above, be given due deference. The ICTR decisions referred to by the Defence[27] are both decisions of *Trial Chambers*, which do not carry the same precedential weight, and which are of persuasive authority only, even amongst Trial Chambers of the same international criminal court.[28]

23. Secondly, and in any event, the alleged divergence between the case law of the ICTY Appeals Chamber and ICTR Trial Chambers is in the Prosecution's submission more one of wording than of substance. Like the ICTY Appeals Chamber, the ICTR Trial Chambers have affirmed that "Indeed, subpoenas should not be issued lightly".[29] Contrary to what the Defence suggests, the ICTR Trial Chambers do not treat the "purpose" requirement as involving "only a *prima facie* showing of relevance".[30] On the contrary, ICTR Trial Chambers have repeatedly affirmed that an applicant for a subpoena "must have a reasonable belief that the prospective witness can ***materially assist*** its case".[31]

24. Furthermore, contrary to what paragraph 10 of the Fofana Appeal seems to suggest, the ICTR Trial Chambers appear never to have given detailed consideration to the question whether a subpoena could be denied where the information sought to be obtained by the applicant could be obtained by other means. It is true that in some cases ICTR Trial Chambers have said that an applicant for a subpoena "must first demonstrate that it has made reasonable attempts to obtain the voluntary cooperation of the parties involved and has been unsuccessful", without going on to consider whether the anticipated evidence

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[27] See Defence Appeal, footnote 21, referring to *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, "Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana", T. Ch. I, 23 June 2004. ("**Bogosora Decision 23 June 2004**"); *Prosecutor* v. *Simba,* ICTR-01-76-T, "Decision on Defence Request Subpoenas", T.Ch. I, 4 May 2002.

[28] *Aleksovski* Appeal Judgement, para. 114.

[29] *Prosecutor* v. *Simba,* ICTR-01-76-T, "Decision on the Defence Request for a Subpoena for Witness SHB", T.Ch. I, 7 February 2005, para. 3; Bogosora Decision 23 June 2004, para. 4

[30] Defence Appeal, para. 10.

[31] *Prosecutor* v. *Simba,* "Decision on the Defence Request for a Subpoena for Witness SHB", ICTR-01-76-T, T.Ch. I, 7 February 2005, para. 3 (emphasis added); *Prosecutor v. Bagosora et al.,* "Decision on Bagosora Defence's Request for a Subpoena Regarding Mamadou Kane", ICTR-98-41-T, T. Ch. I, 22 October 2004, para. 2; Bogosora Decision 23 June 2004, para. 4.

could be obtained by other means.[32] However, they have never expressly said that it is immaterial whether or not the requested information could be obtained by other means. Indeed, in at least two instances, an ICTR Trial Chamber has granted subpoenas after having expressly made the finding that the desired information "could not be obtained by other means".[33] In this respect, it is noteworthy that the decision in the *Simba* case on which the Fofana Appeal relies[34] expressly cites the ICTY Appeals Chamber decisions in *Halilović* and *Krstić* with approval, suggesting that the ICTR Trial Chamber did not consider that it was taking a divergent approach. It is also noted that the facts of the *Simba* decision were different to those in the present case. In *Simba*, the witnesses were already on the defence witness list, their statements had been disclosed, and one of the witnesses had even been interviewed by the prosecution. Therefore the decision turned on the witnesses' subsequent refusal to appear.

25. **Paragraphs 11 and 12 of the Fofana Appeal** appear to argue that it is somehow contradictory to have a low standard of ***admissibility*** for witnesses, and at the same time a high standard for ***compellability*** in the case of witnesses who are not willing to testify. The Defence argument appears to be that having two different standards for admissibility and compellability will have the result that certain evidence that would be admissible may not be put before the court if the witness is not willing to testify. This argument is fallacious, for a number of reasons.

26. First, it is not the case in the practice of the Special Court, or in any other international criminal court, that the Defence is entitled to call as much evidence as it wishes, subject only to the requirement that the evidence is admissible. For instance, under Rule 73 *ter* (D), the Trial Chamber or a Judge may order the defence to reduce the number of witnesses, if it considers that an excessive number of witnesses are being called to prove the same facts. Under Rule 90(F)(ii), the Trial Chamber is required to exercise control over the mode and order of interrogating witnesses and presenting evidence so as to avoid the wasting of time. Under this rule, the Trial Chamber could truncate the testimony of a witness who has been called where the subject-matter of a line of examination or cross-

[32] See, for instance, Bogosora Decision 23 June 2004, para. 4.
[33] *Prosecutor v. Bagosora et al.*, "Decision on Bagosora Defence's Request for a Subpoena Regarding Mamadou Kane", ICTR-98-41-T, T. Ch. I, 22 October 2004, para. 3; Bogosora Decision 23 June 2004, para. 4.
[34] Defence Appeal, footnote 21, citing *Prosecutor* v. *Simba,* "Decision on Defence Request Subpoenas", ICTR-01-76-T, T.Ch. I, 4 May 2002.

examination is, for instance, unduly repetitive of matters already covered by other witnesses. Thus, even if the evidence of a witness is relevant and admissible, the Trial Chamber may not permit a party to present it if it is unnecessarily *duplicative* of other evidence. In the same way, when deciding whether to grant a subpoena, the Trial Chamber must amongst other matters consider such questions as whether the anticipated evidence would merely duplicate the evidence of other witnesses who are already willing to testify, or whether it would potentially *add* something of significance to the applicant's case.

27. Secondly, while the rights of an Accused must always be respected, it must also be borne in mind that a subpoena will affect the rights of the person to whom it is addressed, by forcing that person to testify against his or her will. In view of this fact, the Prosecution submits that it is self-evident that "Subpoenas should not be issued lightly, for they involve the use of coercive powers".[35]. If, for instance, there are ten witnesses who are capable of testifying in relation to a particular fact but only eight are willing to do so, a party should look first to the eight willing witnesses before seeking subpoenas against the two unwilling witnesses. If there is something lacking in the testimony of the eight willing witnesses that the unwilling witnesses are capable of adding, subpoenas may well be issued. However, the burden must be on an applicant for a subpoena to establish the need for this.

28. Thirdly, given that a subpoena involves the use of coercive power, it has the potential to be abused. The ICTY Appeals Chamber has stated that the Trial Chamber must exercise its discretion "to ensure that the compulsive mechanism of the subpoena is not abused",[36] adding that "[p]articular caution is needed where the [party] is seeking to interview a witness who has declined to be interviewed."[37] Thus, in deciding whether to issue a subpoena, one of the factors which a Trial Chamber will need to consider is whether the requested subpoena would be an abusive exercise of the subpoena power. If it is established that a requested subpoena would materially add something to the requesting party's case that could not be obtained by other non-coercive means, the Trial Chamber would be entitled to presume that the requested subpoena is not abusive, unless there was

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[35] *Halilović* Appeal Decision, paras. 6, 10. See also *Milošević* Trial Decision, para. 35.
[36] *Halilović* Appeal Decision, para. 6; see also *Milošević* Trial Decision, para. 35.
[37] *Milošević* Trial Decision, para. 35 (quoting a dissenting opinion in the *Halilović* Appeal Decision).

something particular about the request that raised a concern. However, where the Trial Chamber is not so satisfied, a Trial Chamber would be entitled to require the requesting party to satisfy it that the requested subpoena would not be abusive.

29. Finally, at the time that a Trial Chamber is requested to issue a subpoena, the Trial Chamber would normally not be in a position to assess the relevance and admissibility of the information that will be obtained as a result of that subpoena. Admissibility and relevance are issues that will fall to be determined later. At the stage of issuing a subpoena, the Trial Chamber is necessarily concerned with other issues, and in particular, the issue of the *need* for a subpoena. The Prosecution submits that this is logical: Rule 54 empowers the Trial Chamber to issue a subpoena where this is "necessary" for the purposes of a trial, but makes no mention of issues of relevance and admissibility.
30. There is a distinction between flexibility in the admission of evidence pursuant to Rule 89(C) and flexibility in the compulsory procedures under Rule 54 for bringing that evidence before the Court. The Impugned Decision never suggests that the test of "necessity" and "purpose" require the Trial Chamber to determine whether the anticipated evidence would be relevant and admissible. Rather, the Impugned Decision states the test to be whether there is *a reasonable basis for the belief* that the anticipated evidence "is likely to be of material assistance to the applicant's case, or that there is at least a good chance that it would be of material assistance to the applicant's case, in relation to clearly identified issues relevant to the forthcoming trial".[38] In other words, the question is not whether the *evidence* would be relevant, but whether the *issue* in respect of which the anticipated evidence may "materially assist" the party is a relevant issue.
31. Paragraph 12 of the Fofana Appeal argues that the Trial Chamber's approach "wrongly places emphasis on the *necessity of the evidence* as opposed to the *necessity of the subpoena*". For the reasons given above, that is incorrect. Under the Trial Chamber's approach, an applicant for a subpoena is not required to show that evidence is necessary, but only that there is *a reasonable basis for the belief* that the anticipated evidence is likely to be of material assistance to the applicant's case. What the applicant must show is that the request is necessary, as described above.

[38] Impugned Decision, para. 29.

32. **Paragraph 13 of the Fofana Appeal** argues that the approach taken in the Impugned Decision requires the Trial Chamber to embark on "premature evaluations of the probative value of the anticipated evidence". The Prosecution submits that this argument should be rejected for the same reasons given in the previous paragraph. At the point in time at which the Trial Chamber is requested to issue a subpoena, the Trial Chamber is not concerned at all as such with the probative value of the anticipated evidence, or its credibility or reliability. What the Trial Chamber is concerned with is the *need* to issue a subpoena.
33. The burden must be on an applicant for a subpoena, as the moving party, to establish the need for the subpoena. A subpoena is obviously not necessary if the witness is willing to testify. It is equally not necessary if, for instance, the anticipated evidence would merely duplicate the evidence of other witnesses who have already testified or are expected to testify, or if there is no reasonable basis for believing that the anticipated evidence could be of any material assistance to the requesting party, or if the anticipated evidence could be obtained by other non-coercive means. It is illogical to suggest, as the Fofana Appeal does, that requiring an applicant for a subpoena to justify its need is somehow "at odds with the principle of orality". It is also not the case, contrary to what the Defence Appeal suggests, that under the test applied by the Trial Chamber, a subpoena will only be issued if the anticipated evidence is "indispensable". The Prosecution repeats that what the Imugned Decision requires is that the applicant for a subpoena must demonstrate a reasonable basis for the belief that the anticipated evidence "is likely to be of material assistance to the applicant's case, or that there is at least a good chance that it would be of material assistance to the applicant's case, in relation to clearly identified issues relevant to the forthcoming trial".[39]
34. **Paragraphs 14 and 15 of the Fofana Appeal** argue that Rule 54 should be interpreted in accordance with "principles ... of extreme flexibility", and should not be given a "highly restrictive" interpretation. The Prosecution submits that the approach taken to Rule 54 by the ICTY Appeals Chamber and in the Impugned Decision is not "highly restrictive". Rather, it is one of common sense. The interpretation of Rule 54 apparently contended for by the Defence is that a party is entitled to a subpoena addressed to any witness who

[39] See para. 19(1) above.

is unwilling to testify and who has information *relevant* to the events alleged in the indictment. Given the scale of events that typically form the subject-matter of an indictment in international criminal law, the number of people who have relevant information will be extremely high. For instance, the indictment in this case alleges the existence of an armed conflict in Sierra Leone at all times relevant to the indictment.[40] The number of people in Sierra Leone capable of giving evidence relevant to the question whether or not there was an armed conflict in Sierra Leone at those times is likely to number in the tens or hundreds of thousands. The interpretation contended for by the Fofana Appeal would effectively make the applicant for a subpoena the sole arbiter of whether a subpoena is necessary. The Trial Chamber acknowledged that the test it enunciated needs to be applied in a "reasonably liberal way" especially where the applicant has been unable to interview the witness, but as the Trial Chamber pointed out, an applicant can not be permitted to undertake a "fishing expedition".[41] It is common sense that an applicant for a subpoena should be able to satisfy the Trial Chamber how the anticipated evidence may materially assist the applicant's case, and in order to do this, it is necessary to identify the issue to which the anticipated evidence would be of material assistance.

VI. THE DEFENCE'S SECOND GROUND OF APPEAL

35. The Defence's second ground of appeal is that:

> Assuming, *ex arguendo*, the application of the proper standard for the issuance of a subpoena pursuant to Rule 54, the Trial Chamber erred in its application of that test to the Motion, which any reasonable trier of fact would have granted.

36. The Prosecution presumes that the Defence arguments relating to this ground of appeal are those contained in paragraphs 16-39 of the Fofana Appeal. (The Defence Appeal in fact does not clearly indicate which of its paragraphs relate to which ground of appeal.)

37. **Paragraphs 16-19 of the Fofana Appeal** merely summarise the Impugned Decision, and contain no substantive arguments.

38. **Paragraphs 20-28 of the Fofana Appeal** seek to distinguish the facts of the present case from those of the ICTY Appeals Chamber decisions which were relied upon by the

[40] Consolidated Indictment, para. 4.
[41] Impugned Decision, para. 19.

