SCSL-2004-14-PT

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(693 - 764)

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THE SPECIAL COURT FOR SIERRA LEONE

BEFORE THE APPEALS CHAMBER:

Judge Winter, President
Judge King, Vice President
Judge Robertson QC
Judge Ayoola
Judge Fernando

Registrar: **Mr. Robin Vincent**

Date filed: **24th March 2004**

THE PROSECUTOR

v

CHIEF SAMUEL HINGA NORMAN
And
MOININA FOFANA

CASE NO. SCSL – 2004 – 14 – PT

MOTION TO RECUSE JUDGE WINTER FROM DELIBERATING IN THE PRELIMINARY MOTION ON THE RECRUITMENT OF CHILD SOLDIERS

Office of the Prosecutor

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INTRODUCTION

1. It is submitted on behalf of Chief Samuel Hinga Norman that Judge Winter, the current President of the Appeals Chamber, ought to withdraw from any further deliberation in the in Preliminary Motion challenging whether the recruitment of child soldiers amounted to a crime under international customary law at the time of the indictment that he faces, and that any past contribution be struck from the remaining judge's consideration.

2. The said Preliminary Motion was filed on the Chief's behalf before the Trial Chamber on the 26th of June 2003. On consideration that the Preliminary Motion raised "a serious issue relating to jurisdiction" and pursuant to the provisions of Rule 72(E) of the Rules of Procedure and Evidence, the Trial Chamber referred the matter to the Appeals Chamber for determination.

3. The Preliminary Motion was orally argued on the 4th of November at a hearing before the then President Justice Geoffrey Robertson QC, Judge King, Justice Ayoola and Judge Winter. In addition the Toronto Human Rights Clinic were given leave to file a written "amicus curiae" brief.

4. Sometime thereafter The United Nations Children Fund ("UNICEF") applied to the Appeals Chamber to submit an "amicus curiae" brief which was duly granted by an Order dated the 11th December 2003. The Appeals Chamber ordered that the said "amicus" brief be filed by the 16th of January 2004. The said brief was filed by UNICEF on the 21st of January 2004.

5. Shortly after this filing, the defence became aware of an apparent close connection between Judge Winter and UNICEF, notably her involvement in a report jointly published by UNICEF and No Peace Without Justice entitled "International Criminal Justice and Children" published in September 2002. In the said report Judge Renate Winter is thanked in the acknowledgements as an "expert who generously reviewed the draft and supported the drafting process". At section 2.3.2 of the Report, the issue of the

recruitment of child soldiers is considered and at page 45 the text states that "the Rome

6. Statute... **confirms** that conscripting or enlisting children under 15 or using them to participate in hostilities is a crime under international law during any armed conflict" (emphasis added). The Report further deals with the Special Court for Sierra Leone and its power to prosecute for conscripting or enlisting children (pages 115 – 116) **[Annex A].**

7. Further research undertaken by the Defence revealed additional contact between UNICEF and Judge Winter. In a UNICEF report entitled "Working for and with Adolescents" dated February 2002, UNICEF asserted (at page 56) that they "benefited immensely from the technical assistance provided by Austrian Judge Renate Winter and would like to recommend her to other country offices" **[Annex B].** In addition Judge Winter is listed with a number of senior UNICEF personnel as forming part of an expert panel for a Masters Degree in Children's Rights run by the University of Freiburg **[Annex C]**.

8. Upon discovery of these matters, the Defence immediately wrote to Judge Winter in a letter dated the 3rd of February 2004 **[Annex D]**. The Defence expressed surprise that the relationship between Judge Winter and UNICEF had not been brought to their attention by the Judge herself and requested that she thoroughly detail the nature of her current and past relationship with UNICEF and any published or other writings or research on the topic of child soldiers with which she had been directly involved. Further the Defence requested information as to whether the issue of child soldiers formed part of the Maters Degree course and what the nature of the course content was on this topic in the event of it so doing.

9. In an e-mail dated the 5th of March 2004, the Defence were informed by Ms Reiger on behalf of President Robertson that Judge Winter had written to him stating "having considered all the points addressed in your letter of 3 February 2004, she does not see any reason to recuse herself under Article 15 of the Rules. Justice Winter will provide a detailed written statement for the Court and parties next week".

10. The Defence responded in an e-mail dated the 9th of March 2004 asking Ms Reiger to remind Judge Winter that they were waiting anxiously for a substantive response to their letter and confirming that they were requesting that a written statement be delivered as proposed by Judge Winter. By an e-mail dated the 12th of March, Ms Reiger informed the defence that Judge Winter had instructed her to inform them that "she reiterates that she sees no reason to recuse herself pursuant to Rule 15 of the Rules, and will not be making any further statement on the matter" **[Annex E]**.

11. In the absence of any or any satisfactory co-operation from Judge Winter on this serious issue, the Defence consider in the premises they have no option but to file the instant Motion, however they reserve the right to supplement this Motion with additional material once the extent of the relationship between Judge Winter and UNICEF has been ascertained.

12. The issue of whether the Rome statute created or confirmed the status of the recruitment of child soldiers as a crime under international law was one of the central substantive issues that was argued before the Appeals Chamber at the hearing in November.

THE LAW

The Statute and the Rules of the Special Court [1] -

13. Article 13 : Qualification of Judges: Para. 1; inter alia, 'The judges shall be persons of high moral character, impartiality and integrity.....".
Article 17: Rights of the Accused: Para. 1; 'All accused shall be equal before the Special Court".
Article 17 Para. 2: The accused shall be entitled to a fair and public hearing..."
Article 17 Para. 3: The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute".

[1] The defence also refer the Appeals Chamber to the corresponding provisions in the Statutes and Rules of the ICTR and ICTY (Articles 12 and 13 respectively and Article 21 and Rule 15) and also the Statute of the ICC which in Article 41(2) states inter alia: "A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground".

Rule 15: Disqualification of Judges: 'A Judge may not sit at a trial or appeal in any case in which he has a personal interest or concerning which he has or has had any personal association which might affect his impartiality....".

14. The jurisprudential concept that a tribunal must be impartial and free of bias on an issue that it is required to determine is well established as a fundamental principle in international law[2] and indeed the Appeals Chamber itself has recently had the opportunity to contribute to the jurisprudence on this issue from international tribunals. In *Decision on Defence Motion Seeking Disqualification of Justice Robertson from the Appeals Chamber*[3] it was held that the relevant test was whether an independent bystander or reasonable man would have a legitimate apprehension of bias (at paragraph 15). The famous dictum of former Chief Justice Lord Hewart in *R v Sussex Justice ex parte McCarthy* that "Justice must not be only be done but be seen to be done" was cited as "a sacred and overriding principle" which required that Judges must be above suspicion of bias (at paragraph 16).

15. Jurisprudence from national jurisdictions also provides pertinent assistance as to the applicable standards in this area and the Defence submits that the case of **Regina v Bow Street Metropolitan Stipendiary Magistrates and others, Ex parte Pinochet Ugarte (No. 2) (House of Lords) (2000) 1 AC 119** is of particular relevance to the instant application. In the said case, after the UK House of Lords had ruled that Senator Pinochet was liable to extradition to Spain from the UK, the Senator challenged the decision on the basis of the appearance of bias of Lord Hoffman as a result of his links to Amnesty International, which had been permitted to intervene in the proceedings. Lord Hoffman's wife had for a number of years worked in an administrative capacity for Amnesty International's International Secretariat and Lord Hoffman was a Director of a charitable arm of Amnesty[4][5].

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[2] See Art. 14 of International Covenant on Civil and Political Rights (Annex E), Art. 7 of African Charter on Human and Peoples' Rights (Annex F) and Art. 6 of European Convention on Human rights (Annex G)
[3] SCSL-2004-15 (1201-1298) 13 March 2004
[4] Amnesty International Charity Limited (AICL)

16. Lord Goff described the issue before their Lordships at the subsequent hearing as one "in which a judge was closely connected with a party to the proceedings" rather than the situation where a judge is a party to the cause or where he has a financial interest in a party. His Lordship held that, whether or not Amnesty had technically become a party to the proceedings as a result of being granted leave to intervene, "it so participated in the proceedings, actively supporting the cause of one party...against another...that it must be treated as a party" (pg. 12).

17. At the subsequent hearing their Lordships quashed the previous decision on the grounds that there may have been an appearance of bias and remitted it for a new hearing in which Lord Hoffman would not participate. In the course of their judgment their Lordships enunciated the following relevant propositions:

(i) " The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he indeed sitting as a judge in his own cause. In that case the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that that he is not impartial, for example because of his friend ship with a party.....This case falls within the first category of case... In such a case once it is shown that the judge is himself a party to the cause, or has a relevant interest in the subject matter, he is disqualified without any investigation into whether there was any likelihood or suspicion of bias. The mere fact of his interest is sufficient to disqualify himself unless he has made sufficient disclosure." (at pages 7-8).

(ii) "The nature of the interest is such that public confidence in the administration

of justice requires that the judge must withdraw from the case or, if he fails to

(iii) disclose his interest and sits in judgment on upon it, the decision cannot stand. It is no answer for a judge to say that he is impartial and will in fact stand by his judicial oath. The purpose of the disqualification is to preserve the administration of justice from any suspicion of impartiality....no further investigation is necessary and, if the interest is not disclosed, the consequence is inevitable" (page 14).

(iv) "Hitherto only pecuniary and proprietary interests have led to automatic disqualification. But... this litigation is most unusual. It is not civil but criminal litigation. Most unusually, by allowing AI to intervene, there is a party to a criminal cause or matter that is neither prosecutor nor accused...".

(v) *Per Lord Hutton:* "... I am of the opinion that there could be cases where the interests of the judge in the subject matter of the proceedings arising from his strong commitment to some cause or belief or his association with a person or body involved in the proceedings could shake public confidence in the administration of justice as much as a shareholding (which might be small) in a public company involved in the litigation" (pg. 18).

18. Further guidance can be obtained from the jurisprudence of the ICTY. The following principles can be extracted from the case of **Prosecutor v Anto Furundzija: Appeals Chamber: 21 July 2000: Case No. IT – 95- 17/1- A:**

(i) "The fundamental human right of an accused to be tried before an independent and impartial tribunal is generally recognised as being an integral component of the requirement that an accused should have a fair trial" (para. 177).

(ii) "as a general rule, courts will find that a Judge 'might not bring an impartial and prejudiced mind' to a case if there is proof of actual bias or of an

appearance of bias" (Para. 179).

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

(iv) "The Appeal Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the statute:

A. A Judge is not impartial if it is shown that actual bias exists
B. There is an unacceptable appearance of bias if:
   (i) A judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a judge's disqualification from the case is automatic: or
   (ii) The circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias." (para. 189).

SUBMISSIONS

19. It is submitted that a proper application of the principles set out above must inevitably lead to the conclusion that Judge Winter must withdraw from any further deliberation or determination of the Preliminary Motion concerning the recruitment of child soldiers filed on behalf of Chief Hinga Norman pursuant to the provisions of Rule 15 of the Rules of Procedure and Evidence of the Special Court. It is submitted that by reason of the matters hereinbefore set out Judge Winter has demonstrated, or failed to rebut the inference through her failure to respond to the Defence's requests, that "[s]he has a personal interest or concerning which [she] has or has had any personal association which might affect [her] impartiality", and pursuant to Rule 15(A) she may not participate in the Appeal hearings of the matter in which she has such an interest or association.

20. It is submitted that the Learned Judge has displayed actual bias by pre-judging the very issue that she was called upon by the Special Court to determine impartially. The view of the law expressed in the joint UNICEF/No Peace Without Justice report expresses the unequivocal (but highly contentious) view that the recruitment of child soldiers was a crime under international customary law prior to the introduction of the Rome Statute. This report acknowledged the assistance of Judge Winter who had approved the draft. This was, in effect, the substantive issue of argument before the Appeals Chamber. It was clear from her interventions in the Appeal hearing that Judge Winter remained firmly committed to the view expressed in the report. It is submitted that clearly she did not approach the issue impartially. Further or alternatively it is submitted that the reasonable bystander would not have determined that Judge Winter was impartial on this issue in the circumstances.

21. Further or alternatively it is submitted that Judge Winter ought to withdraw from further deliberation in the said Preliminary Motion on the grounds that she has "a personal interest" and/or "a personal association" by her relationship with UNICEF. Judge Winter's refusal to detail the extent of this relationship leave the Defence with no other rational inference but that the relationship is very extensive indeed. It is clear from the

material referred to above that Judge Winter has some personal association with UNICEF and the Defence have unverified information that there are further links. UNICEF is a campaigning organisation with a identifiable position on the issue of the criminalisation of the recruitment of child soldiers. It's brief cannot be said to amount to that of an *amicus curiae* in the sense of being an impartial expositionary brief filed by a "friend of the court". UNICEF can be properly described, as Amnesty International were in Pinochet (No. 2), as "having associated itself in these proceedings with the position of the prosecutor. The prosecution is not being brought in its name, but its interest in the case is to achieve the same result"[6]. In the instant case the desired result of UNICEF. as expressed in the Brief, is that the Appeals Chamber should rule against the Defence and find that " the prohibition on the recruitment and use in hostilities of children under the age of 15 ...had come to bear criminal liability by 30 November 1996" (para. 100 pg. 6507).

22. The failure to disclose the links between Judge Winter and UNICEF prior to the Appeals Chamber granting leave for UNICEF to intervene in the Defence's Preliminary Motion as, it is respectfully submitted, ought properly to have been done, prevents the Defence from considering the relationship to be one which it can properly advise Chief Hinga Norman to disregard. In the Pinochet (No. 2) discussed above, the House of Lords expressed the view "that if the interest is not disclosed, the consequence is inevitable"[7]. It is submitted that the continuing failure to detail the nature of the interest or association, and the failure to reassure the accused as to her impartiality ought also to lead to such inevitable consequences. Further or alternatively it is submitted that the reasonable bystander would have an apprehension of bias by such failure to disclose prior to the grant of leave to UNICEF to intervene and/or by the continuing failure to disclose the extent of Judge Winter's association with UNICEF.

CONCLUSION

23. The Defence submits that Judge Winter should withdraw from any further deliberations in the determination of the Preliminary Motion on the recruitment of child soldier and

[6] *In Re Pinochet (No. 2)* pg. 16
[7] *Ditto*, pg. 14

any past contribution must be struck from the consideration of the remaining Appeals Chambers Judges in reaching their decision, pursuant to the provisions of Rule 15(A) for the following reasons:

(i) Expressing public approval of a highly controversial statement of the law which was the very issue that she was required to determine.

(ii) Failing to disclose her personal interest or association with UNICEF before granting permission for them to intervene in which they had a desired outcome.

(iii) Failing to detail the extent of her relationship with UNICEF and other potential indications of bias on this issue in response to a proper request by the Defence.

(iv) In the premises, failing to dispel the apprehension of bias that the reasonable bystander would hold in the instant case.

23. In the event that the now president of the Special Court declines to withdraw from deliberating in the said Preliminary Motion, the Defence submits that for the aforesaid reasons that the remaining members of the Appeals Chamber must disqualify Judge Winter pursuant to Rule 15(B).

Dated this 23rd day of March 2004.

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AUTHORITIES

- Regina v Bow Street Metropolitan Stipendiary Magistrates and others, ex parte Pinochet Ugarte (No. 2) (House of Lords) (2000) 1 AC 119.
- Prosecutor v Anto Furundzija: Appeals Chamber: 21 July 2000: Case No. IT – 95- 17/1-A.