Impugned Decision. These paragraphs argue that the Impugned Decision failed "to appreciate the *ratio decidendi*" of those ICTY Appeals Chamber decisions, and "failed to take account of the factual contexts of those decisions".[42]

39. The Prosecution submits that this argument misconceives the role of the Appeals Chamber in an appeal against a decision of a Trial Chamber not to issue a subpoena. As argued in paragraphs 7-12 above, the power of a Trial Chamber to issue a subpoena, or to decline to issue a subpoena, is a discretionary power. In an appeal against an exercise of this discretionary power, the question on appeal is not whether the subpoena should or should not have been granted, but rather, whether the decision taken by the Trial Chamber was a proper exercise of its discretion. Thus, contrary to what the Fofana Appeal seems to suggest, the *ratio decidendi* of a decision of the Appeals Chamber in such a case is not a finding to the effect that in certain specific factual circumstances a subpoena must be issued, or that in certain factual circumstances a subpoena must not be issued. Whether a subpoena should or should not be issued in specific factual situation is a matter to be determined by the Trial Chamber, in the exercise of its discretion, having regard to all relevant matters, and different Trial Chambers might well reach different decisions in similar circumstances. In an appeal against the Trial Chamber's decision, the Appeals Chamber is only concerned with whether the Trial Chamber went beyond the margins of its discretion.

40. The relevant legal principles are stated in the ICTY Appeals Chamber decisions in broad and general terms. Whatever propositions the Defence says the *Halilovic* decision stands for on the basis of the outcome of that case, the standard for the issuance of a subpoena was clearly spelt out as follows:

> A Trial Chamber may issue a subpoena when it is "necessary for the purposes of an investigation or for the preparation or conduct of the trial"...The applicant seeking a subpoena must make a certain evidentiary showing of the need for the subpoena. In particular, he must demonstrate a reasonable basis for his belief that the prospective witness is likely to give information that will materially assist the applicant with respect to clearly identified issues at the forthcoming trial...The Trial Chamber is vested with discretion in determining whether the applicant succeeded in making the required showing, this discretion being necessary to ensure that the compulsive mechanism of the subpoena is not abused.[43]

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[42] Defence Appeal, para. 20.
[43] *Halilović* Appeal Decision, para. 6

> In deciding whether the applicant has met the evidentiary threshold, the Trial Chamber may properly consider both whether the information the applicant seeks to elicit through the use of the subpoena is necessary for the preparation of the case and whether this information is obtainable through other means. The background principle informing both considerations is whether, as Rule 54 requires, the issuance of a subpoena is necessary "for the preparation or conduct of the trial". The Trial Chamber's considerations, then, must focus not only on the usefulness of the information to the applicant but on its overall necessity in ensuring that the trial is informed and fair.[44]

41. Notably, the Appeals Chamber in this decision referred to the original rejection of the subpoena application by the ICTY Trial Chamber on the basis that the defence had failed to provide information specific enough to satisfy the evidentiary threshold and stated that this could be a sufficient basis for the rejection of the application.[45] The defence consequently provided further details and sought reconsideration of the matter but the application was eventually rejected by the Trial Chamber on the basis that the witness was coming to testify anyway for the other side.

42. In the *Krstic* decision, the standard under Rule 54 was described as follows:

> Rule 54 permits a judge or a Trial Chamber to make such orders or to issue such subpoenas as may be "necessary [...] for the preparation or conduct of the trial". Such a power clearly includes the possibility of a subpoena being issued requiring a prospective witness to attend at a nominated place and time in order to be interviewed by the defence where that attendance is necessary for the preparation or conduct of the trial. By analogy with applications for access to confidential material produced in other cases (where a legitimate forensic purpose for that access must be shown), an order or a subpoena pursuant to Rule 54 would become "necessary" for the purposes of that Rule where a legitimate forensic purpose for having the interview has been shown. An applicant for such an order or subpoena before or during the trial would have to demonstrate a reasonable basis for his belief that there is a good chance that the prospective witness will be able to give information which will materially assist him in his case, in relation to clearly identified issues relevant to the forthcoming trial.[46]

43. There is nothing to suggest that the Trial Chamber in the current case gave the *Krstic* decision a particularly restrictive interpretation. The Trial Chamber in the Impugned Decision in fact stated that it was mindful of the need to apply the test for a subpoena in a reasonably liberal way when an applicant has not been able to obtain a pre-testimony

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[44] *Halilović* Appeal Decision, para. 7.
[45] Ibid, para. 8.
[46] *Krstić* Appeal Decision, para. 10.

interview from the prospective witness.[47] The Trial Chamber did not at any point liken the Motion to the "fishing expedition" referred to in *Krstic* except to the extent that the use of the term "self-evident" amounted to an unacceptably vague and general assertion.[48]

44. There is no suggestion in the *Halilović* or *Krstić* decisions that the principles they set out are intended to be understood only in the context of the precise factual situations as they presented itself in those cases. The principles are general. How those principles are applied to the circumstances of a particular case is a matter within the discretion of the Trial Chamber.

45. In any event, the Defence attempts to distinguish the *Halilović* and *Krstić* decisions merely for the purpose of attempting to show that they do not *support* the approach taken by the Impugned Decision. There is nothing in these paragraphs of the Fofana Appeal to suggest that these ICTY Appeals Chambers decisions are *inconsistent* with the approach taken by the Impugned Decision.

46. **Paragraphs 30-33 of the Fofana Appeal** argues that the Trial Chamber incorrectly applied the relevant principles to the circumstances of the case when it concluded that it was not satisfied that the requested subpoena was "necessary" in relation to the issue of whether the Second Accused was one of those bearing the "greatest responsibility" for crimes within the jurisdiction of the Special Court, within the meaning of Article 1 of the Statute. The Trial Chamber's findings in this respect are dealt with in paragraphs 35-38 of the Impugned Decision.

47. The Defence argued before the Trial Chamber that President Kabbah could give evidence relating to the relative culpability of the three Accused in this case. The Defence also argued before the Trial Chamber that President Kabbah could testify about the relative culpability of numbers of other persons, who have not been indicted. The Trial Chamber concluded, however, that it was not satisfied that evidence of the relative culpability of these various individuals was not obtainable by other means. The Prosecution submits that this is a finding that it was reasonably open to the Trial Chamber to make. The Fofana Appeal appears not to dispute that such evidence might be obtainable by other

[47] Impugned Decision, para. 47.
[48] Ibid. See also Appeal, para. 38.

means, but argues that "the Defence is interested in the personal observations of the President in this regard".[49] However, in the absence of any justification as to why the Defence needs to have the evidence of President Kabbah rather than the evidence of other witnesses who would be willing to testify voluntarily, and in the absence of anything to establish that the desired evidence could not be obtained by other means, it was open to the Trial Chamber to reach the decision that it did.

48. Paragraph 31 of the Fofana Appeal argues that the Impugned Decision would create a "chilling effect on the co-operation of high level witnesses" who could avoid co-operating by claiming that there are others who are better placed to provide the requested evidence. This argument misses the point. If others are better placed to provide the requested evidence, why should the Trial Chamber exercise its coercive powers against a high-level witness? On the other hand, if there is some reason why the testimony of the high-level witness is needed (for instance, if there are gaps in the knowledge of other witnesses that only the high-level witness can fill), then the "necessity" for a subpoena addressed to the high-level witness can be established. The simple fact is that in the present case the Defence did not establish the need for the exercise of coercive powers against President Kabbah.

49. Paragraph 32 of the Fofana Appeal refers to pronouncements of the Trial Chamber to the effect that the issue of "greatest responsibility" is an evidentiary matter to be determined at the trial stage. The Fofana Appeal argues that the Defence should therefore now be entitled to pursue this issue as fully as possible. The Prosecution submits that nothing in the Impugned Decision prevents the Defence from doing this.[50] The Defence has not been prevented from presenting evidence on the issue of "greatest responsibility", and can obtain subpoenas if necessary. All that the Trial Chamber found was that the Defence had not established the need for the subpoena in this case. For the reasons above, it was open to the Trial Chamber to so conclude.

50. Paragraph 33 of the Fofana Appeal refers to certain evidence that, in the submission of the Defence, President Kabbah may have been in a position to give. Again, this does not alter the fact that the Defence had not satisfied the Trial Chamber that the information it

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[49] Fofana Appeal, para. 31.

[50] This should not be taken as suggesting that the Prosecution in any way concedes that the Defence arguments relating to the issue of "greatest responsibility" have merit.

was seeking would not be available by other means. It also does not alter the fact that it would still remain to be established how such information, if indeed it is the case that President Kabbah could give it, would materially assist the Second Accused in his case. As the Trial Chamber noted in paragraph 38 of the Impugned Decision, even if it could be established that President Kabbah [or any other person for that matter] could be said to be one of the persons bearing the greatest responsibility, this would not affect the allegation that the Second Accused could also be one of those who bears the greatest responsibility.

51. **Paragraphs 34-35 of the Fofana Appeal** argue that the Trial Chamber incorrectly applied the relevant principles to the circumstances of the case when it concluded that it was not satisfied that the requested subpoena was "necessary" in relation to the issue of the individual criminal responsibility of the Second Accused. The Trial Chamber's findings in this respect are dealt with in paragraphs 39-43 of the Impugned Decision.

52. One of the observations made by the Trial Chamber in paragraph 41 of the Impugned Decision was that although it was alleged by the Defence that CDF personnel had consultations with President Kabbah while he was in Guinea, there was no suggestion that he had personal knowledge about what happened on the ground. In view of this and other considerations, the Trial Chamber found that there was no legitimate forensic purpose in calling President Kabbah to verify these facts.

53. Paragraph 34 of the Fofana Appeal disputes this, and argues that there was evidence that President Kabbah "was informed of events unfolding in Sierra Leone via telephone and personal messengers". In fact, the evidence that the Defence invoked in the proceedings before the Trial Chamber is dealt with in paragraph 7 of the original Fofana Motion, and paragraphs 8-11 of the Prosecution's Response to Motion. It is also referred to in paragraph 25 of the Dissenting Opinion. In the Prosecution's Response to Motion, the Prosecution submitted that the Fofana Motion did not make any showing of how any of the matters referred to in the evidence cited by the Defence could in any way impact upon the Trial Chamber's findings on any element of any crime for which the Accused is charged.[51] The Prosecution submits that it was within the discretion of the Trial Chamber to reach the same conclusion.

[51] Response to Motion, para. 9.

54. **Paragraphs 36-37 of the Fofana Appeal** argue that the Trial Chamber incorrectly applied the relevant principles to the circumstances of the case when it concluded that it was not satisfied that the requested subpoena was "necessary" in relation to the issue of superior responsibility of the Second Accused. The Trial Chamber's findings in this respect are dealt with in paragraphs 44-48 of the Impugned Decision.

55. In the proceedings before the Trial Chamber, the Defence sought to justify the need for a subpoena in part on the ground of an argument that President Kabbah was able to give evidence relevant to the Second Accused's alleged command responsibility. The Trial Chamber declined to issue the subpoena on the basis that such information was obtainable through other means.

56. The Defence agrees that it has been possible to gain some of the relevant information through other means and that it has in fact done so. This in itself suggests that the Trial Chamber did not err in its assessment. While President Kabbah's personal view on these issue may be interesting to the Defence, this cannot provide a basis upon which to overturn the Trial Chamber's decision. On the basis of the information before the Trial Chamber, it was open to it to reach the conclusion that it did.

57. The Trial Chamber also considered that:

> "It is not immediately apparent to The Chamber how the mere contention that President Kabbah is alleged to have been the top official coordinating the efforts of the CDF would constitute a reasonable basis for the belief that he is likely to give information that would materially assist in the case of the Second Accused with regards to whether or not those committing the crimes alleged in the Consolidated Indictment were indeed the Second Accused's subordinates, including whether or not he had effective control over them".[52]

The Prosecution submits that it was within the discretion of the Trial Chamber to so find.

VII. THE DEFENCE'S THIRD GROUND OF APPEAL

58. The Defence's third ground of appeal is that:

> The demonstrably flawed reasoning exhibited in the Concurring Opinion with respect to the question of the compellability of a sitting head of state as a witness before an international criminal tribunal casts significant doubt upon the legal validity of the Majority Decision, *in toto*, and suggests that on of Mr. Fofana's fundamental rights under the Statute has been unduly compromised by political

[52] Impugned Decision, para 46.

considerations.[53]

59. The Prosecution presumes that the Defence arguments relating to this ground of appeal are those contained in paragraphs 16-39 of the Fofana Appeal.

60. In the Impugned Decision, the majority of the Trial Chamber did not address the head of State immunity issue, as it denied the motion for a subpoena on other grounds. However, Judge Itoe, who was one of the two Judges in the Majority, took up this question in his Separate Concurring Opinion.

61. The Fofana Appeal argues that the Impugned Decision was somehow tainted by political considerations discernible in the treatment of the head of State immunity issue in the Separate Concurring Opinion. The Fofana Appeal does not develop this argument in any detail and cites no authority for it.

62. Much of the argument in these paragraphs of the Fofana Appeal appears to say no more than that the Defence considers the Separate Concurring Opinion to be wrong, arguing that it is an unwarranted departure from this court's existing jurisprudence, that it places undue reliance on national law, and fails to distinguish precedents from the ICTY.

63. Whether the Fofana Appeal is merely arguing that the Separate Concurring Opinion was wrong on this issue, or whether it is suggesting something stronger than this, it cannot tenably be argued that because a Judge was wrong about one issue in a separate opinion, he must have been wrong about other issues in a majority opinion in which he joined, and that the majority opinion should therefore be reversed. This ground of appeal must be rejected.

IV. CONCLUSION

64. The Prosecution does not dispute the fundamental importance of the right to examine, or have examined, witnesses, and to obtain the attendance and examination of witnesses under the same conditions as the opposite party, enshrined in Article 17(4)(e) of the Special Court Statute. However, it is submitted that no violation of the Accused's fair trial rights have been identified in this appeal.[54] The Defence has not been denied access to any of the applicable procedures for calling witnesses. If a potential defence witnesses

[53] Appeal, para. 4.
[54] See para. 10 of the Fofana Application.

refuses to appear voluntarily, the Defence may request a subpoena. In order for such a request to be successful, a certain standard under the Rules must be satisfied. If the Defence fails to satisfy that standard, it cannot argue that there has *ipso facto* been a breach of a fundamental right.

65. Rule 54 provides that a Trial Chamber "may issue ... subpoenas ... as may be ***necessary*** for the ***purposes*** of an investigation or for the preparation or conduct of the trial". In order to determine whether the criteria of Rule 54 are met, the Trial Chamber must inevitably consider the purposes of a requested subpoena and the necessity of the requested subpoena. This logically requires an inquiry into whether the evidence anticipated as a result of the subpoena could materially assist the applicant's case, and whether the anticipated evidence might be obtained by other non-coercive means. The application of these considerations to the particular circumstances of an individual case is a matter within the discretion of the Trial Chamber, looking at all of the circumstances as a whole.
66. For these reasons the Prosecution submits that the Appeal should be dismissed.

Filed in Freetown,
13 July 2006

For the Prosecution,

For the Prosecution,

Christopher Staker
Acting Prosecutor

Joseph F. Kamara
Senior Trial Attorney

A. MOTIONS, ORDERS, DECISIONS AND JUDGMENTS

SCSL Cases

Prosecutor v Norman, Fofana, Kondewa, SCSL-04-14-T-541, "The Response of the Attorney-General and Minister of Justice to the Applications Made by Moinina Fofana and Samuel Hinga Norman for the Issuance of a Subpoena ad Testificandum to President Alhaji Dr Ahmad Tejan Kabbah", 23 January 2006.

Prosecutor v Norman, Fofana, Kondewa, SCSL-2004-14-T-617, "Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena ad Testificandum to H. E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone", 14 June 2006.

Prosecutor v Norman, Fofana, Kondewa, SCSL-2004-14-T-617, "Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe on the Chamber Majority Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena ad Testificandum to H. E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone", 14 June 2006.

Prosecutor v Norman, Fofana, Kondewa, SCSL-2004-14-T-617, "Dissenting Opinion of Hon. Justice Bankole Thompson on Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena ad Testificandum to H. E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone", 14 June 2006.

Prosecutor v. Norman, Fofana, Kondewa, SCSL-04-15-T-643, "Decision on Motions by the First and Second Accused for Leave to Appeal the Chamber's Decision on their Motions for the Issuance of a Subpoena to the President of the Republic of Sierra Leone", 28 June 2006.

Prosecutor v Norman, Fofana, Kondewa, SCSL-2004-14-T-649, "Norman Notice of Appeal and Submissions against the Trial Chamber's Decision on the Issuance of a *Subpoena ad Testificandum* to H.E. Alhaji Dr. Ahmed Tejan Kabbah, President of the Republic of Sierra Leonef", 6 July 2006.

Prosecutor v Norman, Fofana, Kondewa, SCSL-2004-AR73-397, "Decision on Amendment of the Consolidated Indictment", 16 May 2005.

Prosecutor v Norman, Fofana, Kondewa, SCSL-04-14-T-522, "Fofana Motion for Issuance of a Subpoena Ad Testificandum to President Ahmed Tejan Kabbah", 15 December 2005.

Prosecutor v Norman, Fofana, Kondewa, SCSL-04-14-T-528, "Prosecution Response to Fofana Motion for Issuance of a Subpoena ad Testificandum to President Ahmad Tejan Kabbah", 13 January 2006

Prosecutor v Norman, Fofana, Kondewa, SCSL-04-14-T-533, "Reply to Prosecution Response to Fofana Motion for Issuance of a Subpoena ad Testificandum to President Ahmed Tejan Kabbah", 18 January 2006.

ICTY and ICTR Cases

Prosecutor v. Krstić, IT-98-33-A, "Decision on Application for Subpoenas", Appeals Chamber, 1 July 2003.
(http://www.un.org/icty/krstic/Appeal/decision-e/030701.htm)

Prosecutor v. Halilovic, IT-01-48-AR73, "Decision on the Issuance of Subpoenas", 21 June 2004.
(http://www.un.org/icty/halilovic/appeal/decision-e/040621.htm)

Prosecutor v. Milosevic, IT-02-54-T, "Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schroeder", 9 December 2005, (http://www.un.org/icty/milosevic/trialc/decision-e/051209.htm).

Prosecutor v Bagosora et al., ICTR-98-41-T, "Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana", 23 June 2004, (http://69.94.11.53/ENGLISH/cases/Bagosora/decisions/040623.htm).

Prosecutor v. Dusko Tadic, IT-94-1-A, Judgement, 15 July 1999.
(http://www.un.org/icty/tadic/appeal/judgement/index.htm)

Prosecutor v. Zlatko Aleksovski, IT-95-14/1-A, Judgement, 24 March 2000. (http://www.un.org/icty/aleksovski/appeal/judgement/index.htm)

Prosecutor v Simba, ICTR-01-76-T, "Decision on Defence Request for Subpoenas", 4 May 2005.
(http://69.94.11.53/ENGLISH/cases/Simba/decisions/040505.htm)

Prosecutor v. Kunarac et al., IT-96-23 and IT-96-23/1-A, Judgement, Appeals Chamber, 12 June 2002 ("*Kunarac* Appeal Judgement"), para. 38.
(http://www.un.org/icty/kunarac/appeal/judgement/index.htm)
This authority exceeds 30 pages. The relevant sections are attached.

Prosecutor v. Delalić et al. (Čelebići case), Judgement, IT-96-21-A, Appeals Chamber, 20 February 2001, paras. 203–204.
(http://www.un.org/icty/celebici/appeal/judgement/index.htm)
This authority exceeds 30 pages. The relevant sections are attached.

Prosecutor v. Kupreskic et al., IT-95-16-A, Appeal Judgement, Appeals Chamber, 23 October 2001 ("*Kupreskic* Appeal Judgement"), paras. 30–32.
(http://www.un.org/icty/kupreskic/appeal/judgement/index.htm)
This authority exceeds 30 pages. The relevant sections are attached.

Prosecutor v. Delalic et al. (Celebici case*),* IT-96-21-A*bis*, Judgement on Sentence Appeal, Appeals Chamber, 8 April 2003 ("*Celebici* Sentencing Appeal Judgement"), paras. 54–60.
(http://www.un.org/icty/celebici/appeal/judgement2/index.htm)

This authority exceeds 30 pages. The relevant sections are attached.

Prosecutor v. Bagilishema, ICTR-95-1A-A, Judgement (Reasons), Appeals Chamber, 13 December 2002 (3 July 2002) ("*Bagilishema* Appeal Judgement"), paras. 11–14.
(http://69.94.11.53/ENGLISH/cases/Bagilishema/judgement/acjudge/131202.htm)
This authority exceeds 30 pages. The relevant sections are attached.

Nderubumwe Rutaganda v. Prosecutor, ICTR-96-3-A, Judgement, Appeals Chamber, 26 May 2003 ("*Rutaganda* Appeal Judgement"), paras. 22–23.
http://69.94.11.53/ENGLISH/cases/Rutaganda/judgement/index.htm

Prosecutor v. Krnojelac, IT-97-25-A, Judgement, Appeals Chamber, 17 September 2003 ("*Krnojelac* Appeal Judgement"), paras. 11–12.
(http://www.un.org/icty/krnojelac/appeal/judgement/index.htm)
This authority exceeds 30 pages. The relevant sections are attached.

Prosecutor v. *Vasiljevic,* IT-98-32-A, Judgement, Appeals Chamber, 25 February 2004 ("*Vasiljevic* Appeal Judgement"), para. 7.
(http://www.un.org/icty/vasiljevic/appeal/judgement/index.htm)
This authority exceeds 30 pages. The relevant sections are attached.

Prosecutor v. Krstic, IT-98-33-A, Judgement, Appeals Chamber, 19 April 2004, paras. 187–188.
(http://www.un.org/icty/krstic/Appeal/judgement/index.htm)
This authority exceeds 30 pages. The relevant sections are attached.

Prosecutor v. Milosevic, IT-02-54-AR73, "Reasons for Refusal of Leave to Appeal from Decision to Impose Time Limit, Bench of the Appeals Chamber", 16 May 2002, para. 14.
(http://www.un.org/icty/milosevic/appeal/decision-e/16052002.htm)

Prosecuto v. Bogosora et al., ICTR-98-41-A, "Decision: Interlocutory Appeal from Refusal to Reconsider Decisions Relating to Protective Measures and Application for a Declaration of "Lack of Jurisdiction", Bench of the Appeals Chamber, 2 May 2002, para. 10.
http://69.94.11.53/ENGLISH/cases/Bagosora/decisions/020502e.htm

Prosecutor v Milosevic, IT-99-37-AR73, "Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, Appeals Chamber", 18 April 2002, para. 5.
(http://www.un.org/icty/milosevic/appeal/decision-e/020418.htm)

Prosecutor v Milosevic, IT-02-54-AR73.6, "Decision on the Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case", Appeals Chamber, 20 January 2004, para. 7.
(http://www.un.org/icty/milosevic/appeal/decision-e/040120.htm)

Prosecutor v Bizimungu, ICTR-99-50-AR50, "Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment, Appeals Chamber", 12 February 2004, para. 11.
(http://69.94.11.53/ENGLISH/cases/Bizimungu/decisions/120204.htm)

Prosecutor v Karemera, ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File Amended Indictment, Appeals Chamber, 19 December 2003, para. 9.
(http://69.94.11.53/ENGLISH/cases/Karemera/decisions/191203.htm)

Prosecutor v. Brđanin and Talić, IT-99-36-AR73.9, "Decision on Interlocutory Appeal", Appeals Chamber, 11 December 2002, para. 31.
(http://www.un.org/icty/brdjanin/appeal/decision-e/randall021211.htm)

Prosecutor v. Naletilić and Martinović, IT-98-34-A, Judgment, Appeals Chamber, 3 May 2006, paras. 243-248.
(http://www.un.org/icty/naletilic/appeal/judgement/index.htm)
This authority exceeds 30 pages. The relevant sections are attached.

Prosecutor v. Furundzija, IT-95-17/1-A, Judgement, Appeals Chamber, 21 July 2000 ("*Furundzija* Appeal Judgement"), para. 249.
(http://www.un.org/icty/furundzija/appeal/judgement/index.htm)
This authority exceeds 30 pages. The relevant sections are attached.

Prosecutor v. Akayesu, ICTR-96-4-A, Judgement, Appeals Chamber, 1 June 2001 ("*Akayesu* Appeal Judgement"), fn. 805.
http://trim.unictr.org/webdrawer/rec/25360/view/AKAYESU%20-%20APPEAL%20JUDGEMENT.pdf
This authority exceeds 30 pages. The relevant sections are attached.

Prosecutor v. Musema, ICTR-96-13-A, Judgement, Appeals Chamber, 16 Nov. 2001 ("*Musema* Appeal Judgement"), para. 15.
http://69.94.11.53/ENGLISH/cases/Musema/judgement/Arret/index.htm
This authority exceeds 30 pages. The relevant sections are attached.

Prosecutor v. *Simba,* ICTR-01-76-T, "Decision on the Defence Request for a Subpoena for Witness SHB", , T.Ch. I, 7 February 2005, para. 3.
(http://trim.unictr.org/webdrawer/rec/60994/view/SIMBA%20-%20DECISION%20ON%20THE%20DEFENCE%20REQUEST%20FOR%20A%20SUBPOENA%20FOR%20WITNESS%20SHB.pdf)

Prosecutor v. Bagosora et al., ICTR-98-41-T, "Decision on Bagosora Defence's Request for a Subpoena Regarding Mamadou Kane", T. Ch. I, 22 October 2004, para. 2.
(http://69.94.11.53/ENGLISH/cases/Bagosora/decisions/221004b.htm)

UN Documents
United Nations, Security Council, Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, para. 41.

IN THE APPEALS CHAMBER

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

Registrar:
Mr Hans Holthuis

Judgement of: 20 February 2001

PROSECUTOR

V.