ANNEXES

A Extract from "International Criminal Justice & Children" published by No Peace Without Justice and UNICEF Innocenti Research Centre, 2002: Contents, Executive Summary, Recommendations, Section 2.3 "Protection of children in times of war" and section 5.1.2 "The Special Court for Sierra Leone".

B UNICEF report "Working for and with adolescents, February 2002, Title page and pg 56.

C. Brochure from University of Freibourg for Executive Master on Children's Rights 2003-2004

D Letter to Judge Winter dated the 3rd of February 2004

E E-mail correspondence with Ms Reiger

Statutory Material

F Articles 12 and 21 of the Statute and Rule 15 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda

G Articles 13 and 21 of the Statute and Rule 15 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia

H Article 41 of the Statute of the International Criminal Court

I Article 14 of the International Covenant on Civil and Political Rights

J Article 7 of the African Charter on Human and Peoples' Rights

K Article 6 of the European Convention on Human Rights

AUTHORITIES

Regina v Bow Street Stipendiary Magistrates and others, ex parte Pinochet Ugarte (No 2) (House of Lords) (2000) 1 AC 119

[2000] 1 AC 119

REGINA v BOW STREET METROPOLITAN STIPENDIARY

MAGISTRATE and Others, Ex parte PINOCHET UGARTE (No. 2)

[HOUSE OF LORDS]

[2000] 1 AC 119

HEARING-DATES: 15, 16, 17, December 1998, 15 January 1999

15 January 1999

CATCHWORDS:
Natural Justice - Bias - Judge in own cause - Request for extradition of former head of state for human rights crimes - Applicant claiming immunity - Human rights body joined as party to proceedings - Judge unpaid director and chairman of charity closely linked to human rights body - Connection not disclosed to parties - Whether judge automatically disqualified - Whether appearance of bias

HEADNOTE:
The applicant, a former head of state of Chile who was on a visit to London, was arrested under warrants issued pursuant to section 8(1) of the Extradition Act 1989 following receipt of international warrants of arrest issued by a Spanish court alleging various crimes against humanity, including murder, hostage-taking and torture, committed during the applicant's period of office and for which he was knowingly responsible. The Divisional Court quashed the warrants on the ground, inter alia, that as a former head of state he was immune from arrest and extradition proceedings in the United Kingdom in respect of acts committed while he was head of state. The quashing of the second warrant was stayed pending an appeal to the House of Lords by the prosecuting authorities on the issue of the immunity enjoyed by a former head of state. Before the main hearing A.I., a human rights body which had campaigned against the applicant, obtained leave to intervene in the appeal and was represented by counsel in the proceedings. The appeal was allowed by a majority of three to two and the second warrant was restored pending a decision by the Home Secretary whether to issue an authority to proceed pursuant to section 7(1) of the Act. Subsequently the applicant's advisers discovered that one of the judges who had been part of the majority was, although not a member of A.I., an unpaid director and chairman of A.I.C. Ltd., a charity which was wholly controlled by A.I. and carried on that part of its work which was charitable. One of the objects of A.I.C. Ltd. was to procure the abolition of torture, extra-judicial execution and disappearance. The Home Secretary signed the authority to proceed.

On a petition by the applicant for the House of Lords to set aside its previous decision on the ground of apparent bias on the part of the judge: -

Held, granting the petition, that as the ultimate court of appeal the House had power to correct any injustice caused by one of its earlier orders; that the fundamental principle that a man may not be a judge in his own cause was not limited to the automatic disqualification of a judge who had a pecuniary interest in the outcome of a case but was equally applicable if the judge's decision would lead to the promotion of a cause in which he was involved together with one of the parties; that, although the judge could not personally be regarded

as having been a party to the appeal, A.I., which had been a party with the interest of securing the extradition of the applicant to Spain, and A.I.C. Ltd. were both parts of a movement working towards the same goals; that in order to maintain the absolute **impartiality** of the judiciarythere had to be a rule which automatically disqualified a judge who was involved, whether personally or as a director of a company, in promoting the same causes in the same organisation as was a party to the suit; and that, accordingly, the earlier decision of the House would be set aside (post, pp. 132D, 134B-E, 135A-F, 139B-140A,142E-143F, 146E-F).

Dimes v. Proprietors of Grand Junction Canal (1852) 3 H.L.Cas. 759, H.L.(E.) applied.

Decision of the House of Lords [2000] 1 A.C. 61 [1998] 3 W.L.R. 1456; [1998] 4 All E.R. 897 set aside.

INTRODUCTION:
Petition

This was an application by Senator Augusto Pinochet Ugarte to set aside the decision of the House of Lords (Lord Nicholls of Birkenhead, Lord Steyn and Lord Hoffmann; Lord Slynn of Hadley and Lord Lloyd of Berwick dissenting) of 25 November 1998 allowing an appeal by the Commissioner of Police of the Metropolis and the Government of Spain against a decision of the Divisional Court (Lord Bingham C.J., Collins and Richards JJ.) dated 28 October 1998 granting an order of certiorari to quash a warrant issued pursuant to section 8(1) of the Extradition Act 1989 at the request of the Central Court of Criminal Proceedings No. 5, Madrid, by Ronald Bartle, Bow Street Metropolitan Stipendiary Magistrate. The ground of the application was that the links between Lord Hoffmann and Amnesty International, an intervener in the proceedings, were such as to give the appearance that he might have been biased against the applicant. Leave to intervene was given to Amnesty International.

The facts are stated in the opinion of Lord Browne-Wilkinson.

COUNSEL:
Clive Nicholls Q.C., Clare Montgomery Q.C., Helen Malcolm, James Cameron and Julian B.Knowles for the applicant.

Montgomery Q.C. The jurisdiction of the House to hear the application was not in any real dispute. The decision had international implications and required acceptance by the wider international community. The links between the judge and Amnesty International, which were not disclosed prior to the hearing and not known to the applicant's legal advisors, were such as to undermine confidence in the decision. For examples of Amnesty International's charitable objectives: see McGovern v. Attorney-General [1982] Ch. 321. For an example of how the non-charitable parts of Amnesty International have continuously campaigned against the applicant: see Ex parte Amnesty International, The Times, 11 December 1998.

A failure of disclosure is a relevant factor in deciding whether justice was seen to be done although it does not necessarily vitiate the decision. It cannot be seriously suggested that there is a duty on the applicant'ssolicitors to trawl around for information and request disclosure: see Shetreet, Judges on Trial (1976), pp. 305-306, 308, 311; In the marriage of Kennedy and Carhill (1995) F.L.C. 92-605.

It is doubtful whether the test established in Reg. v. Gough [1993] A.C. 646, of a real "danger of bias" meets the objective of the common law rule which is to preserve the appearance of non-bias rather than the fact of non-bias as determined by the court (see how the test in Gough has been interpreted in, for example, Reg. v. Inner West London Coroner, Ex parte Dallaglio [1994] 4 All E.R. 139, 151, 161). The court cannot rely on its knowledge of the integrity of the judge concerned to outweigh the appearance of bias to the eye of the

bystander. The reference point must remain the reasonable observer. This is consistent with the test laid down under article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969): see Harris, O'Boyle, Warbrick, Law of the European Convention on Human Rights (1995), p. 235; Hauschildt v. Denmark (1989) 12 E.H.R.R. 266; Langborger v. Sweden (1989) 12 E.H.R.R. 416 and Holm v. Sweden (1993) 18 E.H.R.R. 79. **Impartiality** and independence are different concepts, one is sub group of the other. The position under article 6(1) should be the position under English law: see Reg. v. Sultan Khan [1997] A.C. 558 and Porter v. Magill (1997) 96 L.G.R. 157.

The New Zealand courts have preferred to follow the Australian case of Webb v. The Queen (1994) 181 C.L.R. 41 rather than Reg. v. Gough [1993] A.C. 646: see B.O.C. New Zealand Ltd. v. Trans Tasman Properties Ltd. [1997] N.Z.A.R. 49. For the Canadian approach see: Reg. v. S.(R.D.) (1997) 151 D.L.R. (4th) 193. The court in Reg. v. Gough [1993] A.C. 646 was not referred to the Australian authorities nor even to the Scottish case of Bradford v. McLeod, 1986 S.L.T. 244.

A high standard should apply to the higher courts. At the lower levels local interests can involve everyone in the area at the higher level there is no need for any conflict of interest.

The applicant could not be said to have waived any objection he had to the judge by his subsequent actions. The connection with Amnesty International was not a matter of public record and the parties had been entitled to assume there was no such connection. Even if there was a waiver there is the issue of public interest in seeing that the judiciary is acting fairly and a duty on the House to see that confidence is maintained.

The application cannot be regarded as an abuse of process by reason of delay. Between the date of knowledge of the connection to the point of issuing proceedings there were practical problems and time was spent in investigating the facts.

The appropriate test is whether a fair minded observer with knowledge of the relevant facts would have a suspicion of bias. Non-disclosure alone is a procedural impropriety which is sufficient to raise such suspicion.

Alun Jones Q.C., David Elvin, James Lewis, Campaspe Lloyd-Jacob and James Maurici for the Commissioner of Police and the Government of Spain. The applicant raised the issue of bias with the Secretary of State before issuing the present petition. Very strong representations were made to the Secretary of State urging him to disregard the decision of the House and refuse to issue an authority to proceed. All the facts which theapplicant relies on now were known to his advisers then yet the submissions to the Secretary of State suggest that he is the only person who can uphold this point.

In effect by taking that course of action the applicant had elected to pursue his grievance before the Secretary of State rather than the House: see Auckland Casino Ltd. v. Casino Control Authority [1995] 1 N.Z.L.R. 142; Reg. v. Nailsworth Licensing Justices, Ex parte Bird [1953] 1 W.L.R. 1046; Thomas v. University of Bradford (No. 2) [1992] 1 All E.R. 964 and Reg. v. Camborne Justices, Ex parte Pearce [1955] 1 Q.B. 41. It was only after the Secretary of State had made his decision that the current petition was issued. This raises issues of waiver, abuse of process and acquiescence.

The applicant's advisers had denied having any knowledge of the link between the judge and Amnesty International yet it is clear that at least two of them had some knowledge of the connection. That is surely relevant to the discretionary aspects of relief because if one is complaining about non-disclosure one should have regard to ones own position.

Applying the "real danger of bias" test laid down in Reg. v. Gough [1993] A.C. 646 to the facts in the case it was clear that there was no such danger. The duty of disclosure is

subsumed in the Gough test. The test propounded in Reg. v. S.(R.D.) (1997) 151 D.L.R. (4th) 193 of a "reasonable apprehension of bias" is effectively the same as the Gough test. That case also establishes that it is accepted that a judge brings his attitudes, experiences and views to the job.

The judge's involvement with the Amnesty International charity is an embodiment of his broader approach to the law which he brings to his decision making. Being against torture can hardly be regarded as bias. The applicant's real objection is to the judge's perceived liberal instincts. The fact that the subject matter of the complaint has a personal link with an organisation which has interests in the outcome of the decision is not determinative of there being a "real danger" of bias: see Reg. v. Chairman of the Town Planning Board, Ex parte Mutual Luck Investment Ltd. (1995) 5 H.K.P.L.R. 328; Reg. v. Secretary of State for the Environment, Ex parte Kirkstall Valley Campaign Ltd. [1996] 3 All E.R. 304.

New Zealand, Canada and Hong Kong have all applied and followed the Gough approach. See also the discussion in Shetreet, Judges on Trial (1976), pp. 305-306.

Elvin following. The requirement of article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms reflects principles already deeply embodied in the common law. Accordingly, nothing of substance is added by invocation of article 6(1). This can be seen from consideration of the two interrelated elements of article 6(1), the requirements for a tribunal which is both independent and impartial. The requirement of independence has an objective test and focuses on the structural and compositional aspects of the tribunal. **Impartiality** means lack of prejudice or bias and has a subjective test.

The European Court of Human Rights has not suggested that there is a duty of disclosure. It has said that if there is a ground for concern (after consideration of the objective and subjective tests) the judge must withdraw. As such it is the equivalent of the actual bias test under English law as described in Reg. v. Gough [1993] A.C. 646: see Campbell and Fellv. United Kingdom (1984) 7 E.H.R.R. 165; De Cubber v. Belgium (1984) 7 E.H.R.R. 236; Gregory v. United Kingdom (1997) 25 E.H.R.R. 577, 584; Reg. v. Devon County Council, Ex parte Baker [1995] 1 All E.R. 73, 88; Reg. v. Secretary of State for the Environment, Ex parte Kirkstall Valley Campaign Ltd. [1996] 3 All E.R. 304. The European Court of Human Rights has ruled that the right to an impartial tribunal may be waived: see Pfeifer and Plankl v. Austria (1992) 14 E.H.R.R. 692.

Reg. v. Secretary of State for the Home Department, Ex parte Doody [1994] 1 A.C. 531 and B. v. W.(Wardship: Appeal) [1979] 1 W.L.R. 1041 were straightforward cases of failure to disclose evidence and do not have any wider application.

The Gough test concerns the appearance of bias to a reasonable observer not to one of the parties. Auckland Casino Ltd. v. Casino Control Authority [1995] 1 N.Z.L.R. 142 and Reg. v. S.(R.D.) (1997) 151 D.L.R. (4th) 193 are both consistent with the Gough test.

Peter Duffy Q.C., Owen Davies and David Scorey for Amnesty International. There are many differences between Amnesty International and Amnesty International Charity Ltd.: see McGovern v. Attorney-General [1982] Ch. 321. For the sum total of Amnesty International's activities which are charitable see Reg. v. Radio Authority, Ex parte Bull [1998] Q.B.294.

Amnesty International supports the position of challenging trials vitiated by bias. The issue is: what constitutes bias? It is in the public benefit for judges to be involved with charities. It cannot be that if a judge is involved with a charity which is concerned with grave human rights violations he is thereby excluded from sitting in a case in which human rights issues arise. The issue of disclosure only arises if there is an issue which needs to be disclosed. Is it necessary or desirable that a ritual should be gone through whereby judges disclose their connections with every human rights body? Charitable objectives are by definition

nonpolitical and in the public interest. A judges relationship with a charity and support for its objectives should not be investigated or under suspicion.

Montgomery Q.C. in reply. The whole argument about waiver or election is based on the false premise that the Secretary of State is an alternative remedy to petitioning the House. They are in fact parallel remedies involving different standards and tests.

The provision of an impartial tribunal is a duty and cannot therefore be waived. Rights can be waived not duties: see Pfeifer and Plankl v. Austria (1992) 14 E.H.R.R. 692.

The House has indulged in no investigation of the background facts. The House cannot therefore declare on what actually occurred and has to deal only with the appearance of what occurred. A judge must not hear a case involving a matter which a charity of which he is a director is sworn to abolish in circumstances where a company closely related to that charity is an intervener in the case.

The duty of disclosure is established by practice. It is not just one of the incidents of a fair trial but lies at the heart of the matter: see Reg. v. Devon County Council, Ex parte Baker [1995] 1 All E.R. 73. The test must be that information should be disclosed which would give rise to the apprehension of bias on the part of a reasonable man in the shoes of oneof the parties. That is a free standing ground on which relief should be granted. Reg. v. Secretary of State for the Home Department, Ex parte Doody [1994] 1 A.C. 531 and B. v. W.(Wardship: Appeal) [1979] 1 W.L.R.1041 show that a failure to disclose relevant information can undermine a decision.

There is an important distinction between the appearance of bias (the actuality) and the apprehension of bias (the subjective view). Reg. v. Gough [1993] A.C. 646 has plainly been misunderstood as it is taken to mean that the relevant issue is only the actuality rather than the appearance. However, it is the appearance of bias to the public and the party concerned which is relevant. If that fear of bias is justified, even if knowledge of the facts would vitiate that fear, then the test of bias has been satisfied. In the instant case the judge was identified or apparently identified with the policy objectives of one side's case: see Reg. v. S.(R.D.) (1997) 151 D.L.R. (4th) 193, 227. That appearance of bias cannot stand.

Their Lordships took time for consideration.

17 December 1998. Their Lordships granted the application for reasons to be given later.

15 January 1999.

PANEL: Lord Browne-Wilkinson, Lord Goff of Chieveley, Lord Nolan, Lord Hope of Craighead and Lord Hutton

JUDGMENTBY-1: Lord Browne-Wilkinson

JUDGMENT-1:
Lord Browne-Wilkinson: . My Lords,

Introduction

This petition has been brought by Senator Pinochet to set aside an order made by your Lordships on 25 November 1998. It is said that the links between one of the members of the Appellate Committee who heard the appeal, Lord Hoffmann, and Amnesty International ("A.I.") were such as to give the appearance that he might have been biased against Senator Pinochet. On 17 December 1998 your Lordships set aside the order of 25 November 1998 for reasons to be given later. These are the reasons that led me to that conclusion.

Background facts

Senator Pinochet was the head of state of Chile from 11 September 1973 until 11 March 1990. It is alleged that during that period there took place in Chile various crimes against humanity (torture, hostage taking and murder) for which he was knowingly responsible.

In October 1998 Senator Pinochet was in this country receiving medical treatment. In October and November 1998 the judicial authorities in Spain issued international warrants for his arrest to enable his extradition to Spain to face trial for those alleged offences. The Spanish Supreme Court has held that the courts of Spain have jurisdiction to try him. Pursuant to those international warrants, on 16 and 23 October 1998 metropolitan stipendiary magistrates issued two provisional warrants for his arrest under section 8(1)(b) of the Extradition Act 1989. Senator Pinochet was arrested. He immediately applied to the Queen's Bench Divisional Court to quash the warrants. The warrant of 16 October was quashed and nothing further turns on that warrant. The second warrant of 23 October 1998 was quashed by an order of the Divisional Court of theQueen's Bench Division (Lord Bingham of Cornhill C.J., Collins and Richards JJ.) However, the quashing of the second warrant was stayed to enable an appeal to be taken to your Lordships' House [2000] 1 A.C. 61 on the question certified by the Divisional Court as to "the proper interpretation and scope of the immunity enjoyed by a former head of state from arrest and extradition proceedings in the United Kingdom in respect of acts committed while he was head of state."

As that question indicates, the principle point at issue in the main proceedings in both the Divisional Court and this House was as to the immunity, if any, enjoyed by Senator Pinochet as a past head of state in respect of the crimes against humanity for which his extradition was sought. The Crown Prosecution Service ("C.P.S.") (which is conducting the proceedings on behalf of the Spanish Government) while accepting that a foreign head of state would, during his tenure of office, be immune from arrest or trial in respect of the matters alleged, contends that once he ceased to be head of state his immunity for crimes against humanity also ceased and he can be arrested and prosecuted for such crimes committed during the period he was head of state. On the other side, Senator Pinochet contends that his immunity in respect of acts done whilst he was head of state persists even after he has ceased to be head of state. The position therefore is that if the view of the C.P.S. (on behalf of the Spanish Government) prevails, it was lawful to arrest Senator Pinochet in October and (subject to any other valid objections and the completion of the extradition process) it will be lawful for the Secretary of State in his discretion to extradite Senator Pinochet to Spain to stand trial for the alleged crimes. If, on the other hand, the contentions of Senator Pinochet are correct, he has at all times been and still is immune from arrest in this country for the alleged crimes. He could never be extradited for those crimes to Spain or any other country. He would have to be immediately released and allowed to return to Chile as he wishes to do.

The court proceedings

The Divisional Court having unanimously quashed the provisional warrant of 23 October on the ground that Senator Pinochet was entitled to immunity, he was thereupon free to return to Chile subject only to the stay to permit the appeal to your Lordships' House. The matter proceeded to your Lordships' House with great speed. It was heard on 4, 5 and 9-12 November 1998 by a committee consisting of Lord Slynn of Hadley, Lord Lloyd of Berwick, Lord Nicholls of Birkenhead, Lord Steyn and Lord Hoffmann. However, before the main hearing of the appeal, there was an interlocutory decision of the greatest importance for the purposes of the present application. Amnesty International ("A.I."), two other human rights bodies and three individuals petitioned for leave to intervene in the appeal. Such leave was granted by a committee consisting of Lord Slynn, Lord Nicholls and Lord Steyn subject to any protest being made by other parties at the start of the main hearing. No such protest having been made A.I. accordingly became an intervener in the appeal. At the hearing of the appeal

A.I. not only put in written submissions but was also represented by counsel, Professor Brownlie, Michael Fordham, Owen Davies andFrances Webber. Professor Brownlie addressed the committee on behalf of A.I. supporting the appeal.

The hearing of this case, both before the Divisional Court and in your Lordships' House, produced an unprecedented degree of public interest not only in this country but worldwide. The case raises fundamental issues of public international law and their interaction with the domestic law of this country. The conduct of Senator Pinochet and his regime have been highly contentious and emotive matters. There are many Chileans and supporters of human rights who have no doubt as to his guilt and are anxious to bring him to trial somewhere in the world. There are many others who are his supporters and believe that he was the saviour of Chile. Yet a third group believe that, whatever the truth of the matter, it is a matter for Chile to sort out internally and not for third parties to interfere in the delicate balance of contemporary Chilean politics by seeking to try him outside Chile.

This wide public interest was reflected in the very large number attending the hearings before the Appellate Committee including representatives of the world press. The Palace of Westminster was picketed throughout. The announcement of the final result gave rise to worldwide reactions. In the eyes of very many people the issue was not a mere legal issue but whether or not Senator Pinochet was to stand trial and therefore, so it was thought, the cause of human rights triumph. Although the members of the Appellate Committee were in no doubt as to their function, the issue for many people was one of moral, not legal, right or wrong.

The decision and afterwards

Judgment in your Lordships' House was given on 25 November 1998. The appeal was allowed by a majority of three to two and your Lordships' House restored the second warrant of 23 October 1998. Of the majority, Lord Nicholls and Lord Steyn each delivered speeches holding that Senator Pinochet was not entitled to immunity: Lord Hoffmann agreed with their speeches but did not give separate reasons for allowing the appeal. Lord Slynn and Lord Lloyd each gave separate speeches setting out the reasons for their dissent.

As a result of this decision, Senator Pinochet was required to remain in this country to await the decision of the Home Secretary whether to authorise the continuation of the proceedings for his extradition under section 7(1) of the Extradition Act 1989. The Home Secretary had until 11 December 1998 to make that decision, but he required anyone wishing to make representations on the point to do so by the 30 November 1998.

The link between Lord Hoffmann and A.I.

It appears that neither Senator Pinochet nor (save to a very limited extent) his legal advisers were aware of any connection between Lord Hoffmann and A.I. until after the judgment was given on 25 November. Two members of the legal team recalled that they had heard rumours that Lord Hoffmann's wife was connected with A.I. in some way. During the Newsnight programme on television on 25 November, an allegation tothat effect was made by a speaker in Chile. On that limited information the representations made on Senator Pinochet's behalf to the Home Secretary on 30 November drew attention to Lady Hoffmann's position and contained a detailed consideration of the relevant law of bias. It then read:

"It is submitted therefore that the Secretary of State should not have any regard to the decision of Lord Hoffmann. The authorities make it plain that this is the appropriate approach to a decision that is affected by bias. Since the bias was in the House of Lords, the Secretary of State represents the senator's only domestic protection. Absent domestic protection the senator will have to invoke the jurisdiction of the European Court of Human Rights."

After the representations had been made to the Home Office, Senator Pinochet's legal advisers received a letter dated 1 December 1998 from the solicitors acting for A.I. written in response to a request for information as to Lord Hoffmann's links. The letter of 1 December, so far as relevant, reads as follows:

"Further to our letter of 27 November, we are informed by our clients, Amnesty International, that Lady Hoffmann has been working at their international secretariat since 1977. She has always been employed in administrative positions, primarily in their department dealing with press and publications. She moved to her present position of programme assistant to the director of the media and audio visual programme when this position was established in 1994. Lady Hoffmann provides administrative support to the programme, including some receptionist duties. She has not been consulted or otherwise involved in any substantive discussions or decisions by Amnesty International, including in relation to the Pinochet case."

On 7 December a man anonymously telephoned Senator Pinochet's solicitors alleging that Lord Hoffmann was a director of the Amnesty International Charitable Trust. That allegation was repeated in a newspaper report on 8 December. Senator Pinochet's solicitors informed the Home Secretary of these allegations. On 8 December they received a letter from the solicitors acting for A.I. dated 7 December which reads, so far as relevant, as follows:

"On further consideration, our client, Amnesty International have instructed us that after contacting Lord Hoffmann over the weekend both he and they believe that the following information about his connection with Amnesty International's charitable work should be provided to you. Lord Hoffmann is a director and chairperson of Amnesty International Charity Ltd. ('A.I.C.L.'), a registered charity incorporated on 7 April 1986 to undertake those aspects of the work of Amnesty International Ltd. ('A.I.L.') which are charitable under U.K. law. A.I.C.L. files reports with Companies House and the Charity Commissioners as required by U.K. law. A.I.C.L. funds a proportion of the charitable activities undertaken independently byA.I.L. A.I.L.'s board is composed of Amnesty International's Secretary General and two Deputy Secretaries General. Since 1990 Lord Hoffmann and Peter Duffy Q.C. have been the two directors of A.I.C.L. They are neither employed nor remunerated by either A.I.C.L. or A.I.L. They have not been consulted and have not had any other role in Amnesty International's interventions in the case of Pinochet. Lord Hoffmann is not a member of Amnesty International. In addition, in 1997 Lord Hoffmann helped in the organisation of a fund raising appeal for a new building for Amnesty International U.K. He helped organise this appeal together with other senior legal figures, including the Lord Chief Justice, Lord Bingham. In February your firm contributed oe1,000 to this appeal. You should also note that in 1982 Lord Hoffmann, when practising at the Bar, appeared in the Chancery Division for Amnesty International U.K."

Further information relating to A.I.C.L. and its relationship with Lord Hoffmann and A.I. is given below. Mr. Alun Jones for the C.P.S. does not contend that either Senator Pinochet or his legal advisers had any knowledge of Lord Hoffmann's position as a director of A.I.C.L. until receipt of that letter.

Senator Pinochet's solicitors informed the Home Secretary of the contents of the letter dated 7 December. The Home Secretary signed the authority to proceed on 9 December 1998. He also gave reasons for his decision, attaching no weight to the allegations of bias or apparent bias made by Senator Pinochet.

On 10 December 1998, Senator Pinochet lodged the present petition asking that the order of 25 November 1998 should either be set aside completely or the opinion of Lord Hoffmann should be declared to be of no effect. The sole ground relied upon was that Lord Hoffmann's links with A.I. were such as to give the appearance of possible bias. It is important to stress that Senator Pinochet makes no allegation of actual bias against Lord Hoffmann; his claim is based on the requirement that justice should be seen to be done as well as actually being

done. There is no allegation that any other member of the committee has fallen short in the performance of his judicial duties.

Amnesty International and its constituent parts

Before considering the arguments advanced before your Lordships, it is necessary to give some detail of the organisation of A.I. and its subsidiary and constituent bodies. Most of the information which follows is derived from the directors' reports and notes to the accounts of A.I.C.L. which have been put in evidence.

A.I. itself is an unincorporated, non-profit-making organisation founded in 1961 with the object of securing throughout the world the observance of the provisions of the Universal Declaration of Human Rights in regard to prisoners of conscience. It is regulated by a document known as the statute of Amnesty International. A.I. consists of sections in different countries throughout the world and its international headquarters in London. Delegates of the sections meet periodically at the international council meetings to coordinate their activities and to elect an internationalexecutive committee to implement the council's decisions. The international headquarters in London is responsible to the international executive committee. It is funded principally by the sections for the purpose of furthering the work of A.I. on a worldwide basis and to assist the work of sections in specific countries as necessary. The work of the international headquarters is undertaken through two United Kingdom registered companies, Amnesty International Ltd. ("A.I.L.") and Amnesty International Charity Ltd. ("A.I.C.L.").

A.I.L. is an English limited company incorporated to assist in furthering the objectives of A.I. and to carry out the aspects of the work of the international headquarters which are not charitable.

A.I.C.L. is a company limited by guarantee and also a registered charity. In McGovern v. Attorney-General [1982] Ch. 321, Slade J. held that a trust established by A.I. to promote certain of its objects was not charitable because it was established for political purposes; however the judge indicated that a trust for research into the observance of human rights and the dissemination of the results of such research could be charitable. It appears that A.I.C.L. was incorporated on 7 April 1986 to carry out such of the purposes of A.I. as were charitable. Clause3 of the memorandum of association of A.I.C.L. provides:

"Having regard to the statute for the time being of Amnesty International, the objects for which the company is established are: (a) To promote research into the maintenance and observance of human rights and to publish the results of such research. (b) To provide relief to needy victims of breaches of human rights by appropriate charitable (and in particular medical, rehabilitational or financial) assistance. (c) To procure the abolition of torture, extra-judicial execution and disappearance ..."

Under article 3(a) of A.I.C.L. the members of the company are all the elected members for the time being of the international executive committee of Amnesty International and nobody else. The directors are appointed by and removable by the members in general meetings. Since 8 December 1990 Lord Hoffmann and Mr. Duffy have been the sole directors, Lord Hoffmann at some stage becoming the chairperson.

There are complicated arrangements between the international headquarters of A.I., A.I.C.L. and A.I.L. as to the discharge of their respective functions. From the reports of the directors and the notes to the annual accounts, it appears that, although the system has changed slightly from time to time, the current system is as follows. The international headquarters of A.I. are in London and the premises are, at least in part, shared with A.I.C.L. and A.I.L. The conduct of A.I.'s international headquarters is (subject to the direction of the international executive committee) in the hands of A.I.L. A.I.C.L. commissions A.I.L. to undertake

charitable activities of the kind which fall within the objects of A.I. The directors of A.I.C.L. then resolve to expend the sums that they have received from A.I. sections or elsewhere in funding such charitable work as A.I.L. performs. A.I.L. then reports retrospectively to A.I.C.L. as to the moneys expended and A.I.C.L. votes sums to A.I.L. for such part of A.I.L.'s work as can properly be regarded as charitable. It was confirmedin the course of argument that certain work done by A.I.L. would therefore be treated as in part done by A.I.L. on its own behalf and in part on behalf of A.I.C.L.

I can give one example of the close interaction between the functions of A.I.C.L. and A.I. The report of the directors of A.I.C.L. for the year ended 31 December 1993 records that A.I.C.L. commissioned A.I.L. to carry out charitable activities on its behalf and records as being included in the work of A.I.C.L. certain research publications. One such publication related to Chile and referred to a report issued as an A.I. report in 1993. Such 1993 report covers not only the occurrence and nature of breaches of human rights within Chile, but also the progress of cases being brought against those alleged to have infringed human rights by torture and otherwise in the courts of Chile. It records that "no one was convicted during the year for past human rights violations. The military courts continued to claim jurisdiction over human rights cases in civilian courts and to close cases covered by the 1978 Amnesty law." It also records "Amnesty International continued to call for full investigation into human rights violations and for those responsible to be brought to justice. The organisation also continued to call for the abolition of the death penalty." Again, the report stated that "Amnesty International included references to its concerns about past human rights violations against indigenous peoples in Chile and the lack of accountability of those responsible." Therefore A.I.C.L. was involved in the reports of A.I. urging the punishment of those guilty in Chile for past breaches of human rights and also referring to such work as being part of the work that it supported.