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

("*CELEBICI* Case")

JUDGEMENT

Counsel for the Accused:

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

The Office of the Prosecutor:

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

201. 3. Discussion

202. In respect of a factual error alleged on appeal, the *Tadic* Appeal Judgement provides the test that:

> 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.[264]

203. In the appeal of *Furundzija*, the Appeals Chamber declined to conduct an independent assessment of the evidence admitted at trial, as requested by the appellants, understood as a request for *de novo* review, and took the view that "[t]his Chamber does not operate as a second Trial Chamber."[265]

204. In paragraphs 737-767 of the Trial Judgement, a thorough analysis of evidence led the Trial Chamber to conclude that Mucic "had all the powers of a commander" in the camp.[266] The conclusion was also based on Mucic's own admission that he had "necessary disciplinary powers".[267] Mucic, who disputes this conclusion on appeal, must persuade the Appeals Chamber that the conclusion is one which could not have reasonably been made by a reasonable tribunal of fact, so that a miscarriage of justice has occurred.[268]

205. The Appeals Chamber notes that Mucic argued at trial to the effect that, in the absence of any document formally appointing him to the position of commander or warden of the camp, it was not shown what authority he had over the camp personnel .[269] On appeal, he repeats this argument,[270] and reiterates some of his objections made at trial in respect of the Prosecution evidence which was accepted by the Trial Chamber as showing that he had *de facto* authority in the camp in the period alleged in the Indictment.[271]

206. Having concluded that "the actual exercise of authority in the absence of a formal appointment is sufficient for the purpose of incurring criminal responsibility " provided that the *de facto* superior exercises actual powers of control,[272] the Trial Chamber considered the argument of Mucic that he had no "formal authority ".[273] It looked at the following factors to establish that Mucic had *de facto* authority: Mucic's acknowledgement of his having authority over the Celebici camp since 27 July 1992,[274] the submission in the defence closing brief that Mucic used his "limited" authority to prevent crimes and to order that the detainees not be mistreated and that the offenders tried to conceal offences from him,[275] the defence statement that when Mucic was at the camp, there was "far greater" discipline than when he was absent,[276] the evidence that co-defendant Delic told the detainees that Mucic was commander,[277] the evidence that he arranged for the transfer of detainees,[278] his classifying of detainees for the purpose of continued detention or release,[279] his control of guards,[280] and the evidence that he had the authority to release prisoners.[281] At trial, the Trial Chamber accepted this body of evidence. The Appeals Chamber considers that it has not been shown that the Trial Chamber erred in accepting the evidence which led to the finding that Mucic was commander of the camp and as such exercised command responsibility.

207. Mucic argues that the Trial Chamber failed to explain on what date he became commander of the camp. The Trial Chamber found:

> The Defence is not disputing that there is a considerable body of evidence [...] that Zdravko Mucic was the acknowledged commander of the prison-camp. Instead, the Defence submits that the Prosecution has to provide evidence which proves beyond a reasonable doubt the dates during which Mucic is alleged to have exercised authority in the Celebici prison-camp [...]. The Trial Chamber agrees that the Prosecution has the burden of proving that Mucic was the commander of the Celebici prison-camp and that the standard of proof in this respect is beyond reasonable doubt. However, the issue of the actual date on which Mucic became a commander is not a necessary element in the discharge of this burden of proof. Instead, the issue is whether he was, during the relevant period as set forth in the Indictment, the commander of the prison-camp.[282]

208. The Appeals Chamber can see no reason why the Trial Chamber's conclusion that it was unnecessary to make a finding as to the exact date of his appointment – as opposed to his status during the relevant period – was unreasonable.

209. Mucic claims that he had no authority of whatever nature during the months of May, June and July of 1992. The Indictment defined the relevant period in which Mucic was commander of the camp to be "from approximately May 1992 to November 1992 ". The offences of subordinates upon which the relevant charges against Mucic were based took place during that period. The Appeals Chamber notes that the Trial Judgement considered the objection of Mucic to the evidence which was adduced to show that he was present in the camp in May 1992.[283] The objection was made through the presentation of defence evidence, which was rejected by the Trial Chamber as being inconclusive.[284] On this point, the Appeals Chamber observes that Mucic did not challenge the testimony of certain witnesses which was adduced to show that Mucic was not only present in the camp but in a position of authority in the months of May, June and July of 1992 . Reference is made to the evidence given by Witness D, who was a member of the Military Investigative Commission in the camp and worked closely with Mucic in the classification of the detainees.[285] The Trial Chamber was "completely satisfied" with this evidence.[286] The witness testified that Mucic was present at the meeting of the Military Investigative Commission held in early June 1992 to discuss the classification and continued detention or release of the detainees.[287] It is also noteworthy that, in relation to a finding in the case of Delic, it was found that the Military Investigative Commission only conducted interviews with detainees after informing Mucic, or Delic when the former was absent, and that only Mucic and Delic had access to the files of the Commission.[288] Further, Mucic conceded in his interview with the Prosecution that he went to the camp as early as 20 May 1992.[289] Moreover, Grozdana Cecez, a former detainee at the camp, was interrogated by Mucic in late May or early June 1992.[290] The Appeals Chamber is satisfied that the evidence relied upon by the Trial Chamber constitutes adequate support for its findings.

210. The Appeals Chamber is satisfied that it was open to the Trial Chamber to find that from "before the end of May 1992" Mucic was exercising *de facto* authority over the camp and its personnel.[291]

211. In addition, Mucic submitted:[292]

> (i) The Trial Chamber failed to consider the causal implications of the acquittal of the co-defendant Delalic from whom the Prosecution alleged Mucic obtained his necessary authority; and

> (ii) The Trial Chamber gave wrongful and/or undue weight to the acts of benefice [*sic*] attributed to Mucic at, *inter alia*, paragraph 1247 of the Trial Judgement, to found command responsibility, instead of treating them as acts of compassion coupled with the strength of personal character which constitute some other species of authority.[293]

212. The first argument appears to be based on an assumption that Mucic's authority rested in some formal way on that of Delalic. This argument has no merit. It is clear that the Trial Chamber found that, regardless of the way Mucic was appointed , he in fact exercised *de facto* authority, irrespective of Delalic's role in relation to the camp.

213. The second point lacks merit in that the acts related to in paragraph 1247 of the Trial Judgement were considered by the Trial Chamber for the purpose of sentencing , rather than conviction; and that acts beneficial to detainees done by Mucic referred to by the Trial Chamber may reasonably be regarded as strengthening its view that Mucic was in a position of authority to effect "greater discipline" in the camp than when he was absent.[294] Although potentially compassionate in nature, these acts are nevertheless evidence of the powers which Mucic exercised and thus of his authority.

IN THE APPEALS CHAMBER

Before:

Judge Claude Jorda, Presiding

Judge Mohamed Shahabuddeen

Judge Wolfgang Schomburg

Judge Mehmet Güney

Judge Theodor Meron

Registrar:

Mr. Hans Holthuis

Judgement of:
12 June 2002

PROSECUTOR

V

DRAGOLJUB KUNARAC

RADOMIR KOVAC

AND

ZORAN VUKOVIC

JUDGEMENT

Counsel for the Prosecutor:

Mr. Anthony Carmona

Ms. Norul Rashid

Ms. Susan Lamb

Ms. Helen Brady

Counsel for the Accused:

Mr. Slavisa Prodanovic and Mr. Dejan Savatic for the accused Dragoljub Kunarac

Mr. Momir Kolesar and Mr. Vladimir Rajic for the accused Radomir Kovac

Mr. Goran Jovanovic and Ms. Jelena Lopicic for the accused Zoran Vukovic

34. II. STANDARD OF REVIEW

35. Article 25 of the Statute sets out the circumstances in which a party may appeal from a decision of the Trial Chamber. The party invoking a specific ground of appeal must identify an alleged error within the scope of this provision, which states:

> 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 [...]

36. The overall standard of review was summarised as follows by the Appeals Chamber in the *Kupreskic* Appeal Judgement:[10]

> As has been held by the Appeals Chamber on numerous occasions, an appeal is not an opportunity for the parties to reargue their cases. It does not involve a trial *de novo*. On appeal, parties must limit their arguments to matters that fall within the scope of Article 25 of the Statute. The general rule is that the Appeals Chamber will not entertain arguments that do not allege legal errors invalidating the judgement, or factual errors occasioning a miscarriage of justice, apart from the exceptional situation where a party has raised a legal issue that is of general significance to the Tribunal's jurisprudence. Only in such a rare case may the Appeals Chamber consider it appropriate to make an exception to the general rule.

37. The Statute and settled jurisprudence of the Tribunal provide different standards of review with respect to errors of law and errors of fact.

38. Where a party contends that a Trial Chamber has made an error of law, the Appeals Chamber, as the final arbiter of the law of the Tribunal, must determine whether such an error of substantive or procedural law was in fact made. However, the Appeals Chamber is empowered only to reverse or revise a Trial Chamber's decision when there is an error of law "invalidating the decision". Therefore, not every error of law leads to a reversal or revision of a decision of a Trial Chamber.

39. Similarly, only errors of fact which have "occasioned a miscarriage of justice " will result in the Appeals Chamber overturning the Trial Chamber's decision.[11] The appealing party alleging an error of fact must, therefore, demonstrate precisely not only the alleged error of fact but also that the error caused a miscarriage of justice,[12] which has been defined 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."[13] The responsibility for the findings of facts and the evaluation of evidence resides primarily with the Trial Chamber. As the Appeals Chamber in the *Kupreskic* Appeal Judgement held:[14]

> Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber. It must be borne in mind that two judges , both acting reasonably, can come to different conclusions on the basis of the same evidence.

40. In the *Kupreskic* Appeal Judgement it was further held that:[15]

> The reason that 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 witnesses in person and so is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence. Accordingly, it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness' testimony to prefer, without necessarily articulating every step of the reasoning in reaching a decision on these points.

41. Pursuant to Article 23(2) of the Statute, the Trial Chamber has an obligation to set out a reasoned opinion. In the *Furundzija* Appeal Judgement, the Appeals Chamber held that Article 23 of the Statute gives the right of an accused to a reasoned opinion as one of the elements of the fair trial requirement embodied in Articles 20 and 21 of the Statute. This element, *inter alia*, enables a useful exercise of the right of appeal available to the person convicted.[16] Additionally, only a reasoned opinion allows the Appeals Chamber to understand and review the findings of the Trial Chamber as well as its evaluation of evidence.

42. The *rationale* of a judgement of the Appeals Chamber must be clearly explained. There is a significant difference from the standard of reasoning before a Trial Chamber. Article 25 of the Statute does not require the Appeals Chamber to provide a reasoned opinion such as that required of the Trial Chamber. Only Rule 117(B) of the Rules calls for a "reasoned opinion in writing." The purpose of a reasoned opinion under Rule 117(B) of the Rules is not to provide access to all the deliberations of the Appeals Chamber in order to enable a review of its ultimate findings and conclusions. The Appeals Chamber must indicate with sufficient clarity the grounds on which a decision has been based.[17] However, this obligation cannot be understood as requiring a detailed response to every argument.[18]

43. As set out in Article 25 of the Statute, the Appeals Chamber's mandate cannot be effectively and efficiently carried out without focused contributions by the parties.[19] In a primarily adversarial system,[20] like that of the International Tribunal, the deciding body considers its case on the basis of the arguments advanced by the parties. It thus falls to the parties appearing before the Appeals Chamber to present their case clearly, logically and exhaustively so that the Appeals Chamber may fulfil its mandate in an efficient and expeditious manner. One cannot expect the Appeals Chamber to give detailed consideration to submissions of the parties if they are obscure, contradictory, vague, or if they suffer from other formal and obvious insufficiencies.[21] Nonetheless , the Appeals Chamber has the obligation to ensure that the accused receives a fair trial.[22]

44. An appellant must therefore clearly set out his grounds of appeal as well as the arguments in support of each ground. Furthermore, depending on the finding challenged, he must set out the arguments supporting the contention that the alleged error has invalidated the decision or occasioned a miscarriage of justice. Moreover , the appellant must provide the Appeals Chamber with exact references to the parts of the records on appeal invoked in its support. The Appeals Chamber must be given references to paragraphs in judgements, transcript pages, exhibits or other authorities , indicating precisely the date and exhibit page number or paragraph number of the text to which reference is made.

45. Similarly, the respondent must clearly and exhaustively set out the arguments in support of its contentions. The obligation to provide the Appeals Chamber with exact references to all records on appeal applies equally to the respondent. Also , the respondent must prepare the appeal proceedings in such a way as to enable the Appeals Chamber to decide the issue before it in principle without searching , for example, for supporting material or authorities.

46. In the light of the aforementioned settled jurisprudence, the procedural consequence of Article 25 (1)(b) of the Statute is that the Appeals Chamber ought to consider in writing only those challenges to the findings of facts which demonstrate a possible error of fact resulting in a miscarriage of justice. The Appeals Chamber will in general, therefore, address only those issues for which the aforementioned prerequisites have been demonstrated precisely.

47. Consonant with the settled practice, the Appeals Chamber exercises its inherent discretion in selecting which submissions of the parties merit a "reasoned opinion " in writing. The Appeals Chamber cannot be expected to provide comprehensive reasoned opinions on evidently unfounded submissions. Only this approach allows the Appeals Chamber to concentrate on the core issues of an appeal.