The directors of A.I.C.L. do not receive any remuneration. Nor do they take any part in the policy-making activities of A.I. Lord Hoffmann is not a member of A.I. or of any other body connected with A.I.

In addition to the A.I. related bodies that I have mentioned, there are other organisations which are not directly relevant to the present case. However, I should mention another charitable company connected with A.I. and mentioned in the papers, namely, "Amnesty International U.K. Section Charitable Trust" registered as a company under number 3139939 and as a charity under 1051681. That was a company incorporated in 1995 and, so far as I can see, has nothing directly to do with the present case.

The parties' submissions

Miss Montgomery in her very persuasive submissions on behalf of Senator Pinochet contended (1) that, although there was no exact precedent, your Lordships' House must have jurisdiction to set aside its own orders where they have been improperly made, since there is no other court which could correct such impropriety; (2) that (applying the test in Reg. v. Gough [1993] A.C. 646) the links between Lord Hoffmann and A.I. were such that there was a real danger that Lord Hoffmann was biased in favour of A.I. or alternatively (applying the test in Webb v. The Queen (1994) 181 C.L.R. 41) that such links give rise to a reasonable apprehension or suspicion on the part of a fair minded and informed member of the public that Lord Hoffmann might have been so biased.

On the other side, Mr. Alun Jones accepted that your Lordships had power to revoke an earlier order of this House but contended that there was no case for such revocation here. The applicable test of bias, he submitted, was that recently laid down by your Lordships in Reg. v. Gough and it was impossible to say that there was a real danger that Lord Hoffmann had been biased against Senator Pinochet. He further submitted that, by relying on the allegations of bias in making submissions to the Home Secretary, Senator Pinochet had

elected to adopt the Home Secretary as the correct tribunal to adjudicate on the issue of apparent bias. He had thereby waived his right to complain before your Lordships of such bias. Expressed in other words, he was submitting that the petition was an abuse of process by Senator Pinochet. Mr. Duffy for A.I. (but not for A.I.C.L.) supported the case put forward by Mr. Alun Jones.

Conclusions

1. Jurisdiction

As I have said, the respondents to the petition do not dispute that your Lordships have jurisdiction in appropriate cases to rescind or vary an earlier order of this House. In my judgment, that concession was rightly made both in principle and on authority.

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) [1972] A.C. 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.

2. Apparent bias

As I have said, Senator Pinochet does not allege that Lord Hoffmann was in fact biased. The contention is that there was a real danger or reasonable apprehension or suspicion that Lord Hoffmann might have been biased, that is to say, it is alleged that there is an appearance of bias not actual bias.

The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge isnot a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial.

In my judgment, this case falls within the first category of case, viz. where the judge is disqualified because he is a judge in his own cause. In such a case, once it is shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there was a likelihood or suspicion of bias. The mere fact of his interest is sufficient to disqualify him unless he has made sufficient disclosure: see Shetreet, Judges on Trial (1976), p. 303; De Smith, Woolf and Jowell, Judicial Review of Administrative Action, 5th ed. (1995), p. 525. I will call this "automatic disqualification."

In Dimes v. Proprietors of Grand Junction Canal (1852) 3 H.L.Cas. 759, the then Lord Chancellor, Lord Cottenham, owned a substantial shareholding in the defendant canal which was an incorporated body. In the action the Lord Chancellor sat on appeal from the Vice-Chancellor, whose judgment in favour of the company he affirmed. There was an appeal to your Lordships' House on the grounds that the Lord Chancellor was disqualified. Their Lordships consulted the judges who advised, at p. 786, that Lord Cottenham was disqualified from sitting as a judge in the cause because he had an interest in the suit. This advice was unanimously accepted by their Lordships. There was no inquiry by the court as to whether a reasonable man would consider Lord Cottenham to be biased and no inquiry as to the circumstances which led to Lord Cottenham sitting. Lord Campbell said, at p. 793:

"No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest." (Emphasis added.)

On occasion, this proposition is elided so as to omit all references to the disqualification of a judge who is a party to the suit: see, for example, Reg. v. Rand (1866) L.R. 1 Q.B. 230; Reg. v. Gough [1993] A.C. 646, 661. This does not mean that a judge who is a party to a suit is not disqualified just because the suit does not involve a financial interest. The authorities cited in the Dimes case show how the principle developed. The starting-point was the case in which a judge was indeed purporting to decide a case in which he was a party. This was held to be absolutely prohibited. That absolute prohibition was then extended to cases where, although not nominally a party, the judge had an interest in the outcome.

The importance of this point in the present case is this. Neither A.I., nor A.I.C.L., have any financial interest in the outcome of this litigation. We are here confronted, as was Lord Hoffmann, with a novel situation where the outcome of the litigation did not lead to financial benefit toanyone. The interest of A.I. in the litigation was not financial; it was its interest in achieving the trial and possible conviction of Senator Pinochet for crimes against humanity.

By seeking to intervene in this appeal and being allowed so to intervene, in practice A.I. became a party to the appeal. Therefore if, in the circumstances, it is right to treat Lord Hoffmann as being the alter ego of A.I. and therefore a judge in his own cause, then he must have been automatically disqualified on the grounds that he was a party to the appeal. Alternatively, even if it be not right to say that Lord Hoffmann was a party to the appeal as such, the question then arises whether, in non-financial litigation, anything other than a financial or proprietary interest in the outcome is sufficient automatically to disqualify a man from sitting as judge in the cause.

Are the facts such as to require Lord Hoffmann to be treated as being himself a party to this appeal? The facts are striking and unusual. One of the parties to the appeal is an unincorporated association, A.I. One of the constituent parts of that unincorporated association is A.I.C.L. A.I.C.L. was established, for tax purposes, to carry out part of the functions of A.I. those parts which were charitable which had previously been carried on either by A.I. itself or by A.I.L. Lord Hoffmann is a director and chairman of A.I.C.L., which is wholly controlled by A.I., since its members (who ultimately control it) are all the members of the international executive committee of A.I. A large part of the work of A.I. is, as a matter of strict law, carried on by A.I.C.L. which instructs A.I.L. to do the work on its behalf. In reality, A.I., A.I.C.L. and A.I.L. are a close-knit group carrying on the work of A.I.

However, close as these links are, I do not think it would be right to identify Lord Hoffmann personally as being a party to the appeal. He is closely linked to A.I. but he is not in fact A.I. Although this is an area in which legal technicality is particularly to be avoided, it cannot be ignored that Lord Hoffmann took no part in running A.I. Lord Hoffmann, A.I.C.L. and the

executive committee of A.I. are in law separate people.

Then is this a case in which it can be said that Lord Hoffmann had an "interest" which must lead to his automatic disqualification? Hitherto only pecuniary and proprietary interests have led to automatic disqualification. But, as I have indicated, this litigation is most unusual. It is not civil litigation but criminal litigation. Most unusually, by allowing A.I. to intervene, there is a party to a criminal cause or matter who is neither prosecutor nor accused. That party, A.I., shares with the government of Spain and the C.P.S., not a financial interest but an interest to establish that there is no immunity for ex-heads of state in relation to crimes against humanity. The interest of these parties is to procure Senator Pinochet's extradition and trial a non-pecuniary interest. So far as A.I.C.L. is concerned, clause 3(c) of its memorandum provides that one of its objects is "to procure the abolition of torture, extra-judicial execution and disappearance." A.I. has, amongst other objects, the same objects. Although A.I.C.L., as a charity, cannot campaign to change the law, it is concerned by other means to procure the abolition of these crimes against humanity. In my opinion, therefore, A.I.C.L. plainly had a non-pecuniary interest, to establish that Senator Pinochet was not immune.

That being the case, the question is whether in the very unusual circumstances of this case a non-pecuniary interest to achieve a particular result is sufficient to give rise to automatic disqualification and, if so, whether the fact that A.I.C.L. had such an interest necessarily leads to the conclusion that Lord Hoffmann, as a director of A.I.C.L., was automatically disqualified from sitting on the appeal? My Lords, in my judgment, although the cases have all dealt with automatic disqualification on the grounds of pecuniary interest, there is no good reason in principle for so limiting automatic disqualification. The rationale of the whole rule is that a man cannot be a judge in his own cause. In civil litigation the matters in issue will normally have an economic impact; therefore a judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. But if, as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties. Thus in my opinion if Lord Hoffmann had been a member of A.I. he would have been automatically disqualified because of his non-pecuniary interest in establishing that Senator Pinochet was not entitled to immunity. Indeed, so much I understood to have been conceded by Mr. Duffy.

Can it make any difference that, instead of being a direct member of A.I., Lord Hoffmann is a director of A.I.C.L., that is of a company which is wholly controlled by A.I. and is carrying on much of its work? Surely not. The substance of the matter is that A.I., A.I.L. and A.I.C.L. are all various parts of an entity or movement working in different fields towards the same goals. If the absolute **impartiality** of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a director of a company, in promoting the same causes in the same organisation as is a party to the suit. There is no room for fine distinctions if Lord Hewart C.J.'s famous dictum is to be observed: it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done:" see Rex v. Sussex Justices, Ex parte McCarthy [1924] 1 K.B. 256, 259.

Since, in my judgment, the relationship between A.I., A.I.C.L. and Lord Hoffmann leads to the automatic disqualification of Lord Hoffmann to sit on the hearing of the appeal, it is unnecessary to consider the other factors which were relied on by Miss Montgomery, viz. the position of Lady Hoffmann as an employee of A.I. and the fact that Lord Hoffmann was involved in the recent appeal for funds for Amnesty. Those factors might have been relevant if Senator Pinochet had been required to show a real danger or reasonable suspicion of bias. But since the disqualification is automatic and does not depend in any way on an implication of bias, it is unnecessary to consider these factors. I do, however, wish to make it clear (if I

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have not already done so) that my decision is not that Lord Hoffmann has been guilty of bias of any kind: he was disqualified as a matter of law automatically by reason of his directorship of A.I.C.L., a company controlled by a party, A.I.

For the same reason, it is unnecessary to determine whether the test of apparent bias laid down in Reg. v. Gough [1993] A.C. 646 ("is there in the view of the court a real danger that the judge was biased?") needs to be reviewed in the light of subsequent decisions. Decisions in Canada, Australia and New Zealand have either refused to apply the test in Reg. v. Gough, or modified it so as to make the relevant test the question whether the events in question give rise to a reasonable apprehension or suspicion on the part of a fairminded and informed member of the public that the judge was not impartial: see, for example, the High Court of Australia in Webb v. The Queen, 181 C.L.R. 41. It has also been suggested that the test in Reg. v. Gough in some way impinges on the requirement of Lord Hewart C.J.'s dictum that justice should appear to be done: see Reg. v. Inner West London Coroner, Ex parte Dallaglio [1994] 4 All E.R. 139, 152a-b. Since such a review is unnecessary for the determination of the present case, I prefer to express no view on it.

It is important not to overstate what is being decided. It was suggested in argument that a decision setting aside the order of 25 November 1998 would lead to a position where judges would be unable to sit on cases involving charities in whose work they are involved. It is suggested that, because of such involvement, a judge would be disqualified. That is not correct. The facts of this present case are exceptional. The critical elements are (1) that A.I. was a party to the appeal; (2) that A.I. was joined in order to argue for a particular result; (3) the judge was a director of a charity closely allied to A.I. and sharing, in this respect, A.I.'s objects. Only in cases where a judge is taking an active role as trustee or director of a charity which is closely allied to and acting with a party to the litigation should a judge normally be concerned either to recuse himself or disclose the position to the parties. However, there may well be other exceptional cases in which the judge would be well advised to disclose a possible interest.

Finally on this aspect of the case, we were asked to state in giving judgment what had been said and done within the Appellate Committee in relation to Amnesty International during the hearing leading to the order of 25 November. As is apparent from what I have said, such matters are irrelevant to what we have to decide: in the absence of any disclosure to the parties of Lord Hoffmann's involvement with A.I., such involvement either did or did not in law disqualify him regardless of what happened within the Appellate Committee. We therefore did not investigate those matters and make no findings as to them.

Election, waiver, abuse of process

Mr. Alun Jones submitted that by raising with the Home Secretary the possible bias of Lord Hoffmann as a ground for not authorising the extradition to proceed, Senator Pinochet had elected to choose the Home Secretary rather than your Lordships' House as the arbiter as to whether such bias did or did not exist. Consequently, he submitted, Senator Pinochet had waived his right to petition your Lordships and, by doing so immediately after the Home Secretary had rejected the submission, was committing an abuse of the process of the House.

This submission is bound to fail on a number of different grounds, of which I need mention only two. First, Senator Pinochet would only be put to his election as between two alternative courses to adopt. I cannot see that there are two such courses in the present case, since the Home Secretary had no power in the matter. He could not set aside the order of 25 November and as long as such order stood, the Home Secretary was bound to accept it as stating the law. Secondly, all three concepts - election, waiver and abuse of process - require that the person said to have elected etc. has acted freely and in full knowledge of the facts. Not until 8 December 1998 did Senator Pinochet's solicitors know anything of Lord

Hoffmann's position as a director and chairman of A.I.C.L. Even then they did not know anything about A.I.C.L. and its constitution. To say that by hurriedly notifying the Home Secretary of the contents of the letter from A.I.'s solicitors, Senator Pinochet had elected to pursue the point solely before the Home Secretary is unrealistic. Senator Pinochet had not yet had time to find out anything about the circumstances beyond the bare facts disclosed in the letter.

Result

It was for these reasons and the reasons given by my noble and learned friend, Lord Goff of Chieveley, that I reluctantly felt bound to set aside the order of 25 November 1998. It was appropriate to direct a rehearing of the appeal before a differently constituted committee, so that on the rehearing the parties were not faced with a committee four of whom had already expressed their conclusion on the points at issue.

JUDGMENTBY-2: Lord Goff of Chieveley

JUDGMENT-2:
Lord Goff of Chieveley: . My Lords, I have had the opportunity of reading in draft the opinion prepared by my noble and learned friend, Lord Browne-Wilkinson. It was for the like reasons to those given by him that I agreed that the order of your Lordships' House in this matter dated 25 November 1998 should be set aside and that a rehearing of the appeal should take place before a differently constituted Committee. Even so, having regard to the unusual nature of this case, I propose to set out briefly in my own words the reasons why I reached that conclusion.

Like my noble and learned friend, I am of the opinion that the principle which governs this matter is that a man shall not be a judge in his own cause - nemo judex in sua causa: see Dimes v. Proprietors of Grand Junction Canal, 3 H.L.Cas. 759, 793, per Lord Campbell. As stated by Lord Campbell the principle is not confined to a cause to which the judge is a party, but applies also to a cause in which he has an interest. Thus, for example, a judge who holds shares in a company which is a party to the litigation is caught by the principle, not because he himself is a party to the litigation (which he is not), but because he has by virtue of his shareholding an interest in the cause. That was indeed the ratio decidendi of the famous Dimescase itself. In that case the then Lord Chancellor, Lord Cottenham, affirmed an order granted by the Vice-Chancellor granting relief to a company in which, unknown to the defendant and forgotten by himself, he held a substantial shareholding. It was decided, following the opinion of the judges, that Lord Cottenham was disqualified,by reason of his interest in the cause, from adjudicating in the matter, and that his order was for that reason voidable and must be set aside. Such a conclusion must follow, subject only to waiver by the party or parties to the proceedings thereby affected.