48. In principle, therefore, the Appeals Chamber will dismiss, without providing detailed reasons, those Appellants' submissions in the briefs or the replies or presented orally during the Appeal Hearing which are evidently unfounded. Objections will be dismissed without detailed reasoning where:

    1. the argument of the appellant is clearly irrelevant;

    2. it is evident that a reasonable trier of fact could have come to the conclusion challenged by the appellant; or

    3. the appellant's argument unacceptably seeks to substitute his own evaluation of the evidence for that of the Trial Chamber. [23]

IN THE APPEALS CHAMBER

Before:
Judge Patricia Wald, Presiding
Judge Lal Chand Vohrah
Judge Rafael Nieto-Navia
Judge Fausto Pocar
Judge Liu Daqun

Registrar:
Mr. Hans Holthuis

Judgement of:
23 October 2001

PROSECUTOR

v

ZORAN KUPRESKIC
MIRJAN KUPRESKIC
VLATKO KUPRESKIC
DRAGO JOSIPOVIC
VLADIMIR SANTIC

APPEAL JUDGEMENT

The Office of the Prosecutor:

Mr. Upawansa Yapa
Mr. Anthony Carmona
Mr. Fabricio Guariglia
Ms. Sonja Boelaert-Suominen
Ms. Norul Rashid

Counsel for the Defendants:

Mr. Ranko Radovic, Mr. Tomislav Pasaric for Zoran Kupreskic
Ms. Jadranka Slokovic-Glumac, Ms. Desanka Vranjican for Mirjan Kupreskic
Mr. Anthony Abell, Mr. John Livingston for Vlatko Kupreskic
Mr. William Clegg Q.C., Ms. Valerie Charbit for Drago Josipovic
Mr. Petar Pavkovic for Vladimir Santic

27. B. Reconsideration of factual findings made by the Trial Chamber

1. General principles

28. Under this heading, the Appeals Chamber will discuss the standard that applies with respect to the reconsideration of factual findings by the Trial Chamber. The vast majority of the grounds of appeal raised by the Defendants in this case concerns alleged errors of fact. Several of the parties to the present appeal have also raised questions of a more general nature relating to the Appeals Chamber's review of errors of fact under Article 25(1)(b) of the Statute.[36] In light thereof, the Appeals Chamber considers it appropriate to elaborate upon this matter.

29. In order for the Appeals Chamber to overturn a factual finding by the Trial Chamber, an appellant must demonstrate that the Trial Chamber committed a factual error and the error resulted in a miscarriage of justice.[37] The appellant must establish that the error of fact was critical to the verdict reached by the Trial Chamber, thereby resulting in 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."[38] Consequently, it is not each and every error of fact that will cause the Appeals Chamber to overturn a decision of the Trial Chamber, but only one that has occasioned a miscarriage of justice.[39]

30. Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber . Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber. It must be borne in mind that two judges , both acting reasonably, can come to different conclusions on the basis of the same evidence.[40]

31. As stated above, it is initially the Trial Chamber's task to assess and weigh the evidence presented at trial. In that exercise, it has the discretion to "admit any relevant evidence which it deems to have probative value", as well as to exclude evidence "if its probative value is substantially outweighed by the need to ensure a fair trial."[41] As the primary trier of fact, it is the Trial Chamber that has the main responsibility to resolve any inconsistencies that may arise within and/or amongst witnesses' testimonies. It is certainly within the discretion of the Trial Chamber to evaluate any inconsistencies , to consider whether the evidence taken as a whole is reliable and credible and to accept or reject the "fundamental features" of the evidence.[42] The presence of inconsistencies in the evidence does not, *per se*, require a reasonable Trial Chamber to reject it as being unreliable.[43] Similarly, factors such as the passage of time between the events and the testimony of the witness, the possible influence of third persons, discrepancies, or the existence of stressful conditions at the time the events took place do not automatically exclude the Trial Chamber from relying on the evidence. However, the Trial Chamber should consider such factors as it assesses and weighs the evidence.

32. The reason that 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 witnesses in person and so is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence.[44] Accordingly, it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness' testimony to prefer, without necessarily articulating every step of the reasoning in reaching a decision on these points. This discretion is, however, tempered

by the Trial Chamber's duty to provide a reasoned opinion, following from Article 23(2) of the Statute. In the *Furundzija* Appeal Judgement, the Appeals Chamber considered the right of an accused under Article 23 of the Statute to a reasoned opinion to be an aspect of the fair trial requirement embodied in Articles 20 and 21 of the Statute.[45]

33. It follows from the jurisprudence of the Appeals Chambers of both the ICTY and ICTR that the testimony of a single witness, even as to a material fact, may be accepted without the need for corroboration.[46] With the exception of the testimony of a child not given under solemn declaration ,[47] the Trial Chamber is at liberty , in appropriate circumstances, to rely on the evidence of a single witness.

34. The Appeals Chamber notes, however, that a reasonable Trial Chamber must take into account the difficulties associated with identification evidence in a particular case and must carefully evaluate any such evidence, before accepting it as the sole basis for sustaining a conviction. Domestic criminal law systems from around the world recognise the need to exercise extreme caution before proceeding to convict an accused person based upon the identification evidence of a witness made under difficult circumstances. The principles developed in these jurisdictions acknowledge the frailties of human perceptions and the very serious risk that a miscarriage of justice might result from reliance upon even the most confident witnesses who purport to identify an accused without an adequate opportunity to verify their observations . In the well known United Kingdom case of *R.* v *Turnbull*, the court held that, when a witness has purported to identify the accused under difficult circumstances, the judge should "withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification ...". It further underscored the need always to caution a jury about the dangers of identification evidence.[48]

35. The *Turnbull* principles are reflected in the jurisprudence of many other common law countries.[49] The High Court of Malaya, for example, has pointed out that

> [t]here have been many cases of wrongful convictions based on mistaken eyewitness identification. It has been held that evidence as to identity based on personal impressions, however bona fida, is perhaps of all classes of evidence the least to be relied upon, and therefore, unless supported by other facts, an unsafe basis for the verdict.[50]

36. Similarly, the Supreme Court of the United States, has emphasised that the

> 'influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor--perhaps it is responsible for more errors than all other factors combined'...And the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial , and thus his susceptibility to suggestion the greatest...the vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification....[51]

37. Despite the deference afforded to trial court findings of fact in domestic legal systems, particularly on issues of witness credibility, appellate courts have , on occasion, found the factual findings upon which lower courts have based their conclusions unreasonable and have quashed resulting convictions. In one of the appeals considered in *Turnbull*, for example, the appellate court found

that the decision of the trial court to convict the accused was unsafe and unsatisfactory . In doing so, the court noted that there was no suggestion that the identification witnesses were dishonest and that one of the witnesses, in particular, was acknowledged to have been a very "impressive" witness. Nonetheless, the appellate court found that "the quality of the identifications was not good, indeed there were notable weaknesses in it and there was no evidence capable of supporting the identifications made." Accordingly, the court allowed the appeal against conviction.[52]

38. Most civil law countries adopt the principle of "free evaluation of evidence ", allowing judges considerable scope in assessing the evidence put before them.[53] The decisive element is the intimate conviction of the trial judge, which determines whether or not a given fact has been proven. However, the Federal Court of Germany , for example, has pointed out that a trial judge must exercise extreme caution in the evaluation of a witness' recognition of a person.[54] Particularly in cases where the identification of the accused depends upon the credibility of a witness testimony, the trial judge must comprehensively articulate the factors relied upon in support of the identification of the accused and the evidence must be weighed with the greatest care.[55] The Supreme Court of Austria, has emphasised that, where the identification of the accused depends upon a single witness, a fact finder must be extremely careful in addressing specific arguments raised by the defendant about the credibility of the witness.[56] Similarly, the Supreme Court of Sweden has held, on numerous occasions, that all imprecision or inaccuracy in a witness' testimony must be addressed and analysed thoroughly by the fact finder .[57]

39. In cases before this Tribunal, a Trial Chamber must always, in the interests of justice, proceed with extreme caution when assessing a witness' identification of the accused made under difficult circumstances. While a Trial Chamber is not obliged to refer to every piece of evidence on the trial record in its judgement , where a finding of guilt is made on the basis of identification evidence given by a witness under difficult circumstances, the Trial Chamber must rigorously implement its duty to provide a "reasoned opinion". In particular, a reasoned opinion must carefully articulate the factors relied upon in support of the identification of the accused and adequately address any significant factors impacting negatively on the reliability of the identification evidence. As stated by the Canadian Court of Appeal in *R.* v *Harper*:

> Where the record, including the reasons for judgment, discloses a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence , then it falls upon the reviewing tribunal to intercede.[58]

40. Courts in domestic jurisdictions have identified the following factors as relevant to an appellate court's determination of whether a fact finder's decision to rely upon identification evidence was unreasonable or renders a conviction unsafe: identifications of defendants by witnesses who had only a fleeting glance or an obstructed view of the defendant;[59] identifications occurring in the dark[60] and as a result of a traumatic event experienced by the witness;[61] inconsistent or inaccurate testimony about the defendant's physical characteristics at the time of the event;[62] misidentification or denial of the ability to identify followed by later identification of the defendant by a witness;[63] the existence of irreconcilable witness testimonies;[64] and a witness' delayed assertion of memory regarding the defendant coupled with the "clear possibility " from the circumstances that the witness had been influenced by suggestions from others.[65]

41. In sum, where the Appeals Chamber is satisfied that the Trial Chamber returned a conviction on the basis of evidence that could not have been accepted by any reasonable tribunal or where the

evaluation of the evidence was "wholly erroneous", it will overturn the conviction since, under such circumstances, no reasonable tribunal of fact could be satisfied beyond reasonable doubt that the accused had participated in the criminal conduct.[66] This is the standard the Appeals Chamber will apply when considering the challenges raised by the Defendants to the Trial Chamber's factual findings in the present case.

Case: IT-96-21-*Abis*

IN THE APPEALS CHAMBER

Before:
Judge Theodor Meron, Presiding
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge David Hunt
Judge Asoka de Zoysa Gunawardana

Registrar:
Mr Hans Holthuis

Judgment of:
8 April 2003

PROSECUTOR
v
Zdravko MUCIC, Hazim DELIC and Esad LANDZO

JUDGMENT ON SENTENCE APPEAL

Counsel for the Prosecution:

Mr Norman Farrell
Mr Anthony Carmona
Ms Helen Brady

Counsel for the Defence:

Mr Tomislav Kuzmanovic and Mr Howard Morrison QC for Zdravko Mucic
Mr Salih Karabdic and Mr Tom Moran for Hazim Delic
Ms Cynthia Sinatra and Mr Peter Murphy for Esad Landzo

8 Application by Delic for reconsideration of his original appeal against conviction

48. Although this application was included in what is in form and substance an appeal against sentence, Delic made it clear that he was independently seeking to have the Appeals Chamber reconsider its decision dismissing his appeal against the convictions other than that relating to Scepo Gotovac.[154] The prosecution argued, *inter alia*, that, since the earlier judgment of the Appeals Chamber in this case, the issue of those convictions was now *res judicata* and cannot be litigated further.[155] Delic argued that, according to the "law of the case" doctrine, a party is entitled to litigate issues which have already been decided when the strict application of the *res judicata* principle would cause "manifest injustice" to a party.[156] The prosecution responded that the "law of the case" doctrine did not apply in this Tribunal, and that in any event it could apply only "during the course of a single continuing lawsuit".[157] The Appeals Chamber observes that this application by Delic would appear to have been made during the course of a "single continuing lawsuit", but it does not find it necessary to resolve the issue which was debated.

49. The Appeals Chamber has an inherent power to reconsider any decision, including a judgment where it is necessary to do so in order to prevent an injustice. The Appeals Chamber has previously held that a Chamber may reconsider a decision, and not only when there has been a change of circumstances, where the Chamber has been persuaded that its previous decision was erroneous and has caused prejudice.[158] Whether or not a Chamber does reconsider its decision is itself a discretionary decision.[159] Those decisions were concerned only with interlocutory decisions, but the Appeals Chamber is satisfied that it has such a power also in relation to a judgment which it has given – where it is persuaded:

> (a) (i) that a clear error of reasoning in the previous judgment has been demonstrated by, for example, a subsequent decision of the Appeals Chamber itself, the International Court of Justice, the European Court of Human Rights or a senior appellate court within a domestic jurisdiction, or
>
> (ii) that the previous judgment was given *per incuriam*; and
>
> (b) that the judgment of the Appeals Chamber sought to be reconsidered has led to an injustice.

50. It is now well accepted in the Tribunal's jurisprudence that it possesses an inherent jurisdiction, deriving from its judicial function, to ensure that its exercise of the jurisdiction which is expressly given to it by that Statute is not frustrated and that its basic judicial functions are safeguarded.[160] The principal purpose of the Tribunal's existence is to administer justice, and to ensure that its proceedings do not lead to injustice. The prevention of injustice arising from error is, in most systems, provided by rights of appeal. In the civil law system, the first level of appeal is usually a *de novo* rehearing, followed by two or more levels of appeal on matters of law, or on matters of both facts and law. In the common law system, there is usually no rehearing (except in relation to minor crimes tried before magistrates) but there is either one or two levels of appeal on matters of law, or on matters of mixed fact and law. Many common law systems, however, also provide for a reconsideration where a filtering authority (either the Attorney General or a government body) examines the basis for the reconsideration request and, where appropriate, refers it to a court of criminal appeal for such reconsideration.

51. This Tribunal has only one level of appeal. That is not a *de novo* rehearing but a limited form of appeal relating to errors on a question of law which invalidates the Trial Chamber's decision or an error

of fact which has occasioned a miscarriage of justice.[161] The prospect of an injustice resulting from a judgment of the Appeals Chamber is not met by any further levels of appeal. Such a prospect must be met in some way to ensure that the Tribunal's proceedings do not lead to injustice. The right of review granted by Article 26 of the Tribunal's Statute is limited to the discovery of a new fact 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. That right has been interpreted as excluding issues of law,[162] and it is therefore only a partial answer to the prospect of injustice. A partial answer still leaves outstanding a significant prospect of injustice. No court should allow that.