In the present case your Lordships are not concerned with a judge who is a party to the cause, nor with one who has a financial interest in a party to the cause or in the outcome of the cause. Your Lordships are concerned with a case in which a judge is closely connected with a party to the proceedings. This situation has arisen because, as my noble and learned friend has described, Amnesty International ("A.I.") was given leave to intervene in the proceedings; and, whether or not A.I. thereby became technically a party to the proceedings, it so participated in the proceedings, actively supporting the cause of one party (the Government of Spain, represented by the Crown Prosecution Service) against another (Senator Pinochet), that it must be treated as a party. Furthermore, Lord Hoffmann is a director and chairperson of Amnesty International Charity Ltd. ("A.I.C.L."). A.I.C.L. and Amnesty International Ltd. ("A.I.L.") are United Kingdom companies through which the work of the International Headquarters of A.I. in London is undertaken, A.I.C.L. having been incorporated to carry out those purposes of A.I. which are charitable under U.K. law. Neither Senator Pinochet nor the lawyers acting for him were aware of the connection between Lord

Hoffmann and A.I. until after judgment was given on 25 November 1998.

My noble and learned friend has described in lucid detail the working relationship between A.I.C.L., A.I.L. and A.I., both generally and in relation to Chile. It is unnecessary for me to do more than state that not only was A.I.C.L. deeply involved in the work of A.I., commissioning activities falling within the objects of A.I. which were charitable, but that it did so specifically in relation to research publications including one relating to Chile reporting on breaches of human rights (by torture and otherwise) in Chile and calling for those responsible to be brought to justice. It is in these circumstances that we have to consider the position of Lord Hoffmann, not as a person who is himself a party to the proceedings or who has a financial interest in such a party or in the outcome of the proceedings, but as a person who is, as a director and chairperson of A.I.C.L., closely connected with A.I. which is, or must be treated as, a party to the proceedings. The question which arises is whether his connection with that party will (subject to waiver) itself disqualify him from sitting as a judge in the proceedings, in the same way as a significant shareholding in a party will do, and so require that the order made upon the outcome of the proceedings must be set aside.

Such a question could in theory arise, for example, in relation to a senior executive of a body which is a party to the proceedings, who holds no shares in that body; but it is, I believe, only conceivable that it will do so where the body in question is a charitable organisation. He will by reason of his position be committed to the well-being of the charity, and to the fulfilment by the charity of its charitable objects. He may for that reason properly be said to have an interest in the outcome of the litigation, though he has no financial interest, and so to be disqualified from sitting as a judge in the proceedings. The cause is "a cause in which he has aninterest," in the words of Lord Campbell in the Dimes case, at p. 793. It follows that in this context the relevant interest need not be a financial interest. This is the view expressed in Shetreet, Judges on Trial (1976), p. 310, where he states that "[a] judge may have to disqualify himself by reason of his association with a body that institutes or defends the suit," giving as an example the chairman or member of the board of a charitable organisation.

Let me next take the position of Lord Hoffmann in the present case. He was not a member of the governing body of A.I., which is or is to be treated as a party to the present proceedings: he was chairperson of an associated body, A.I.C.L., which is not a party. However, on the evidence, it is plain that there is a close relationship between A.I., A.I.L. and A.I.C.L. A.I.C.L. was formed following the decision in McGovern v. Attorney-General [1982] Ch. 321, to carry out the purposes of A.I. which were charitable, no doubt with the sensible object of achieving a tax saving. So the division of function between A.I.L. and A.I.C.L. was that the latter was to carry out those aspects of the work of the international headquarters of A.I. which were charitable, leaving it to A.I.L. to carry out the remainder, that division being made for fiscal reasons. It follows that A.I., A.I.L. and A.I.C.L. can together be described as being, in practical terms, one organisation, of which A.I.C.L. forms part. The effect for present purposes is that Lord Hoffmann, as chairperson of one member of that organisation, A.I.C.L., is so closely associated with another member of that organisation, A.I., that he can properly be said to have an interest in the outcome of proceedings to which A.I. has become party. This conclusion is reinforced, so far as the present case is concerned, by the evidence of A.I.C.L. commissioning a report by A.I. relating to breaches of human rights in Chile, and calling for those responsible to be brought to justice. It follows that Lord Hoffmann had an interest in the outcome of the present proceedings and so was disqualified from sitting as a judge in those proceedings.

It is important to observe that this conclusion is, in my opinion, in no way dependent on Lord Hoffmann personally holding any view, or having any objective, regarding the question whether Senator Pinochet should be extradited, nor is it dependent on any bias or apparent bias on his part. Any suggestion of bias on his part was, of course, disclaimed by those representing Senator Pinochet. It arises simply from Lord Hoffmann's involvement in A.I.C.L.;

the close relationship between A.I., A.I.L. and A.I.C.L., which here means that for present purposes they can be regarded as being, in practical terms, one organisation; and the participation of A.I. in the present proceedings in which as a result it either is, or must be treated as, a party.

JUDGMENTBY-3: Lord Nolan

JUDGMENT-3:
Lord Nolan: . My Lords, I agree with the views expressed by noble and learned friends, Lord Browne-Wilkinson and Lord Goff of Chieveley. In my judgment the decision of 25 November had to be set aside for the reasons which they give. I would only add that in any case where the **impartiality** of a judge is in question the appearance of the matter is just as important as the reality.

JUDGMENTBY-4: Lord Hope of Craighead

JUDGMENT-4:
Lord Hope of Craighead: . My Lords, I have had the advantage of reading in draft the speeches which have been prepared by my noble and learned friends, Lord Browne-Wilkinson and Lord Goff of Chieveley. For the reasons which they have given I also was satisfied that the earlier decision of this House cannot stand and must be set aside. But in view of the importance of the case and its wider implications, I should like to add these observations.

One of the cornerstones of our legal system is the **impartiality** of the tribunals by which justice is administered. In civil litigation the guiding principle is that no one may be a judge in his own cause: nemo debet esse judex in propria causa. It is a principle which is applied much more widely than a literal interpretation of the words might suggest. It is not confined to cases where the judge is a party to the proceedings. It is applied also to cases where he has a personal or pecuniary interest in the outcome, however small. In London and North-Western Railway Co. v. Lindsay (1858) 3 Macq. 99 the same question as that which arose in Dimes v. Proprietors of Grand Junction Canal, 3 H.L.Cas. 759 was considered in an appeal from the Court of Session to this House. Lord Wensleydale stated that, as he was a shareholder in the appellant company, he proposed to retire and take no part in the judgment. The Lord Chancellor said that he regretted that this step seemed to be necessary. Although counsel stated that he had no objection, it was thought better that any difficulty that might arise should be avoided and Lord Wensleydale retired.

In Sellar v. Highland Railway Co., 1919 S.C.(H.L.) 19 the same rule was applied where a person who had been appointed to act as one of the arbiters in a dispute between the proprietors of certain fishings and the railway company was the holder of a small number of ordinary shares in the railway company. Lord Buckmaster, after referring to the Dimes and Lindsay cases, gave this explanation of the rule, at pp. 20-21:

"The law remains unaltered and unvarying today, and, although it is obvious that the extended growth of personal property and the wide distribution of interests in vast commercial concerns may render the application of the rule increasingly irksome, it is none the less a rule which I for my part should greatly regret to see even in the slightest degree relaxed. The importance of preserving the administration of justice from anything which can even by remote imagination infer a bias or interest in the judge upon whom falls the solemn duty of interpreting the law is so grave that any small inconvenience experienced in its preservation may be cheerfully endured. In practice also the difficulty is one easily overcome, because, directly the fact is stated, it is common practice that counsel on each side agree that the existence of the disqualification shall afford no objection to the prosecution of the suit, and the matter proceeds in the ordinary way, but, if the disclosure is not made, either through neglect or inadvertence, the judgment becomes voidable and may be set aside."

As my noble and learned friend, Lord Goff of Chieveley, said in Reg. v. Gough [1993] A.C. 646, 661, the nature of the interest is such that public confidence in the administration of justice requires that the judge must withdraw from the case or, if he fails to disclose his interest and sits injudgment upon it, the decision cannot stand. It is no answer for the judge to say that he is in fact impartial and that he will abide by his judicial oath. The purpose of the disqualification is to preserve the administration of justice from any suspicion of partiality. The disqualification does not follow automatically in the strict sense of that word, because the parties to the suit may waive the objection. But no further investigation is necessary and, if the interest is not disclosed, the consequence is inevitable. In practice the application of this rule is so well understood and so consistently observed that no case has arisen in the course of this century where a decision of any of the courts exercising a civil jurisdiction in any part of the United Kingdom has had to be set aside on the ground that there was a breach of it.

In the present case we are concerned not with civil litigation but with a decision taken in proceedings for extradition on criminal charges. It is only in the most unusual circumstances that a judge who was sitting in criminal proceedings would find himself open to the objection that he was acting as a judge in his own cause. In principle, if it could be shown that he had a personal or pecuniary interest in the outcome, the maxim would apply. But no case was cited to us, and I am not aware of any, in which it has been applied hitherto in a criminal case. In practice judges are well aware that they should not sit in a case where they have even the slightest personal interest in it either as defendant or as prosecutor.

The ground of objection which has invariably been taken until now in criminal cases is based on that other principle which has its origin in the requirement of **impartiality.** This is that justice must not only be done; it must also be seen to be done. It covers a wider range of situations than that which is covered by the maxim that no one may be a judge in his own cause. But it would be surprising if the application of that principle were to result in a test which was less exacting than that resulting from the application of the nemo judex in sua causa principle. Public confidence in the integrity of the administration of justice is just as important, perhaps even more so, in criminal cases. Article 6(1) of the European Convention on Fundamental Rights and Freedoms makes no distinction between civil and criminal cases in its expression of the right of everyone to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Your Lordships were referred by Miss Montgomery in the course of her argument to Bradford v. McLeod, 1986 S.L.T. 244. This is one of only two reported cases, both of them from Scotland, in which a decision in a criminal case has been set aside because a full-time salaried judge was in breach of this principle. The other is Doherty v. McGlennan, 1997 S.L.T. 444. In neither of these cases could it have been said that the sheriff had an interest in the case which disqualified him. They were cases where the sheriff either said or did something which gave rise to a reasonable suspicion about his **impartiality.**

The test which must be applied by the appellate courts of criminal jurisdiction in England and Wales to cases in which it is alleged that there has been a breach of this principle by a member of an inferior tribunal is different from that which is used in Scotland. The test which was approved by your Lordships' House in Reg. v. Gough [1993] A.C. 646 is whetherthere was a real danger of bias on the part of the relevant member of the tribunal. I think that the explanation for this choice of language lies in the fact that it was necessary in that case to formulate a test for the guidance of the lower appellate courts. The aim, as Lord Woolf explained, at p. 673, was to avoid the quashing of convictions upon quite insubstantial grounds and the flimsiest pretexts of bias. In Scotland the High Court of Justiciary applies the test which was described in Gough as the reasonable suspicion test. In Bradford v. McLeod, 1986 S.L.T. 244, 247 it adopted as representing the law of Scotland the rule which was expressed by Eve J. in Law v. Chartered Institute of Patent Agents [1919] 2 Ch. 276, 289:

"Each member of the council in adjudicating on a complaint thereunder is performing a judicial duty, and he must bring to the discharge of that duty an unbiased and impartial mind. If he has a bias which renders him otherwise than an impartial judge he is disqualified from performing his duty. Nay, more (so jealous is the policy of our law of the purity of the administration of justice), if there are circumstances so affecting a person acting in a judicial capacity as to be calculated to create in the mind of a reasonable man a suspicion of that person's **impartiality,** those circumstances are themselves sufficient to disqualify although in fact no bias exists."

The Scottish system for dealing with criminal appeals is for all appeals from the courts of summary jurisdiction to go direct to the High Court of Justiciary in its appellate capacity. It is a simple, one-stop system, which absolves the High Court of Justiciary from the responsibility of giving guidance to inferior appellate courts as to how to deal with cases where questions have been raised about a tribunal's **impartiality.** Just as Eve J. may be thought to have been seeking to explain to members of the council of the chartered institute in simple language the test which they should apply to themselves in performing their judicial duty, so also the concern of the High Court of Justiciary has been to give guidance to sheriffs and lay justices as to the standards which they should apply to themselves in the conduct of criminal cases. The familiar expression that justice must not only be done but must also be seen to be done serves a valuable function in that context.

Although the tests are described differently, their application by the appellate courts in each country is likely in practice to lead to results which are so similar as to be indistinguishable. Indeed it may be said of all the various tests which I have mentioned, including the maxim that no one may be a judge in his own cause, that they are all founded upon the same broad principle. Where a judge is performing a judicial duty, he must not only bring to the discharge of that duty an unbiased and impartial mind. He must be seen to be impartial.

As for the facts of the present case, it seems to me that the conclusion is inescapable that Amnesty International has associated itself in these proceedings with the position of the prosecutor. The prosecution is not being brought in its name, but its interest in the case is to achieve the same result because it also seeks to bring Senator Pinochet to justice. This distinguishes its position fundamentally from that of other bodies which seek to uphold human rights without extending their objects to issuesconcerning personal responsibility. It has for many years conducted an international campaign against those individuals whom it has identified as having been responsible for torture, extra-judicial executions and disappearances. Its aim is that they should be made to suffer criminal penalties for such gross violations of human rights. It has chosen, by its intervention in these proceedings, to bring itself face to face with one of those individuals against whom it has for so long campaigned.

But everyone whom the prosecutor seeks to bring to justice is entitled to the protection of the law, however grave the offence or offences with which he is being prosecuted. Senator Pinochet is entitled to the judgment of an impartial and independent tribunal on the question which has been raised here as to his immunity. I think that the connections which existed between Lord Hoffmann and Amnesty International were of such a character, in view of their duration and proximity, as to disqualify him on this ground. In view of his links with Amnesty International as the chairman and a director of Amnesty International Charity Ltd. he could not be seen to be impartial. There has been no suggestion that he was actually biased. He had no financial or pecuniary interest in the outcome. But his relationship with Amnesty International was such that he was, in effect, acting as a judge in his own cause. I consider that his failure to disclose these connections leads inevitably to the conclusion that the decision to which he was a party must be set aside.

JUDGMENTBY-5: Lord Hutton

JUDGMENT-5:
Lord Hutton: . My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Browne-Wilkinson. I gratefully adopt his account of the matters (including the links between Amnesty International and Lord Hoffmann) leading to the bringing of this petition by Senator Pinochet to set aside the order made by this House on 25 November 1996. I am in agreement with his reasoning and conclusions on the issue of the jurisdiction of this House to set aside that order and on the issues of election, waiver and abuse of process. In relation to the allegation made by Senator Pinochet, not that Lord Hoffmann was biased in fact, but that there was a real danger of bias or a reasonable apprehension or suspicion of bias because of Lord Hoffmann's links with Amnesty International, I am also in agreement with the reasoning and conclusion of Lord Browne-Wilkinson, and I wish to add some observations on this issue.

In the middle of the last century the Lord Chancellor, Lord Cottenham, had an interest as a shareholder in a canal company to the amount of several thousand pounds. The company filed a bill in equity seeking an injunction against the defendant who was unaware of Lord Cottenham's shareholding in the company. The injunction and the ancillary order sought were granted by the Vice-Chancellor and were subsequently affirmed by Lord Cottenham. The defendant subsequently discovered the interest of Lord Cottenham in the company and brought a motion to discharge the order made by him, and the matter ultimately came on for hearing before this House in Dimes v. Proprietors of Grand Junction Canal, 3 H.L.Cas. 759. The House ruled that the decree of the Lord Chancellor should be set aside, not because in coming to his decision Lord Cottenham was influenced by his interest in the company, butbecause of the importance of avoiding the appearance of the judge labouring under the influence of an interest. Lord Campbell said, at pp. 793-794:

"No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest. Since I have had the honour to be Chief Justice of the Court of Queen's Bench, we have again and again set aside proceedings in inferior tribunals because an individual, who had an interest in a cause, took a part in the decision. And it will have a most salutary influence on these tribunals when it is known that this High Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence."

In his judgment in Reg. v. Gough [1993] A.C. 646, 659 my noble and learned friend, Lord Goff of Chieveley, made reference to the great importance of confidence in the integrity of the administration of justice, and he said:

"In any event, there is an overriding public interest that there should be confidence in the integrity of the administration of justice, which is always associated with the statement of Lord Hewart C.J. in Rex v. Sussex Justices, Ex parte McCarthy [1924] 1 K.B. 256, 259, that it is 'of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.'"

Then referring to the Dimes case, he said, at p. 661:

" ... I wish to draw attention to the fact that there are certain cases in which it has been considered that the circumstances are such that they must inevitably shake public confidence in the integrity of the administration of justice if the decision is to be allowed to stand. Such cases attract the full force of Lord Hewart C.J.'s requirement that justice must not only be done but must manifestly be seen to be done. These cases arise where a person sitting in a

judicial capacity has a pecuniary interest in the outcome of the proceedings. In such a case, as Blackburn J. said in Reg. v. Rand (1866) L.R. 1 Q.B. 230, 232: "any direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter.' The principle is expressed in the maxim that nobody may be judge in his own cause (nemo judex in sua causa). Perhaps the most famous case in which the principle was applied is Dimes v. Proprietors of Grand Junction Canal (1852) 3 H.L.Cas. 759, in which decrees affirmed by Lord Cottenham L.C. in favour of a canal company in which he was a substantial shareholder were set aside by this House, which thenproceeded to consider the matter on its merits, and in fact itself affirmed the decrees. Lord Campbell said, at p. 793: 'No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred.' In such a case, therefore, not only is it irrelevant that there was in fact no bias on the part of the tribunal, but there is no question of investigating, from an objective point of view, whether there was any real likelihood of bias, or any reasonable suspicion of bias, on the facts of the particular case. The nature of the interest is such that public confidence in the administration of justice requires that the decision should not stand."

Later in his judgment Lord Goff said, at p. 664f, agreeing with the view of Lord Woolf, at p. 673f, that the only special category of case where there should be disqualification of a judge without the necessity to inquire whether there was any real likelihood of bias was where the judge has a direct pecuniary interest in the outcome of the proceedings. However I am of opinion that there could be cases where the interest of the judge in the subject matter of the proceedings arising from his strong commitment to some cause or belief or his association with a person or body involved in the proceedings could shake public confidence in the administration of justice as much as a shareholding (which might be small) in a public company involved in the litigation. I find persuasive the observations of Lord Widgery C.J. in Reg. v. Altrincham Justices, Ex parte N. Pennington [1975] Q.B. 549, 552:

"There is no better known rule of natural justice than the one that a man shall not be a judge in his own cause. In its simplest form this means that a man shall not judge an issue in which he has a direct pecuniary interest, but the rule has been extended far beyond such crude examples and now covers cases in which the judge has such an interest in the parties or the matters in dispute as to make it difficult for him to approach the trial with the **impartiality** and detachment which the judicial function requires. Accordingly, application may be made to set aside a judgment on the so-called ground of bias without showing any direct pecuniary or proprietary interest in the judicial officer concerned."

A similar view was expressed by Deane J. in Webb v. The Queen, 181 C.L.R. 41, 74:

"The area covered by the doctrine of disqualification by reason of the appearance of bias encompasses at least four distinct, though sometimes overlapping, main categories of case. The first is disqualification by interest, that is to say, cases where some direct or indirect interest in the proceedings, whether pecuniary or otherwise, gives rise to a reasonable apprehension of prejudice, partiality or prejudgment ... The third category is disqualification by association. It will often overlap the first and consists of cases where the apprehension of prejudgment or other bias results from some direct or indirect relationship, experience or contact with a person or personsinterested in, or otherwise involved in, the proceedings." (My emphasis.)

An illustration of the approach stated by Lord Widgery and Deane J. in respect of a non-pecuniary interest is found in the earlier judgment of Lord Carson in Frome United Breweries Co. Ltd. v. Bath Justices [1926] A.C. 586, 618 when he cited with approval the judgments of the Divisional Court in Reg. v. Fraser (1893) 9 T.L.R. 613. Lord Carson described Fraser's case as one:

"where a magistrate who was a member of a particular council of a religious body one of the objects of which was to oppose the renewal of licences, was present at a meeting at which it was decided that the council should oppose the transfer or renewal of the licences, and that a solicitor should be instructed to act for the council at the meeting of the magistrates when the case came on. A solicitor was so instructed, and opposed the particular licence, and the magistrate sat on the bench and took part in the decision. The court in that case came to the conclusion that the magistrate was disqualified on account of bias, and that the decision to refuse the licence was bad. No one imputed mala fides to the magistrate, but Cave J., in giving judgment, said: 'the question was, What would be likely to endanger the respect or diminish the confidence which it was desirable should exist in the administration of justice?' Wright J. stated that although the magistrate had acted from excellent motives and feelings, he still had done so contrary to a well settled principle of law, which affected the character of the administration of justice."

I have already stated that there was no allegation made against Lord Hoffmann that he was actually guilty of bias in coming to his decision, and I wish to make it clear that I am making no finding of actual bias against him. But I consider that the links, described in the judgment of Lord Browne-Wilkinson, between Lord Hoffmann and Amnesty International, which had campaigned strongly against General Pinochet and which intervened in the earlier hearing to support the case that he should be extradited to face trial for his alleged crimes, were so strong that public confidence in the integrity of the administration of justice would be shaken if his decision were allowed to stand. It was this reason and the other reasons given by Lord Browne-Wilkinson which led me to agree reluctantly in the decision of the Appeal Committee on 17 December 1998 that the order of 25 November 1998 should be set aside.

DISPOSITION:
Petition granted.

SOLICITORS:
Solicitors: Kingsley Napley; Crown Prosecution Service, Headquarters; Bindman & Partners.

B. L. S.

Prosecutor v Anto Furundzija: Appeals Chamber: 21 July 2000: Case No. IT – 95-17/1 – A

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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

I. INTRODUCTION

The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("the International Tribunal" or "the ICTY") is seized of an appeal filed by Anto Furundzija ("the Appellant") against the Judgement rendered by Trial Chamber II of the International Tribunal on 10 December 1998.

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

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

HEREBY RENDERS ITS JUDGEMENT.

A. Procedural background

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

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

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

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

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

6. The trial of the Appellant commenced on 8 June 1998. The Appellant filed a motion on 12 June 1998, seeking to exclude the portion of Witness A's testimony that related to the Appellant's presence during the sexual assaults alleged to have been perpetrated by a co-accused, hereafter Accused B, upon Witness A, on the ground that it did not fall within the scope of the Amended Indictment. In a Decision issued later on the same day, the Trial Chamber held that it would "only consider as relevant Witness A's evidence in so far as it relates to Paragraphs 25 and 26 as pleaded in the Indictment against the Accused."[3]

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

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

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

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

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

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

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

1. The Appeal

(a) Notice of Appeal

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

(b) Post-Trial Application

15. The Appellant filed on 3 February 1999 the "Defendant's Post-Trial Application to the Bureau of the Tribunal for the Disqualification of Presiding Judge Mumba, Motion to Vacate Conviction and Sentence, and Motion for a New Trial". By this motion, the Appellant sought an order from the Bureau disqualifying Judge Mumba, vacating the Judgement and ordering a new trial before a

differently constituted Trial Chamber. On 5 March 1999, the Appeals Chamber issued an order suspending the briefing schedule in the appeal on the merits pending the decision by the Bureau. On 11 March 1999, the Bureau issued its Decision on the Post-Trial Application, dismissing the application on the ground that the determination as to the fairness of the trial was not within the competence of the Bureau.[7]

(c) Filing of Briefs

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

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

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

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

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

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

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

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

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

B. Grounds of Appeal

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

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

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

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

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

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

C. Relief Requested

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

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

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

II. STANDARD OF REVIEW ON APPEAL

A. Submissions of the Parties

1. The Appellant

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

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

2. The Respondent

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

30. The Respondent submits that two categories of error fall within Article 25(1)(a) of the Statute, which provides for an appeal from "an error on a question of law invalidating the decision". The first relates to an error in the substantive law applied by the Trial Chamber and the second to an error in the exercise of the Trial Chamber's discretion.[23] Where the error alleged is one of substantive law, the Respondent says that the nature of the burden on the appealing party is that of persuasion rather than proof.[24] Where the appeal is based on an error in the exercise of the Trial Chamber's discretion, the Respondent contends that the Appeals Chamber should review the impugned decision under an abuse of discretion standard.[25] The Respondent submits that "absent a showing that the Trial Chamber abused its discretion, the Appeals Chamber should not substitute its own view for that of the Trial Chamber."[26]

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

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

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

B. Discussion

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

> 1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:
>
> (a) an error on a question of law invalidating the decision; or
>
> (b) an error of fact which has occasioned a miscarriage of justice.
>
> 2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

35. Errors of law do not raise a question as to the standard of review as directly as errors of fact.

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

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

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

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

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

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

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

38. The Appeals Chamber now turns to consider the Appellant's submissions in relation to the appropriate standard of review where the sufficiency of the evidence in support of a conviction is challenged on appeal. The Appellant submits that the *Tadic* Appeals Judgement demonstrates that, in evaluating the sufficiency of the evidence in support of a conviction, the Appeals Chamber must determine whether the standard of proof beyond reasonable doubt was correctly applied by the Trial Chamber.[37] The Appellant further invites the Appeals Chamber to: 1) conduct an independent

assessment of the evidence, both as to its sufficiency and its quality; and 2) inquire whether a reasonable trier of fact could have found that an inference or hypothesis consistent with innocence of the offence charged was open on the evidence.[38] The Appellant further contends that, as to the application of the standard of proof beyond reasonable doubt, the Appeals Chamber must find that guilt was not merely a reasonable conclusion based on the evidence, but rather the only "fair and rational hypothesis which may be derived from the evidence".[39]

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

40. The Appeals Chamber finds no merit in the Appellant's submission which it understands to mean that the scope of the appellate function should be expanded to include *de novo* review. This Chamber does not operate as a second Trial Chamber. The role of the Appeals Chamber is limited, pursuant to Article 25 of the Statute, to correcting errors of law invalidating a decision, and errors of fact which have occasioned a miscarriage of justice.

III. FIRST GROUND OF APPEAL

A. Submissions of the Parties

1. The Appellant

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

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

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

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

44. More specifically, the Appellant contends that the documents submitted by the Prosecutor prior to trial, on which the Appellant relied for trial preparation, including the Indictment and the 1995 Statement by Witness A, do not contain any allegations of complicity in rapes or sexual assaults committed in the large room ("the Large Room") either in his presence or after his departure.[43] According to the Appellant, the Amended Indictment does not contain allegations of a conspiracy

between him and Accused B, nor does it contain allegations of concert of action and forced nudity, since any rapes and sexual assaults committed in the Large Room are alleged to have taken place before the Appellant's arrival in that room.[44] The Appellant contends that, in reliance on the Prosecutor's pre-trial submissions and the Indictment, he prepared for trial in the reasonable belief that the Prosecutor would attempt to prove that he arrived in the Large Room after the sexual assaults on Witness A by Accused B had taken place.[45] The Appellant submits that the testimony of Witness A at trial was inconsistent with the events alleged in the Amended Indictment and all pre-trial pleadings, in that Witness A testified at trial that the Appellant 1) began questioning Witness A prior to Accused B's arrival in the Large Room, 2) was present at the time of Accused B's rape of Witness A in the Large Room, 3) questioned Witness A in the "Large Room" while Accused B was raping her and otherwise sexually assaulting her, and 4) left Witness A with Accused B in the Large Room where Accused B continued to rape and sexually assault her.[46]

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

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

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

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

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

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

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

50. The Appellant submits that the Trial Chamber failed to remedy the prejudice suffered by him as a consequence of the Prosecutor's inexcusable misconduct with regard to the belated disclosure of the Medica documents, since the relief chosen by the Trial Chamber failed to place him in the position he would have been in had the Prosecutor disclosed the Medica documents prior to trial.[55] According to the Appellant, the scope of the re-opened proceedings was so restrictive that he could not pursue relevant defences and, consequently, did not receive a fair trial. The Appellant argues that, by limiting the issues at the re-opened proceedings to the psychiatric and psychological treatment received by Witness A, he was prevented from introducing relevant evidence contained in the Medica documents, such as Witness A's mental and emotional condition during the material period in 1993, the relevance of which was unknown to the Defence prior to the disclosure of the Medica documents.[56] Furthermore, according to the Appellant, the limited scope of the re-opened proceedings prevented him from introducing evidence regarding the credibility of Witness A's trial testimony in respect of her emotional condition during the relevant period of 1993.[57]

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

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

2. The Respondent

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

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

54. In addressing the first aspect of this ground of appeal, the Prosecutor submits that there was ample notice of the conduct alleged in paragraphs 25 and 26 of the Amended Indictment which the Appellant faced at trial,[61] and that, in any event, the issue of lack of fair notice as to conduct in the Large Room which was not reflected in the Amended Indictment was resolved by the Trial Chamber's Decision of 12 June 1998, granting the Appellant's request to exclude certain evidence.[62] The Prosecutor further submits that there are no findings in the Judgement which support the Appellant's argument that the Trial Chamber based its conviction on evidence which it had previously held to be inadmissible.[63]

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

55. The Prosecutor submits that there is no inconsistency between the testimony of Witnesses A and D as to whether Witness D was interrogated in the Pantry and that there is no failure on the part of

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

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

56. The Prosecutor rejects the Appellant's contention that the scope of the re-opened proceedings was too limited and submits that the new matter which arose as a result of the belated disclosure of the Medica documents was correctly circumscribed by the Trial Chamber in its decision to reopen the proceedings.[68] The Prosecutor contends that the issue of medical, psychiatric or psychological treatment or counselling received by Witness A was the focus of the re-opened proceedings, and not the mental health or psychological state of Witness A generally.[69] According to the Prosecutor, the Appellant was aware that any evidence relating to the mental health or psychological state of Witness A generally would have been material to his case since his defence had been conducted on the basis that Witness A's memory was flawed. Consequently, the Prosecutor submits, the Appellant was under an obligation to exercise due diligence in respect of the production of such evidence during the trial.[70]

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

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

B. Discussion

(a) First aspect of the first ground of appeal

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

60. The Appeals Chamber notes that the Indictment was filed and remains under seal. On 2 June 1998, however, the Prosecutor filed an Amended Indictment, which set forth, by way of a redacted version of the Indictment, only those allegations underlying three counts against the Appellant.[73] The only difference between the Indictment and the Amended Indictment is that in the former the introductory words "shortly after the events described in paragraphs 21 and 22" appear in paragraph

25. The Appellant did not raise any objections in respect of the Amended Indictment as filed on 2 June 1998, and his trial proceeded on the basis of the charges as set forth therein. Any complaint raised by the Appellant as to whether he received fair notice of the charges to be proven against him must be assessed in light of the allegations contained in the Amended Indictment. Accordingly, the charges set forth in the Indictment against the Appellant and the other co-accused, including Accused B, are not relevant to the determination of this ground of appeal.