52. How then is the prospect of injustice to be prevented? The absence of any reference in the Tribunal's Statute to the existence of a power to reconsider is no answer to the prospect of injustice where the Tribunal possesses an inherent jurisdiction to prevent injustice. There was no reference in the Tribunal's Statute to the particular issues dealt with in the cases to which reference has already been made in which the Tribunal's inherent powers were exercised.[163] It was the very absence of any such reference which led to the exercise of those inherent powers, because it was necessary to do so in those cases in order to ensure that the Tribunal's exercise of the jurisdiction which is expressly given to it by that Statute was not frustrated and that its basic judicial functions were safeguarded. There is nothing in the Statute which is inconsistent with the existence of an inherent power of the Appeals Chamber to reconsider its judgment in the appropriate case. As was said by Lord Browne-Wilkinson, in the *Pinochet* Case in which the House of Lords agreed to reconsider its earlier judgment, given in proceedings for extradition on criminal charges.:[164]

> 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 *Broome v Cassell & Co Ltd (No 2)* S1972C 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.

The decision to reconsider the earlier judgment was unanimous. The test which is now stated is not satisfied where the Appeals Chamber is satisfied "just" that its previous decision was wrong; it must also be satisfied that its previous decision has led to an injustice.[165]

53. The Rules of Procedure and Evidence do not enlarge the powers of the Tribunal – they are intended only to establish the way in which the proceedings are conducted in the Tribunal.[166] The absence of any reference to this power in the Rules is therefore no bar to the existence of the inherent power to reconsider. There is nothing in the Rules which is inconsistent with the existence of such an inherent power. Nor does the possibility that the Appeals Chamber will be flooded with applications for reconsideration constitute any such bar. Justice cannot be denied merely because it may be inconvenient to administer it. In any event, there has been no flood of applications resulting from the existing right to seek reconsideration of interlocutory decisions in limited circumstances.[167] Over-enthusiastic counsel who file frivolous applications for reconsideration will fast lose their enthusiasm when they are denied payment of their fees and costs associated with the application.[168] If any pattern of abuse appears which cannot be prevented in that way, the adoption of a Rule imposing a filter upon such applications, such as a requirement of leave to seek reconsideration of a judgment, would stop that abuse.

54. In the present case, Delic has argued that there has been a "significant" change in the law relevant to the present case since the earlier judgment of the Appeals Chamber.[169] He claims that, in the *Kupreskic* Appeal Judgment, which is described as "one of the most important procedural decisions in the Tribunal's history",[170] the Appeals Chamber laid down a "new test" of the sufficiency of the evidence to support a conviction which, if it had been applied by the Appeals Chamber in its earlier judgment, would have resulted in the quashing of his convictions in respect of Counts 3, 18 and 31 of the indictment.[171]

55. The argument that the "test" applied in the *Kupreskic* Appeal Judgment is "new" is misconceived. In that judgment, the Appeals Chamber considered "the standard that applies with respect to the reconsideration of factual findings by the Trial Chamber" on appeal as permitting the Appeals Chamber to substitute its own finding for that of the Trial Chamber only "where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is 'wholly erroneous'".[172] The standard has been stated in other cases in this way:[173]

> The test to be applied in relation to the issue as to whether the evidence is *factually* sufficient to sustain a conviction is whether the conclusion of guilt beyond reasonable doubt is one which *no* reasonable tribunal of fact *could* have reached.

There is no difference in substance between the two formulations. Such a standard has been adopted in one or other of these formulations in every appeal against conviction in the Tribunal.[174] The Appeals Chamber in the *Kupreskic* Appeal Judgment declined to lay down any universal test as to what constitutes a "wholly erroneous" evaluation of the evidence by a Trial Chamber, although it is clear from its approach in that appeal that there is in reality no difference in substance between that test and the unreasonableness one usually stated.[175]

56. The "new test" said by Delic to have been laid down in the *Kupreskic* Appeal Judgment related to the reliability (or the quality) of a witness's evidence, as opposed to the credibility (or truthfulness) of that witness. It was applied in relation to the evidence of identification given by a young girl, the only witness who was able to identify the accused as having taken part in the particular event in question. The distinction is well encapsulated in the observation made by the Appeals Chamber:[176]

> Even witnesses who are very sincere, honest and convinced about their identification are very often wrong.

Delic describes the "key" to the analysis by the Appeals Chamber is that "evidence from a truthful witness may be too unreliable to serve as the basis for a conviction,[177] and he asserts that this "watershed" decision contradicts the earlier judgment of the Appeals Chamber in the present case, so that the failure to apply it would work "a manifest injustice" on Delic.[178]

57. If there is indeed a contradiction between the two judgments, it did not impress itself upon the Appeals Chamber when hearing the *Kupreskic* appeal, as it cites its earlier judgment in the present case as supporting the passage just quoted. Delic had suggested that the *Kupreskic* Appeal Judgment would have been the "proverbial bombshell or blockbuster" in the United States,[179] but his counsel was obliged to concede that – as the *Kupreskic* Appeal Judgment itself makes clear – the test it applied was certainly well known elsewhere throughout the world.[180] Nor was it even "new " to the jurisprudence of the Tribunal. In *Prosecutor v Kunarac et al*,[181] a case in which the issue was the legal sufficiency of the evidence of identification to support a charge of rape, a Trial Chamber, after saying that the credit of the witness upon whom the prosecution case relied was not in issue at that stage, drew attention to

the distinction which has to be drawn between the credibility of a witness and the reliability of that witness's evidence – credibility depends upon whether the witness should be believed; reliability assumes that the witness is speaking the truth, and it depends upon whether the evidence, if accepted, proves (or tends to prove) the fact to which it is directed.[182] The Trial Chamber referred to the uncertainty and the inherent frailties of identification evidence, and added:[183]

> For these reasons, special caution has been found to be necessary before accepting identification evidence because of the possibility that even completely honest witnesses may have been mistaken in their identification.

All of those propositions were taken from decisions which are cited in every worthwhile textbook on evidence.

58. What needs to be emphasised is that, in the earlier judgment in the present case, the Appeals Chamber expressly *declined* the application by Delic to consider the legal sufficiency of the evidence to support the convictions. This is an issue which usually arises at the close of the prosecution case in a trial, when the test applied by a Trial Chamber in determining whether there is a case to answer is whether there is evidence upon which (if accepted) a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused.[184] The Appeals Chamber said that it had instead applied the usual test of whether the conclusion of guilt beyond reasonable doubt reached by the original Trial Chamber in relation to the five counts challenged by Delic was one which no reasonable tribunal of fact could have reached.[185] These issues were fully discussed in the earlier judgment of the Appeals Chamber, in the introductory part of Section VII ("Delic Grounds of Appeal Alleging Errors of Fact"). The procedure followed by the Appeals Chamber required a far wider inquiry than would an inquiry into the legal sufficiency of the evidence. An inquiry into the sufficiency of the evidence requires an acceptance of the truthfulness of the witness,[186] whereas the inquiry involved in the procedure adopted by the Appeals Chamber requires a consideration as to whether no reasonable tribunal of fact could have accepted the witness's evidence as either truthful or reliable or both.

59. The use made in the *Kupreskic* Appeal Judgment of the statement "Even witnesses who are very sincere, honest and convinced about their identification are very often wrong" was directed to a "critical component" of the Trial Chamber's finding that the evidence of the young girl's identification of the accused was truthful. After acknowledging that there had been criticisms levelled at her credibility, the Trial Chamber said:[187]

> [...] these criticisms are outweighed by the impression upon the Trial Chamber while she was giving evidence. Her evidence concerning the identification of the accused was unshaken.

When determining whether no reasonable tribunal of fact could have accepted the young girl's evidence, it was appropriate for the Appeals Chamber to refer to the uncertainty and the inherent frailties of identification evidence. That is a subject which arises frequently in identification cases where an application is made at the end of the prosecution case for a ruling that there is no case to answer, and it was quite natural for the Appeals Chamber, in overturning the Trial Chamber's finding, to have referred to the well established principles applied in such cases to make the point that there is a clear distinction between the honesty of an identification witness and the reliability of that witness's evidence.

60. Delic has not persuaded the Appeals Chamber that the *Kupreskic* Appeal Judgment laid down a "new test" for the examination of the challenges by him to the evidence upon which his convictions were based, or that the test which it stated did not in any event inform the Appeals Chamber in the

course of that examination. The application for the appeal against conviction to be reconsidered is rejected.

Case No.: IT-97-25-A

IN THE APPEALS CHAMBER

Before:
Judge Claude Jorda, Presiding
Judge Wolfgang Schomburg
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Carmel Agius

Registrar:
Mr. Hans Holthuis

Judgement of:
17 September 2003

PROSECUTOR

v.

MILORAD KRNOJELAC

JUDGEMENT

The Office of the Prosecutor:

Mr Christopher Staker
Ms Helen Brady
Mr Anthony Carmona
Ms Norul Rashid

Defence Counsel:

Mr Mihajlo Bakrac
Mr Miroslav Vasic

9. 2. Applicable review criteria of the allegations of errors in general and the errors of fact in particular

10. With regard to the alleged errors of law, the Appeals Chamber recalls that, as arbiter of the law applicable before the International Tribunal, when a party raises such an allegation, it is bound in principle to determine whether an error was in fact committed on a substantive or procedural issue. The case-law recognises that the burden of proof on appeal is not absolute with regard to errors of law. The Appeals Chamber does not review the Trial Chamber's findings on questions of law merely to determine whether they are reasonable but rather to determine whether they are correct. Nevertheless, the party alleging an error of law must, at least, identify the alleged error, present arguments in support of its claim and explain how the error invalidates the decision. An allegation of an error of law which has no chance of resulting in an impugned decision being quashed or revised is not *a priori* legitimate and may therefore be rejected on that ground.

11. As regards errors of fact, the party alleging this type of error in support of an appeal against a conviction must provide evidence both that the error was committed and that this occasioned a miscarriage of justice. The Appeals Chamber has regularly pointed out that it does not lightly overturn findings of fact reached by a Trial Chamber. This approach is explained principally by the fact that only the Trial Chamber is in a position to observe and hear the witnesses testifying and is thus best able to choose between two diverging accounts of the same event. First instance courts are in a better position than the Appeals Chamber to assess witnesses' reliability and credibility and determine the probative value of the evidence presented at trial.

12. Thus, when considering this type of error the Appeals Chamber applies the "reasonable nature" criterion to the impugned finding. Only in cases where it is clear that no reasonable person would have accepted the evidence on which the Trial Chamber based its finding or when the assessment of the evidence is absolutely wrong can the Appeals Chamber intervene and substitute its own finding for that of the Trial Chamber. Thus, the Appeals Chamber will not call the findings of fact into question where there is reliable evidence on which the Trial Chamber might reasonably have based its findings. It is accepted moreover that two reasonable triers of fact might reach different but equally reasonable findings. A party suggesting only a variation of the findings which the Trial Chamber might have reached therefore has little chance of a successful appeal, unless it establishes beyond any reasonable doubt that *no* reasonable trier of fact *could have* reached a guilty finding.

13. When a party succeeds in establishing that an error of fact was committed in accordance with those criteria, the Appeals Chamber still has to accept that the error occasioned a miscarriage of justice such that the impugned finding should be revoked or revised. The party alleging a miscarriage of justice must, in particular, establish that the error strongly influenced the Trial Chamber's decision and resulted in a flagrant injustice, such as where an accused is convicted despite lack of evidence pertaining to an essential element of the crime.

14. In the *Bagilishema* case, the ICTR Appeals Chamber held that the standard of unreasonableness and the same deference to factual findings of the Trial Chamber apply when the Prosecution appeals against an acquittal. The Appeals Chamber will only hold that an error of fact was committed when it determines that no reasonable trier of fact could have made the challenged finding. However, since the Prosecution must establish the guilt of the accused at trial, the significance of an error of fact occasioning a miscarriage of justice takes on a specific character when alleged by the Prosecution. This is because it has the more difficult task of showing that there is no reasonable doubt about the appellant's guilt when account is taken of the Trial Chamber's errors of fact.

15. In light of the above, in order for the appeal to succeed it is vital for the party alleging an error of fact or on a point of law to meet the criteria for review on appeal. In principle, the Appeals Chamber is not obliged to consider a party's submissions if they do not relate to an error of law which invalidates the decision or an error of fact occasioning a miscarriage of justice. There is therefore no point whatsoever in a party reiterating arguments which failed at trial on appeal, unless the party demonstrates that the fact that they were dismissed resulted in an error such as to justify the Appeals Chamber intervening. The Appeals Chamber in the *Kupreskic* Appeals Judgement stated that when a party is not able to explain how an alleged error renders the decision invalid, in general, it must refrain from appealing on that point. The Appeals Chamber considers that this principle holds for alleged errors of both fact and law. Consequently, when there is no chance of a party's submissions leading to a challenged decision being quashed or revised, the Appeals Chamber may reject them, at the outset, as being invalid and it does not have to consider them on the merits.