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

62. The Amended Indictment alleges in relevant part:

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

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

64. The Appellant further submits that the Trial Chamber erred in finding that rapes and sexual assaults were committed in his presence in the Large Room, on the basis of evidence which it had previously declared inadmissible, and in convicting him on that basis. The objection was founded on the fact that the Amended Indictment did not include an allegation that the Appellant was present in the Large Room, while rapes and sexual assaults were perpetrated there. The Appeals Chamber observes that the Trial Chamber upheld this objection insofar as it ruled "inadmissible all evidence relating to rape and sexual assault perpetrated on [Witness A] by [Accused B[in the presence of the [Appellant] in the `Large Room' apart from the evidence of sexual assault alleged in paragraph 25 of the [Amended Indictment]".[76]

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

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

> humiliate her. The interrogation by the [Appellant] and the abuse by Accused B were parallel to each other.
>
> 125. Witness A was left by the accused in the custody of Accused B, who proceeded to rape her, sexually assault her, and to physically abuse and degrade her.
>
> 126. Witness A was subjected to severe physical and mental suffering and public humiliation.

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

67. The Appellant further submits that the Trial Chamber's finding that the Appellant left Witness A in the Large Room to be raped and sexually assaulted by Accused B was impermissible as falling outside the scope of the Amended Indictment.[78] In this context, the Appeals Chamber notes the following. Although the Amended Indictment against the Appellant does not contain any allegations to that effect, at trial Witness A gave evidence that the Appellant left her in the Large Room where she was raped and sexually assaulted by Accused B. In its Judgement, the Trial Chamber states that the Defence "has not disputed that the [Appellant] left Witness A in the room and that there followed another phase of serious sexual assaults by Accused B."[79] The Trial Chamber found that "Witness A was left by the [Appellant] in the custody of Accused B, who proceeded to rape her, sexually assault her, and to physically abuse and degrade her".[80] But while finding so as part of the narrative, the Trial Chamber did not say that the Appellant, in leaving Witness A in the custody of Accused B, did so with the intent that Accused B should perform those acts on Witness A. The performance of such acts by Accused B did not influence the Trial Chamber in coming to a decision to convict the Appellant. This is borne out by a review of the Trial Chamber's legal findings in support of the Appellant's conviction for torture under Count 13 which contain no reference to rapes and sexual assaults in the Large Room:

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

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

(b) Second aspect of the first ground of appeal

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

Witness A in this regard."[83]

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

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

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

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

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

(c) Third aspect of the first ground of appeal

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

75. Article 21(4)(e) of the Statute grants an accused the right "to obtain the attendance and examination of witnesses on his behalf". This right is, for obvious reasons, subject to certain conditions, including a requirement that the evidence should be called at the proper time.[88] In this regard, the Appeals Chamber observes that the Appellant was obliged, under the applicable rules, to present all available evidence at trial. However, it should be noted that the proceedings were re-opened due to the exceptional circumstance of the Prosecutor's late disclosure of material which, in the view of the Trial Chamber, "clearly had the potential to affect the '*credibility of prosecution evidence*'".[89] The question arises whether the Trial Chamber was correct to limit the Appellant's right to call new evidence in the re-opened proceedings to "any medical, psychological or psychiatric

treatment or counselling received by Witness A after May 1993,"[90] and to deny him the right to call Witness F and Enes Surkovic on the ground that their proposed testimony fell outside the scope of the re-opened proceedings.

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

77. The second issue concerns the Trial Chamber's denial of the Appellant's alleged right to call Witness F and Enes Surkovic on the ground that their proposed evidence fell outside the scope of the re-opened proceedings. The Appeals Chamber finds no merit in the Appellant's submission that the evidence was incorrectly excluded. The proposed evidence was clearly not relevant to the question of medical, psychological or psychiatric treatment or counselling received by Witness A, which was the subject of the re-opened proceedings. Outside of these matters, the introduction of the evidence at that stage could not be justified.

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

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

IV. SECOND GROUND OF APPEAL

A. Submissions of the Parties

1. The Appellant

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

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

81. The Appellant alleges that the Trial Chamber established his liability for the crime of torture on the basis of its finding that he interrogated Witness A in the Pantry, but that the evidence does not

prove this beyond reasonable doubt.[91] He claims that Witness D testified that the only interrogator in the Pantry was Accused B, and that the "very, very credible" testimony of the "truthful" Witness D, as described by the Prosecutor during the trial, precludes a finding that the Appellant conducted any interrogation in the Pantry.[92]

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

83. The Appellant further submits that the acts charged in the Amended Indictment would not constitute torture, even if proven. The Appellant alleges that the Prosecutor failed to prove that, by the acts and omissions charged in the Amended Indictment, he intentionally inflicted "severe pain or suffering, whether physical or mental", aimed at "obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person."[96]

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

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

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

86. The Appellant submits that the Trial Chamber cited no authority for the proposition that his presence alone could support a conviction for aiding and abetting.[100] He contends that the acts charged against him in paragraph 26 of the Amended Indictment do not constitute aiding and abetting, and that the cases upon which the Trial Chamber relied to support the conviction for aiding and abetting are distinguishable from the instant case. The Appellant distinguishes the circumstances in the *Dachau Concentration Camp* case and submits that the conduct of the accused in that case, which the court found to constitute "acting in pursuance of a common design to violate the laws and usages of war", did not occur in the present case.[101] Referring to the case of *Rohde*, he argues that there is no evidence that he was a link in the chain of events that led to the rape of Witness A.[102] He also refers to the decision in the *Stalag Luft III* case, and submits that there is no proof that his acts contributed directly to the rape or that the rape would not have happened in this manner had he not aided it willingly.[103] Relying on the *Schonfeld* case, the Appellant submits that he cannot be convicted of aiding and abetting merely because he did not endeavour to prevent the rape of Witness A.[104] He argues that, unlike in the *Schonfeld* case, there was no allegation in this case that his mere presence in or outside the Pantry "was calculated to give additional confidence" to Accused B.[105] He also submits that his case is to be contrasted with the *Almelo Trial* and the *Trial of Otto Sandrock and Three Others*, since there was no allegation or evidence that he knew that there was a common

purpose behind the rape of Witness A or that he had gone to the Pantry for the very purpose of having Witness A raped.[106]

2. The Respondent

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

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

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

89. As regards the Appellant's contention that the acts charged against him in the Amended Indictment, even if proven, do not constitute torture, the Prosecutor interprets that contention to include such issues as the insufficiency of the Amended Indictment, an error of law by the Trial Chamber in determining the elements of torture, the insufficiency of the evidence, and the lack of showing of a previous conspiracy or of evidence in support of a finding of action in concert.[109] The Prosecutor submits that the elements of torture committed in an armed conflict, as stated by the Trial Chamber in the Judgement, reflect a correct interpretation of the law.[110] It is submitted that there was sufficient and relevant evidence for the Trial Chamber to draw the factual conclusions to establish beyond reasonable doubt the elements of the offence of torture in this case.[111] The Prosecutor submits that neither the Statute and the Rules nor the jurisprudence of the International Tribunal require that each and every element of an offence be alleged in an indictment, and that, by failing to raise the insufficiency of the Amended Indictment at the pre-trial stage, the Appellant effectively waived this argument.[112] Any challenge by the Appellant to the Trial Chamber's formulation of the elements of torture would constitute an error of law that requires *de novo* review. However, the Prosecutor considers that the determination by the Trial Chamber that the evidence proved the Appellant's guilt of torture beyond reasonable doubt should not be disturbed, as there is a reasonable basis for it.[113]

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

91. The Prosecutor notes that Witness A testified that there was a relationship between the questions and the assaults,[121] and that the evidence demonstrated that the Appellant was seeking information from Witness A. Even assuming that the main purpose of the Appellant was to obtain information, in contrast with the purpose of Accused B, which was to humiliate and degrade Witness A, that main purpose would not alter the individual criminal responsibility of the Appellant as co-perpetrator of torture.[122]

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

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

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

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

95. Regarding the Appellant's argument that the allegations in paragraph 26 of the Amended Indictment did not meet the requirements for aiding and abetting reflected in the cases cited by the Trial Chamber, the Prosecutor submits that what is relevant to the appeal is not the allegations contained in the charging instrument, but the legal and factual findings contained in the Judgement.[127] Overall, the Prosecutor submits that the Appellant must demonstrate that the findings of the Trial Chamber are inconsistent with existing international customary law and with other decisions of this Tribunal and consequently cannot constitute the basis for determining individual criminal responsibility.[128]

3. Appellant in Reply

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

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

B. Discussion

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

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

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

1. Witness D's Testimony

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

101. The evidence relied upon by the Trial Chamber in the Judgement reveals the following. Witness A gave evidence that the Appellant was standing in the doorway to the Pantry or in that room during the attacks on Witness D and the subsequent sexual assaults on Witness A,[138] and further testified that she and Witness D were interrogated by the Appellant in the Pantry.[139] Witness D testified that, when he entered the Pantry, the Appellant was there, and that the Appellant remained in the vicinity of the doorway to the Pantry.[140] Witness D's evidence thus supports the testimony of Witness A that the Appellant was present in the Pantry or at least in the doorway to that room. It is Witness D's testimony that he did not recall if anything was said while he was being beaten in the Pantry that the Appellant argues gives rise to reasonable doubt as to whether the Appellant conducted an interrogation in the Pantry. However, given that this testimony of Witness D relates solely to the question whether he was interrogated by the Appellant while he was being beaten by Accused B,

Witness D's testimony is not dispositive on the question whether the Appellant interrogated Witness A in the Pantry at any time during her confinement in that room. Moreover, Witness D was only in the Pantry for part of the period of Witness A's confinement in that room, and consequently his testimony does not cover events in the Pantry before his entry, or after his departure. Witness D did testify that upon leaving the Pantry he heard the screams of Witness A and a soldier's voice calling out the name of Furundzija.[141] The Appeals Chamber takes the view that it was not unreasonable for the Trial Chamber to conclude, based upon a consideration of the testimony of both Witnesses A and D, that the Appellant interrogated Witness A in the Pantry.

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

2. Courtroom Identification

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

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

> The Trial Chamber notes that the evidence of Witness A consistently places the accused at the scenes of the crimes committed against her in the Holiday Cottage in May 1993. It is also significant to note that she has been consistent throughout her statements in her recollection that the accused was never the one assaulting her during her period of captivity in the Holiday Cottage; Accused B is always described as the actual perpetrator of the rapes and other assaults. The Trial Chamber finds that Witness A has identified the accused as Anto Furundzija, the Boss. The inconsistencies in her identification testimony are minor and reasonable. In light of her recollection at the time of seeing the accused on television and even noticing that he had put on weight, the Trial Chamber is satisfied that the accused has been sufficiently identified by Witness A.[144]

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

106. Moreover, Witness A's in-court identification is not the sole evidence identifying the Appellant as present in the Large Room; there is other evidence to confirm this. This includes the testimony of Witness A of the arrival of the commander of the Joker unit, addressed by his subordinates as "the Boss" or "Furundzija", in the Large Room where she was interrogated by him immediately after his arrival.[147] Witness A further testified that the Appellant had been irritated by her not giving satisfactory answers to his questions there, and that he had gone to set up the confrontation in the

Pantry with another person who later turned out to be Witness D.[148] Both Witness A and Witness D identified the Appellant as being present in the doorway to the Pantry during the events that subsequently unfolded in that room as charged in the Amended Indictment.[149] The Appeals Chamber notes that the Appellant has not addressed any of these arguments in his reply to the Prosecutor's Response.

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

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

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

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

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

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

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

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

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

> (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> (ii) Be made in the knowledge of the intention of the group to commit the crime; . . .

118. The Trial Chamber found that two types of liability for criminal participation "appear to have crystallised in international law - co-perpetrators who participate in a joint criminal enterprise, on the one hand, and aiders and abettors, on the other".[162] It further stated that, to distinguish a co-perpetrator from an aider or abettor, "it is crucial to ascertain whether the individual who takes part in the torture process also *partakes of the purpose behind torture* (that is, acts with the intention of obtaining information or a confession, of punishing, intimidating, humiliating or coercing the victim or a third person, or of discriminating, on any ground, against the victim or a third person)".[163] It then concluded that, to be convicted as a co-perpetrator, the accused "must participate in an integral part of the torture and partake of the purpose behind the torture, that is the intent to obtain information or a confession, to punish or intimidate, humiliate, coerce or discriminate against the victim or a third person".[164]

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

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

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

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

5. Post-Traumatic Stress Disorder (PTSD)

122. This issue was the subject of the re-opened proceedings at which several experts testified. The

weight of the expert testimony, PTSD's impact upon memory, and the effect of treatment of PTSD on memory, were fully argued before the Trial Chamber which, having examined the inconsistencies in Witness A's evidence, held that:

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

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

6. Presence of the Appellant and Aiding and Abetting

124. The Appellant raises three points in connection with his conviction for aiding and abetting outrages upon personal dignity including rape. First, the Prosecutor failed to prove that the Appellant interrogated anyone in the Pantry. The Trial Chamber failed to cite any authority to support the proposition that presence alone would implicate the Appellant as an aider and abettor.[170] Secondly, the allegations in paragraph 26 of the Amended Indictment do not meet the requirements for aiding and abetting set forth in the cases cited by the Trial Chamber.[171] Thirdly, the Prosecutor did not prove beyond reasonable doubt that the Appellant gave Accused B assistance, encouragement, or moral support that had a substantial effect on the perpetration of the rape or that he knew that his acts assisted Accused B in the commission of the rape.[172] The reasons are that the Appellant never interrogated anyone in the Pantry, that Witness D's evidence conflicts with that of Witness A, and that mere presence would not constitute aiding and abetting.

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

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

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

V. THIRD GROUND OF APPEAL

A. Submissions of the Parties

1. The Appellant

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

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

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

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

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

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

131. Rule 50 of the Rules sets forth the procedure for amending indictments. The Appellant contends that by attempting to amend the Amended Indictment through proof at trial, the Prosecutor violated Rule 50, and that, by admitting the evidence and finding him guilty of a crime without giving him notice of charges relating to the village of Ahmici, the Trial Chamber violated Rule 50.[180]

2. The Respondent

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

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

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

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

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

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

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

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

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

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

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

140. With respect to the Appellant's argument that the Respondent violated Rule 50 of the Rules by attempting to further amend the Amended Indictment through evidence submitted at trial, the Respondent reiterates that the evidence was not at variance with the Amended Indictment, that even if the evidence were at variance, that variance would be permissible, and that the evidence submitted was directly relevant to the charges.[193]

3. Appellant in Reply

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

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

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

B. Discussion

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

> In the Large Room:
>
> 124. Witness A was interrogated by the accused. She was forced by Accused B to undress and remain naked before a substantial number of soldiers. She was subjected to cruel, inhuman and degrading treatment and to threats of serious physical assault by Accused B in the course of her interrogation by the accused. The purpose of this abuse was to extract information from Witness A about her family, her connection with the ABiH and her relationship with certain Croatian soldiers, and also to degrade and humiliate her. The interrogation by the accused and the abuse by Accused B were parallel to each other.
>
> 125. Witness A was left by the accused in the custody of Accused B, who proceeded to rape her, sexually assault her, and to physically abuse and degrade her.
>
> 126. Witness A was subjected to severe physical and mental suffering and public humiliation.
>
> In the Pantry:
>
> 127. The interrogation of Witness A continued in the pantry, once more before an audience of soldiers. Whilst naked but covered by a small blanket, she was interrogated by the accused. She was subjected to rape, sexual assaults, and cruel, inhuman and degrading treatment by Accused B. Witness D was also interrogated by the accused and subjected to serious physical assaults by Accused B. He was made to watch rape and sexual assault perpetrated upon a woman whom he knew, in order to force him to admit allegations made against her. In this regard, both witnesses were humiliated.
>
> 128. Accused B beat Witness D and repeatedly raped Witness A. The accused was

> present in the room as he carried on his interrogations. When not in the room, he was present in the near vicinity, just outside an open door and he knew that crimes including rape were being committed. In fact, the acts by Accused B were performed in pursuance of the accused's interrogation.
>
> 129. It is clear that in the pantry, both Witness A and Witness D were subjected to severe physical and mental suffering and they were also publicly humiliated.
>
> 130. There is no doubt that the accused and Accused B, as commanders, divided the process of interrogation by performing different functions. The role of the accused was to question, while Accused B's role was to assault and threaten in order to elicit the required information from Witness A and Witness D.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

154. In relation to this aspect of the third ground of appeal, the Trial Chamber accepted the evidence of Witness A about the nature of her interrogation by the Appellant.[203] This finding was made in the context of the Trial Chamber's discussion of the link between the armed conflict and the Appellant, and did not form part of the legal findings underlying the Appellant's convictions.