16. As regards the formal requirements, the Appeals Chamber in the *Kunarac* Appeals Judgement specified that it cannot be expected to consider the parties' claims in detail if they are obscure, contradictory or vague or if they are vitiated by other blatant formal defects. In this regard, paragraph 13 of the Practice Direction on the Formal Requirements for Appeals from Judgements of 16 September 2002 states that "where a party fails to comply with the requirements laid down in [...] [the] Practice Direction, or where the wording of a filing is unclear or ambiguous, a designated Pre-Appeal Judge or the Appeals Chamber may, within its discretion, decide upon an appropriate sanction, which can include an order for clarification or re -filing. The Appeals Chamber may also reject a filing or dismiss submissions therein." The party appealing must therefore set out the sub-grounds and submissions of its appeal clearly and provide the Appeals Chamber with specific references to the sections of the appeal case it is putting forward in support of its claims. From a procedural point of view, the Appeals Chamber has discretion under Article 25 of the Statute to determine which of the parties' submissions warrant a reasoned written response. The Appeals Chamber does not have to provide a detailed written explanation of its position with regard to arguments which are clearly without foundation. It must focus its attention on the essential issues of the appeal. In principle, therefore, it will reject without detailed reasoning arguments raised by the Appellants in their briefs or at the appeal hearing if they are obviously ill-founded.

17. Here, the Prosecution raised the problem of the review criteria on appeal as a preliminary matter in its Response.[6] It claims that some sections of the Defence Brief lack clarity as to the alleged errors of law and fact and that, in relation to various factual issues, Krnojelac has presented the arguments raised at trial (sometimes virtually verbatim) without referring to any part of the Judgment and without identifying in its analysis or submissions any error occasioning a miscarriage of justice.[7] The Prosecution submits that, in those circumstances, Krnojelac has not satisfied the burden of proof on appeal.[8]

18. Given the aforementioned case-law, the Appeals Chamber finds that the question is whether the Defence has presented grounds of appeal that are invalid in accordance with the Tribunal's case-law and are thus to be rejected outright because the Defence has not satisfied the review criteria on appeal.

Case No.: IT-98-32-A

IN THE APPEALS CHAMBER

Before:
Judge Theodor Meron, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Wolfgang Schomburg
Judge Inés Mónica Weinberg de Roca

Registrar:
Mr. Hans Holthuis

Date:
25 February 2004

PROSECUTOR

v.

MITAR VASILJEVIC

JUDGEMENT

The Office of the Prosecutor:

Ms. Helen Brady
Ms. Michelle Jarvis
Mr. Steffen Wirth

Counsel for the Accused:

Mr. Vladimir Domazet
Mr. Geert-Jan Knoops

3. II. APPLICABLE CRITERIA FOR REVIEWING THE ALLEGED ERRORS AND FORMAL REQUIREMENTS OF THE GROUNDS PRESENTED BY THE APPELLANT

A. Standard of review under Article 25 of the Statute and the case-law of the Tribunal

4. The Appeals Chamber finds it appropriate to recall the standard of review by which the Appeals Chamber determines whether a ground of appeal is to be granted or dismissed, and the related formal requirements.

5. On appeal, the parties must limit their arguments to legal errors invalidating the decision and to factual errors occasioning a miscarriage of justice within the scope of Article 25 of the Statute.[1] The appeals procedure provided for under Article 25 of the Statute is corrective and does not give rise to a *de novo* review of the case.[2] The Appeals Chamber may affirm, reverse, or revise the decisions taken by the Trial Chamber.[3] These criteria have been frequently referred to by the Appeals Chambers of the International Tribunal and the ICTR and will therefore only be briefly restated below.[4]

6. A party alleging that there is an error of law must advance arguments in support of the contention and explain how the error invalidates the decision; but, if the arguments do not support the contention, that party does not automatically lose its point since the Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law.[5]

7. Regarding errors of fact, the Appeals Chamber will only substitute the Trial Chamber's finding for its own when no reasonable trier of fact could have made the original finding.[6]

8. Further, it is not any error of fact that will cause the Appeals Chamber to overturn a decision by a Trial Chamber, but one which has led to a miscarriage of justice, which has been defined as "a grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of a crime."[7]

9. Similar to an appeal against conviction, an appeal from sentencing is a procedure of a corrective nature rather than a *de novo* sentencing proceeding. A Trial Chamber has considerable though not unlimited discretion when determining a sentence. As a general rule, the Appeals Chamber will not substitute its sentence for that of a Trial Chamber unless "it believes that the Trial Chamber has committed an error in exercising its discretion, or has failed to follow applicable law."[8] The test that has to be applied for appeals from sentencing is whether there has been a discernible error in the exercise of the Trial Chamber's discretion. As long as the Trial Chamber keeps within the proper limits, the Appeals Chamber will not intervene.[9]

10. Before considering the arguments of the Appellant on the merits, the Appeals Chamber will, as a preliminary matter, determine whether the Appellant's submissions meet the formal requirements for consideration on the merits. Should the Appeals Chamber be of the view that an argument does not meet these requirements, then it will be dismissed without detailed reasoning.[10] Further, should a party not argue its points in accordance with the requirements of the Practice Direction on Formal Requirements for Appeals,[11] then the Appeals Chamber may reject a filing or dismiss submissions therein.[12]

11. The Appeals Chamber recalls that the formal criteria require an appealing party to provide the

Appeals Chamber with exact references to the parts of the records, transcripts, judgements and exhibits to which reference is made.[13] In the *Kunarac* Appeals Judgement, the Appeals Chamber found that:

> [i]n principle, therefore, the Appeals Chamber will dismiss, without providing detailed reasons, those Appellants' submissions in the briefs or the replies or presented orally during the Appeal Hearing which are evidently unfounded. Objections will be dismissed without detailed reasoning where:
>
> 1. the argument of the appellant is clearly irrelevant;
>
> 2. it is evident that a reasonable trier of fact could have come to the conclusion challenged by the appellant; or
>
> 3. the appellant's argument unacceptably seeks to substitute his own evaluation of the evidence for that of the Trial Chamber.[14]

12. Further, the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies.[15] An allegation of an error of law which has no reasonable prospect of invalidating the decision may be summarily rejected.[16] A party alleging an error of fact must explain what the alleged error is and why it a reasonable trier of fact could not make this finding and in what way it leads to a miscarriage of justice. Where an appellant only challenges the Trial Chamber's findings and suggests an alternative assessment of the evidence, without indicating in what respects the Trial Chamber's assessment of the evidence was erroneous, then the appellant will have failed to discharge the burden incumbent upon him. In such circumstances, the Appeals Chamber may dismiss the arguments without a reasoned opinion. The Appeals Chamber will examine below, as a preliminary consideration whether the arguments of the Appellant meet these formal requirements or should be dismissed without detailed reasoning.

Case No: IT-98-33-A

IN THE APPEALS CHAMBER

Before:
Judge Theodor Meron, Presiding
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Wolfgang Schomburg

Registrar:
Mr. Hans Holthuis

Judgement:
19 April 2004

PROSECUTOR

v.

RADISLAV KRSTIC

JUDGEMENT

Counsel for the Prosecution:

Mr. Norman Farrell
Mr. Mathias Marcussen
Ms. Magda Karagiannakis
Mr. Xavier Tracol
Mr. Dan Moylan

Counsel for the Defendant:

Mr. Nenad Petrusic
Mr. Norman Sepenuk

186. (c) Remedy

187. As a potential remedy, the Defence has submitted that the Prosecution's failure to disclose material exculpatory under Rule 68 warrants a re-trial.[320] In addition, where an accused has been prejudiced by a breach of Rule 68, that prejudice may be remedied where appropriate through the admission of additional evidence on appeal under Rule 115.[321] On this appeal, the evidence in question did not justify its admission under Rule 115,[322] and the Appeals Chamber finds that it does not justify a re-trial. Nevertheless, it remains the fact that the Defence was able to seek admission of the material as additional evidence. It has therefore not shown that Radislav Krstic have suffered any prejudice. The Defence's petition is therefore dismissed.

188. To the extent that the Appeals Chamber has found that the Prosecution has failed to respect its obligations under the Rules, those breaches fall to be addressed by the appropriate remedies, namely Rule 46 (Misconduct of Counsel) and Rule *68bis* (Failure to Comply with Disclosure Obligations).

Case No. IT-98-34-A

IN THE APPEALS CHAMBER

Before:
Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Wolfgang Schomburg

Registrar:
Mr. Hans Holthuis

Judgement of:
3 May 2006

PROSECUTOR

v.

MLADEN NALETILIC, *a.k.a.* "TUTA"
VINKO MARTINOVIC, *a.k.a.* "STELA"

JUDGEMENT

Counsel for the Prosecutor:

Mr. Norman Farrell
Mr. Peter M. Kremer
Ms. Marie-Ursula Kind
Mr. Xavier Tracol
Mr. Steffen Wirth

Counsel for Naletilic and Martinovic:

Mr. Matthew Hennessy and Mr. Christopher Meek for Mladen Naletilic
Mr. Zelimir Par and Mr. Kurt Kerns for Vinko Martinovic

242. **Denial of request to subpoena a Prosecution Trial Attorney as a witness (fifth ground of appeal)**

243. Under his fifth ground of appeal, Naletilic alleges that the Trial Chamber abused its discretion in denying him the opportunity to subpoena a Prosecution Trial Attorney as a witness to "promises" or "agreements" made between the Office of the Prosecutor and Witnesses Falk Simang and Ralf Mrachacz, both ex-members of the KB, serving life sentences in Germany for the murder of two German soldiers in Bosnia in 1993, in exchange for their testimonies.[498] Naletilic claims that the Trial Chamber's decision denying his request for a subpoena was inadequately reasoned and erroneous.

244. According to Rule 54, "a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial". The Appeals Chamber will "review the order made and [...] substitute its own exercise of discretion for that of the Trial Chamber [...] once [it] is satisfied that the error in the exercise of the Trial Chamber's discretion has prejudiced the party which complains of the exercise".[499]

245. As to Naletilic's argument that the Trial Chamber never adequately explained why it denied his request for a subpoena, the Appeals Chamber notes that the Trial Chamber expressed its reasons as follows:

> Considering that the Defence was given the opportunity to cross-examine Mr. Simang on this matter, which it did at length;
>
> Considering that the Motion does not provide any further clarification as to how the testimony of Witness SS would assist the Defence in the presentation of its case, as for instance a party cannot cross-examine its own witness;
>
> Considering therefore that the Chamber considers that it is in a position to assess the credibility of the witness Mr. Simang and give the appropriate weight to his testimony, and that it does not need to hear further evidence on this specific issue ;
>
> Considering that it is therefore not necessary for the Chamber to determine whether and when prosecuting attorneys may be called to testify.[500]

The Appeals Chamber considers that this reasoning is appropriate and sufficiently well explained to satisfy the reasoned opinion requirement, even if it is not articulated in extensive detail.[501]

246. Naletilic's argument that the fact that the individual in question was a member of the Prosecution was no valid ground to refuse to compel her testimony is irrelevant because it does not appear from the Decision on Attorney's Subpoena that this was an element taken into consideration by the Trial Chamber in rejecting Naletilic's application. The same applies to Naletilic's argument in reply that the right of an appellant to a fair trial must outweigh the interest of the Prosecution.[502]

247. As to Naletilic's argument that the Trial Chamber ignored and refused to discuss the fact that the Prosecution had promised Witness Falk Simang to intercede before the German authorities on his behalf, the Appeals Chamber first observes that Naletilic's allegation about these promises is only substantiated by the letters Witness Falk Simang sent to the Prosecution. Naletilic refers to these, without specifying particular portions of the numerous letters in question.[503] Additionally, review of these letters reveals that Witness Falk Simang did not explicitly mention any promise made by

the Prosecution to intercede on his behalf to obtain his liberty, but, at most, to guarantee his safety and that he would not be disadvantaged by agreeing to give evidence before the International Tribunal.[504] Furthermore, during his cross-examination, Witness Falk Simang stated that the only promises the Prosecution had made to him were that his life would be protected and that he would get a copy of his testimony at trial.[505] Such promises, if made, would not have been inappropriate.

248. It is not disputed that the witness in question expected at the very least that the Prosecution would intervene in his favour. The Trial Chamber acknowledged as much when it stated that "?tghe fact that ?Witnessg Falk Simang expressed hope that his case in Germany would be reopened following these proceedings does not in the view of the Chamber make his testimony less reliable and credible".[506] It does not follow from the fact that a witness may testify out of interest that such a witness is incapable of telling the truth.[507] Naletilic thus has not proven that the Trial Chamber erred in assessing Witness Falk Simang's credibility. Moreover, Naletilic also has not demonstrated that he was prejudiced by his inability to cross-examine the Trial Attorney.

249. For the aforementioned reasons, Naletilic's fifth ground of appeal is dismissed in its entirety.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ENGLISH
Original: French

APPEALS CHAMBER

Before:?
Judge Claude Jorda, Presiding
Judge Mohamed Shahabuddeen
Judge David Hunt
Judge Fausto Pocar
Judge Theodor Meron

Registry:? Adama Dieng

Judgement of:? 3 July 2002

THE PROSECUTOR
(Appellant)
v.
Ignace BAGILISHEMA
(Respondent)

Case No. ICTR-95-1A-A

JUDGEMENT
(REASONS)

Office of the Prosecutor:
Carla Del Ponte
Norman Farrell
Sonja Boelaert-Suominen
Mathias Marcussen

Counsel for the Defence:
Fran餘s Roux
Maroufa Diabira

C.? ?Standard of review for an appeal against acquittal

8.???????? The present appeal is filed by the Prosecution against acquittal by the Trial Chamber. This type of appeal is provided for under Article 24 of the Tribunal?s Statute, which states that the two parties may lodge an appeal on grounds of an error of law or of fact.[4] On several occasions, the Appeals Chamber has reiterated the standards to be applied in considering errors on a question of law and errors of fact raised in an appeal against conviction.[5] However, the Appeals Chamber has never had the opportunity to define the standards to be applied in considering appeals by the Prosecution against acquittal, and deems it necessary to do so in the present matter, inasmuch as the greater part of the Prosecution?s grounds of appeal relates to allegations of errors of fact.

9.???????? With regard to allegations of errors on a question of law, the Appeals Chamber considers that the standards of review are the same for the two types of appeal: following the example of a party appealing against conviction, an appeal by the Prosecution against acquittal, which alleges that the Trial Chamber committed an error on a question of law, must establish that the error invalidates the decision.

10.?????? With regard to errors of fact in appeals against conviction, the Appeals Chamber applies the standard of the ?unreasonableness? of the impugned finding. The Appeals Chamber must determine whether the finding of guilt beyond reasonable doubt is one which no reasonable tribunal of fact *could have* reached, it being understood that the Appeals Chamber can only overturn a decision of the Trial Chamber where the alleged error of fact occasioned a miscarriage of justice. An appellant who alleges an error of fact must therefore show both the error that was committed and the miscarriage of justice resulting therefrom.[6]

11.?????? As the Appeals Chambers of both the ICTR and the ICTY have repeatedly stressed, an appeal is not an opportunity for a *de novo* review of the case. The Appeals Chamber ?will not lightly disturb findings of fact by a Trial Chamber.?[7] Because ?[t]he task of hearing, assessing and weighing the evidence presented at trial is left to the Judges sitting in a Trial Chamber, [?] [i]t is only when 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.?[8] Two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.[9]

12.?????? The Appeals Chamber has also repeatedly explained the reasons for this deference to the factual findings of the Trial Chambers. As the ICTY Appeals Chamber put it in the *Kupre?kić* Appeal Judgement:

> The Trial Chamber has the advantage of observing witnesses in person and so is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence. Accordingly, it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness? testimony to prefer, without necessarily articulating every step of the reasoning in reaching a decision on these points.[10]

13.?????? The same standard of unreasonableness and the same deference to factual findings of the Trial Chamber apply when the Prosecution appeals against an acquittal. Thus, when considering an appeal by the Prosecution, as when considering an appeal by the accused, the Appeals Chamber will only hold that an error of fact was committed when it determines that no reasonable trier of fact could have made the challenged finding.

14.?????? Under Article 24(1)(b) of the Statute, the Prosecution, like the accused, must demonstrate ?an error of fact that occasioned a miscarriage of justice.? For the error to be one that occasioned a miscarriage of justice, it must have been ?critical to the verdict reached.?[11] Because the Prosecution bears the burden at trial of proving the guilt of the accused beyond a reasonable doubt, the significance

of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against acquittal than for a defence appeal against conviction. An accused must show that the Trial Chamber?s factual errors create a reasonable doubt as to his guilt. The Prosecution faces a more difficult task. It must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the accused?s guilt has been eliminated.

United Nations
Nations Unies

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ENGLISH
Original: FRENCH

APPEALS CHAMBER

Before Judges:
Claude Jorda, presiding
Lal Chand Vohrah
Mohamed Shahabuddeen
Rafael Nieto-Navia
Fausto Pocar

Registry: Adama Dieng

Judgement of: 16 November 2001

ALFRED MUSEMA
(Appellant)
v.
THE PROSECUTOR
(Respondent)

Case No. ICTR-96-13-A

JUDGEMENT

Counsel for the Appellant:
Steven Kay, QC
Michail Wladimiroff
Sylvia de Bertodano

Office of the Prosecutor:
Carla Del Ponte
Norman Farrell
Mathias Marcussen
Sonja Boelaert-Suominen

2.??????? Discussion

15. Article 24(1) of the Statute provides for appeals on grounds of an error on a question of law that invalidates the decision or an error of fact which has occasioned a miscarriage of justice. The standards to be applied in both cases are well established. These standards have been uniformly accepted and applied in the case-law of the Appeals Chamber of both ICTR[17] and ICTY[18] and this Appeals Chamber considers that no cogent argument has been put forward by Musema to persuade it to depart therefrom.[19]? The Appeals Chamber rejects the Appellant?s assertion that the applicable standard for both error of law and error of fact is whether the Appeals Chamber is satisfied that no reasonable Trial Chamber could have come to a different conclusion from that which had been reached by the Trial Chamber if it had directed itself properly.

16. Where an error on a question of law is alleged, the burden is on the appealing party to show that the error is one which invalidated the decision,? although such burden is not absolute.[20]

17. As to errors of fact, the test to be applied is whether the conclusion of guilt beyond reasonable doubt is one which no reasonable tribunal of fact could have reached.[21] That is, the Appeals Chamber confirms that the standard to be applied is that of reasonableness.? In order to satisfy this test, the burden rests on the appealing party to show that the Trial Chamber committed an error. The Appeals Chamber stresses, as it has done in the past, that an appeal is *not* an opportunity for a party to have a *de novo* review of their case.[22]? It is particularly necessary to state this because the present appeal tends to call into question all of the factual findings relied upon to convict the Accused.? An appellant who alleges an error of fact must satisfy a two-fold burden: first, show that an error was committed;? and second, show that the error occasioned a miscarriage of justice.[23]? In other words, it is not every error that will lead the Appeals Chamber to overturn a decision of the Trial Chamber.? The appealing party must demonstrate that the error was such that it led to a miscarriage of justice.[24]

18. The Appeals Chamber recalls that in determining whether or not a Trial Chamber?s finding was reasonable, it "will not lightly disturb findings of fact by a Trial Chamber."[25]? In the first place, the task of weighing and assessing evidence lies with the Trial Chamber.? Furthermore, it is for the Trial Chamber to determine whether a witness is credible or not.? Therefore, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber.[26]? But the Trial Chamber?s discretion in weighing and assessing evidence is always limited by its duty to provide a "reasoned opinion in writing,"[27]? although it is not required to articulate every step of its reasoning for each particular finding it makes.[28]? The question arises as to the extent that a Trial Chamber is obliged to set out its reasons for accepting or rejecting a particular testimony.[29]? There is no guiding principle on this point and, to a large extent, testimony must be considered on a case by case basis. The Appeals Chamber of ICTY held that:[30]

> [t]he 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."[31]? The European Court of Human Rights has held that a "tribunal? is not obliged to give a detailed answer to every argument.[32]

19. In addition, the Appeals Chamber of ICTY has stated that although the evidence produced may not have been referred to by a Trial Chamber, based on the particular circumstances of a given case, it may nevertheless be reasonable to assume that the Trial Chamber had taken it into account.[33]

20. It does not necessarily follow that because a Trial Chamber did not refer to any particular evidence

or testimony in its reasoning, it disregarded it.? This is particularly so in the evaluation of witness testimony, including inconsistencies and the overall credibility of a witness. A Trial Chamber is not required to set out in detail why it accepted or rejected a particular testimony.? Thus, in the *Celebici* case, the Appeals Chamber of ICTY found that it is open to the Trial Chamber to accept what it described as the "fundamental features" of testimony.[34]? It also stated that:

> [t]he Trial Chamber is not obliged in its Judgement to recount and justify its findings in relation to every submission made during trial.? It was within its discretion to evaluate the inconsistencies highlighted and to consider whether the witness, when the testimony is taken as a whole, was reliable and whether the evidence was credible. Small inconsistencies cannot suffice to render the whole testimony unreliable.[35]

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 FURUNDZIJA

JUDGEMENT

Counsel for the Prosecutor:

Mr. UpawansaYapa
Mr. Christopher Staker
Mr. Norman Farrell

Counsel for the Accused:

Mr. Luka S. Misetic
Mr. Sheldon Davidson

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 *Erdemovic*[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. 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 *Tadic* 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 *Kupreskic* 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]

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]

2001 WL 34377585 (UN ICT (Rwa))

International Criminal Tribunal for Rwanda

Before: Presiding Judges Claude Jorda, Lal Chand Vohrah, Mohamed Shahabuddeen, Rafael Nieto-Navia, Fausto Pocar

Registry: Adama Dieng

Judgement of: 1 June 2001

THE PROSECUTOR
v.

JEAN-PAUL AKAYESU

JUDGEMENT

ICTR-96-4

Office of the Prosecutor: Carla Del Ponte, Solomon Loh, Wen-qu Zhu, Mathias Marcussen, Sonja Boelaert-Suominen, Morris Anyah

Counsel for the Defence: John Philpot, André Tremblay

Original: English

Original: French

I. INTRODUCTION

A. Trial Proceedings

B. Proceedings on Appeal

II. GENERAL ISSUES RAISED ON APPEAL

A. Admissibility of the Prosecution's Appeal

1. Arguments of the Parties

2001 WL 34377585 (UN ICT (Rwa))

International Criminal Tribunal for Rwanda

Before: Presiding Judges Claude Jorda, Lal Chand Vohrah, Mohamed Shahabuddeen, Rafael Nieto-Navia, Fausto Pocar

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JEAN-PAUL AKAYESU

JUDGEMENT

ICTR-96-4

*** The requested pages begin below ***

Furthermore, it developed a certain number of other tests for the application of article 3 which the Appeals Chamber can summarize here as follows:

FN803. Tadic (jurisdiction Decision), para. 128; Celebici Appeal Judgment, para. 153.

FN804. Tadic, (jurisdiction Decision), para. 128; Celebici Appeal Judgment, para. 153; The Appeals Chamber further recalled the terms used by the Secretary-General of the United Nations during adoption of the Statute: ""Article 4 of the Statute [...] for the first time criminalizes common Article 3 of the Geneva Conventions (see Report of the Secretary-General of the United Nations, (Security Council resolution 955) on the establishment of an international tribunal for the [sole] purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law.

- The offence (serious violation) must be committed within the context of an armed conflict;

- The armed conflict can be internal or international; [**FN805**]

FN805. In Tadic (jurisdiction Decision), ICTY Appeals Chamber indeed demonstrated, with reference to the Nicaragua case (para. 128) that "States specified certain minimum mandatory rules applicable to internal armed conflicts in common Article 3 of the Geneva Conventions of 1949" and that ""[...] at least with respect to the

minimum rules in common Article 3, the character of the conflict is irrelevant" (para. 102). ICTY Appeals Chamber recently confirmed this interpretation in the Celebici case: "It is both legally and morally untenable that the rules contained in common Article 3, which constitute mandatory minimum rules applicable to internal conflicts, in which rules are less developed than in respect of international conflicts, would not be applicable to conflicts of an international character. The rules of common Article 3 are encompassed and further developed in the body of rules applicable to international conflicts. It is logical that this minimum be applicable to international conflicts as the substance of these core rules is identical. In the Appeals Chamber's view, something which is prohibited in internal conflicts is necessarily outlawed in an international conflict where the scope of the rules is broader. The Appeals Chamber is thus not convinced by the arguments raised by the appellants and finds no cogent reasons to depart from its previous conclusions". Cf. Celebici Appeal Judgment, para. 150.

- The offence must be against persons who are not taking any active part in

United Nations S/2000/915

Security Council

Distr.: General
4 October 2000

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

I. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Nature and specificity of the Special Court

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

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

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

III. Competence of the Special Court

A. Subject-matter jurisdiction

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

1. Crimes under international law

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

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

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

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

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

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

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

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

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

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

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

2. Crimes under Sierra Leonean law

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

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

B. Temporal jurisdiction of the Special Court

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

1. The amnesty clause in the Lomé Peace Agreement

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

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

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

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

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

2. Beginning date of the temporal jurisdiction

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

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

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

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

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

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

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

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

C. Personal jurisdiction

1. Persons "most responsible"

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

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

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

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

2. Individual criminal responsibility at 15 years of age

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

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

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

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

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

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

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

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

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

IV. Organizational structure of the Special Court

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

A. The Chambers

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

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

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

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

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

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

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

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

B. The Prosecutor

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

C. The Registrar

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

V. Enforcement of sentences

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

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

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

VI. An alternative host country

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

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

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

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

VII. Practical arrangements for the operation of the Special Court

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

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

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

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

1. Personnel and equipment

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

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

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

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

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

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

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

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

2. Premises

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

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

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

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

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

B. Expertise and advice from the two International Tribunals

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

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

C. Support and technical assistance from UNAMSIL

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

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

VIII. Financial mechanism of the Special Court

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

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

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

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

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

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

IX. Conclusion

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

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

Notes

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

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

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

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

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

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

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

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

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

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

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

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

Annex

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

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

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

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

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

Article 1
Establishment of the Special Court

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

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

Article 2
Composition of the Special Court and appointment of judges

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

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

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

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

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

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

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

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

Article 3
Appointment of a Prosecutor and a Deputy Prosecutor

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

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

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

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

Article 4
Appointment of a Registrar

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

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

Article 5
Premises

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

Article 6
Expenses of the Special Court[a]

The expenses of the Special Court shall ...

Article 7
Inviolability of premises, archives and all other documents

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

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

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

Article 8
Funds, assets and other property

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

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

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

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

Article 9
Seat of the Special Court

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

[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