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

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

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

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

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

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

> The accused was a member of the Jokers, a special unit of the HVO military police, which participated in the armed conflict in the Vitez municipality and especially in the attack on the village of Ahmici. These attacks led to the expulsion, detention, wounding and deaths of numerous civilians.[208]
>
> Finally, on 16 April 1993, the HVO carried out a concerted attack on both Vitez and Ahmici.[209]
>
> Witness B testified about the HVO attack on Ahmici. On 16 April 1993, she woke up to the sound of shooting and explosions. A group of HVO soldiers, including the accused, entered her house and searched it while verbally abusing the witness and her mother. Witness B appealed to the accused for help as he was an acquaintance of hers, but he remained silent. She was then forced to flee as the soldiers fired at her feet. Her house was set on fire.[210]
>
> Witness B also testified that during the attack on Ahmici, the accused was wearing a Jokers patch on his sleeve.[211]

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

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

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

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

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

3. Alleged violation of Rule 50 of the Rules

162. The Appeals Chamber finds wholly unmeritorious the argument that the Prosecutor violated Rule 50 by further amending the Amended Indictment through proof at trial. As discussed above, under Article 18 of the Statute and Rule 47 of the Rules, an indictment need only plead the material acts underlying the charges and need not set out the evidence that is to be adduced in support of them.[215] The evidence admitted at trial did not alter the charges in the Amended Indictment.

163. Thus, this ground of appeal fails.

VI. FOURTH GROUND OF APPEAL

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

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

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

167. The UNCSW was involved in the preparations for the UN Fourth World Conference on Women held in Beijing, China, 4-15 September 1995, and specifically participated in the drafting of the "Platform for Action," a document identifying twelve "critical areas of concern" in the area of women's rights and which contained a five-year action plan for the future, the aim being to achieve gender equality by the year 2000. Three of the critical areas of concern were particularly relevant to issues in the former Yugoslavia.[219] There was an Expert Group Meeting following the Beijing conference, whose purpose was to work towards achieving certain of the goals drawn from the Beijing Conference and set out in the Platform for Action, including the reaffirmation of rape as a war crime, by the end of 1998. Three authors of one of the *amicus curiae* briefs later filed in the instant case[220] and one of the Prosecutors in the instant case, Patricia Viseur-Sellers ("the Prosecution lawyer"), attended this meeting.[221] This Expert Group proposed a definition of rape under international law.[222]

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

A. Submissions of the Parties

1. The Appellant

169. The Appellant submits that because of Judge Mumba's personal interest in, and association with the UNCSW, the ongoing agenda or campaign of the Platform for Action, the three authors of one of the *amicus curiae* briefs, and the Prosecution lawyer, she should have been disqualified under Rule 15 of the Rules.[223] He argues that the test which should be applied by the Appeals Chamber in ascertaining if disqualification is appropriate is whether "a reasonable member of the public, knowing all of the facts SwouldC come to the conclusion that Judge Mumba has *or had* any associations, which *might* affect her impartiality."[224] Based on this test, he submits that Judge Mumba should have been disqualified as an appearance was created that she had sat in judgement in a case that could advance and in fact did advance a legal and political agenda which she helped to create whilst a member of the UNCSW.[225]

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

2. The Respondent

171. The Respondent submits that the Appellant has failed to establish the existence of either a personal interest by Judge Mumba in the instant case, or the existence of an association or working relationship between Judge Mumba, the three authors of one of the *amicus curiae* briefs and the Prosecution lawyer, such that she should have been disqualified. In addition, the Appellant has submitted no evidence to support an allegation that Judge Mumba exhibited actual bias or

partiality.[230] The Prosecutor contends that the standard for a finding of bias should be high and that Judges should not be disqualified purely on the basis of their personal beliefs or legal expertise.[231] In the view of the Prosecutor, the Appellant has failed to meet the "reasonable apprehension" of bias standard.[232] The prior involvement of a Judge in a United Nations body such as the UNCSW cannot give rise to any reasonable apprehension that the Judge has an agenda which would cause him or her to be biased against an accused appearing before him or her. [233]

B. Discussion

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

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

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

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

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

1. Statutory Requirement of Impartiality

177. The fundamental human right of an accused to be tried before an independent and impartial tribunal is generally recognised as being an integral component of the requirement that an accused should have a fair trial. Article 13(1) of the Statute reflects this, by expressly providing that Judges

of the International Tribunal "shall be persons of high moral character, *impartiality* and integrity".[238] This fundamental human right is similarly reflected in Article 21 of the Statute, dealing generally with the rights of the accused and the right to a fair trial.[239] As a result, the Appeals Chamber need look no further than Article 13(1) of the Statute for the source of that requirement.

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

2. Interpretation of the Statutory Requirement for Impartiality

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

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

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

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

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

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

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

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

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

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

188. This is also the trend in civil law jurisdictions, where it is required that a Judge should not only be actually impartial, but that the Judge should also appear to be impartial.[255] For example, under the German Code of Criminal Procedure, although Articles 22 and 23 are the provisions setting down mandatory grounds for disqualification, Article 24 provides that a Judge may be challenged for "fear of bias" and that such "[c]hallenge for fear of bias is proper if there is reason to distrust the impartiality of a Judge". Thus, one can challenge a Judge's partiality based on an objective fear of bias as opposed to having to assert actual bias. Similarly in Sweden, a Judge may be disqualified if any circumstances arise which create a legitimate doubt as to the Judge's impartiality.[256]

3. A standard to be applied by the Appeals Chamber

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

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

B. There is an unacceptable appearance of bias if:

i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome

> of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or
>
> ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[257]

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

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

> A Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case. [259]

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

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

(a) Actual Bias

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

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

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

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

(c) Whether the circumstances of Judge Mumba's membership of the UNCSW would lead a

reasonable and informed observer to apprehend bias

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

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

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

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

198. The Appellant suggests that, during her time with the UNCSW, Judge Mumba acted in a personal capacity and was "personally involved" in promoting the cause of the UNCSW and the Platform for Action. Consequently, she had a personal interest in the Appellant's case and, as this created an appearance of bias, she should have been disqualified.[269] The Prosecutor argues that Judge Mumba acted solely as a representative of her country and, as such, was not putting forward her personal views, but those of her country.[270]

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

200. Secondly, even if it were established that Judge Mumba expressly shared the goals and

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

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

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

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

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

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

206. The Appellant has alleged that "Judge Mumba's decision Sthe JudgementC in fact promoted specific interests and goals of the Commission."[281] He states that she advocated the position that

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

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

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

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

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

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

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

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

214. The Judgement notes that the *amicus curiae* briefs "dealt at great length with issues pertaining to the re-opening of the...proceedings" and the suggested scope of the reopening.[303] They did not address the question of rape or the Appellant's personal responsibility for the rapes in question.[304] In any event, by the time the briefs were filed on 9 and 11 November 1998, the Trial Chamber had already decided to reopen the proceedings which commenced on 9 November 1998.[305]

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

VII. FIFTH GROUND OF APPEAL

A. Submissions of the Parties

1. The Appellant

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

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

218. Referring to the *Celibici* Judgement, the Appellant submits that the Trial Chamber in that case also reaffirmed the principle that crimes warrant a harsher penalty where they result in loss of human

life.[313]

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

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

2. The Respondent

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

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

223. The Respondent disputes the contention that there is a cognisable sentencing regime at the Tribunal, noting that the Appeals Chamber has only addressed the question of sentencing on one occasion.[319] Further, each of the sentences imposed by a Trial Chamber to date, which the Appellant contends reflect an emerging penal regime, is the subject of an appeal. The Respondent submits that the *Erdemovic* case[320] cannot serve as an appropriate guideline, as the circumstances surrounding that case were unique. The accused in that case pleaded guilty to the charges against him, and duress was treated as a significant mitigating factor. Therefore, the Respondent argues, *Erdemovic* is clearly distinguishable from the instant case.[321]

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

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

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

227. The Respondent submits that the gravity of the crime must form the starting point for any determination of sentence. Rather than subscribing to some form of hierarchy between the offences generally, a Trial Chamber should impose a sentence which reflects the inherent gravity of the accused's criminal conduct.[325] The gravity of the crimes must ultimately be determined with regard to the particular circumstances of the case; the degree of the accused's participation should be considered and, generally, the closer a person is to actual participation in the crime, the more serious the nature of his crime.[326] However, an individual who orders or plans a course of criminal conduct will be responsible for his role in having ordered all of the crimes committed by the perpetrators and his responsibility may, therefore, be greater.[327]

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

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

230. The Respondent further submits that, even if any weight is given to sentences imposed by Trial Chambers in other cases, the sentences do not appear to be inconsistent. The Respondent highlights as an example the accused Hazim Delic, in the *Celebici* case, who received a sentence of fifteen years for rape. The Respondent contends that this sentence is probably the one most analogous on its facts to the circumstances of this case.[333] Furthermore, the Respondent submits that, although sentences imposed by Trial Chambers should not serve as a point of reference before this Appeals Chamber, life imprisonment has been imposed in several cases before the ICTR and in the *Jelisic* case before this Tribunal a sentence of 40 years was imposed.[334] In the view of the Respondent, the overall ten-year sentence in this case is within the appropriate range, and on that basis the Appellant has shown no abuse of discretion by the Trial Chamber.[335]

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

3. Appellant in Reply

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

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

234. As regards the *Erdemovic* case, the Appellant submits that in the First *Erdemovic* Sentencing Judgement, the accused was sentenced to ten years' imprisonment for the commission of more than seventy murders, absent mitigating circumstances, but that, in the Second *Erdemovic* Sentencing Judgement, the accused received only a five-year sentence on account of duress and a plea-bargaining agreement reached with the Prosecutor.[342]

B. Discussion

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

Article 23 - Judgement

> 1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.
>
> 2. The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 24 - Penalties

> 1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.
>
> 2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
>
> 3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Rule 101 - Penalties

> (A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life.
>
> (B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as:
>
> (i) any aggravating circumstances;

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

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

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

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

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

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

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

238. The Prosecutor submits that, while there is no existing penal regime, it would be appropriate for the Appeals Chamber to set out sentencing guidelines which should be applied, based on the functions and purposes of sentencing in the legal system of the Tribunal.[348] Without questioning the possible utility of such guidelines, the Chamber considers it inappropriate to establish a definitive list of sentencing guidelines for future reference, when only certain matters relating to sentencing are at issue before it now. Thus, the Appeals Chamber will limit itself to the issues directly raised by this appeal.

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

supports this view:

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

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

1. Crimes against humanity attract harsher penalties than war crimes

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

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

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

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

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

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

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

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

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

245. The Appellant submits that certain judgements of the Tribunal may serve as benchmarks for sentences to be handed down in relation to specific crimes. In particular, it is submitted that the judgements of the Trial Chambers in the *Tadic*[359] and *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]

3. Additional arguments

253. The Appellant submits that "there are substantive issues that hang over the case" that suggest innocence is a possibility and that this should be considered in sentencing.[369] The Appeals Chamber rejects this argument. Guilt or innocence is a question to be determined prior to sentencing. In the event that an accused is convicted, or an Appellant's conviction is affirmed, his guilt has been proved beyond reasonable doubt. Thus a possibility of innocence can never be a factor in sentencing.

254. Accordingly, this ground of appeal must fail.

VIII. DISPOSITION

For the foregoing reasons, **THE APPEALS CHAMBER, UNANIMOUSLY**, rejects each ground of appeal, dismisses the appeal, and affirms the convictions and sentences.

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

_____
Mohamed Shahabuddeen
Presiding

_____
Rafael Nieto-Navia

_____
Fausto Pocar

_____
Patrick Lipton Robinson

Lal Chand Vohrah

Dated this twenty-first day of July 2000
At The Hague,
The Netherlands.

Judge Shahabuddeen, Judge Vohrah and Judge Robinson append declarations to this Judgement.

[SEAL OF THE TRIBUNAL]

Annex A - Glossary of Terms

Aleksovski Appeals Judgement *Prosecutor v. Zlatko Aleksovski,* Case No. IT-95-14/1-A, Judgement, 24 Mar. 2000.

Amended Indictment *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-PT, Amended Indictment, 2 June 1998.

Appellant Anto Furundzija.

Appellant's Amended Brief *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-A, Defendant's Amended Appellate Brief sPublic Versions, 23 June 2000.

Appellant's Reply *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-A, Appellant's Reply Brief sPublic Versions, 23 June 2000.

Bungalow A well-known hostelry in the village of Nadioci, Central Bosnia.

Celebici Judgement *Prosecutor v. Zejnil Delalic et al.,* Case No. IT-96-21-T, Judgement, 16 Nov. 1998.

Confidential Decision *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, Confidential Decision, 15 June 1998.

Defence Defence for Anto Furundzija.

Eur. Ct. H. R. Prior to 1996, the official publication of the Registry of the European Court of Human Rights was entitled "Publications of the European Court of Human Rights." Thereafter, the title was changed to "Reports of Judgments and Decisions."

European Convention on Human Rights European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950.

First *Erdemovic* Sentencing Judgement *Prosecutor v. Drazen Erdemovic,* Case No. IT-96-22-T, Sentencing Judgement, 29 Nov. 1996.

HVO Croatian Defence Council.

Holiday Cottage Building adjacent to the Bungalow - living quarters of the Jokers.

ICCPR International Covenant on Civil and Political Rights, 1966.

ICTR International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

Indictment *Prosecutor v. Anto Furundzija,* Case No. IT-95-17/1-T,

Indictment, 2 Nov. 1995.

International Tribunal or ICTY International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

Jokers A special unit of the military police of the HVO.

Judgement *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, Judgement, 10 Dec. 1998.

Kupreskic Judgement *Prosecutor v. Zoran Kupreskic et al*, Case No. IT-95-16-T, Judgement, 14 Jan. 2000.

Large Room A room in the Holiday Cottage where the events alleged in paragraph 25 of the Amended Indictment occurred.

Pantry A room in the Holiday Cottage where the events alleged in paragraph 26 of the Amended Indictment occurred.

Prosecutor or Respondent Office of the Prosecutor.

Prosecutor's Response *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-A, Prosecution Submission of Public Version of Confidential Respondent's Brief of the Prosecution dated 30 September 1999, 28 June 2000.

PTSD Post-Traumatic Stress Disorder.

Re-opened proceedings Post-trial proceedings commencing on 9 November 1998, pursuant to the Trial Chamber's Decision of 16 July 1998. These proceedings ended on 12 November 1998.

Rome Statute Rome Statute of the International Criminal Court, adopted at Rome on 17 July 1998, U.N. Doc. A/CONF. 183/9.

Rules Rules of Procedure and Evidence of the International Tribunal.

Report of the Secretary-General Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993.

Second *Erdemovic* Sentencing Judgement *Prosecutor v. Drazen Erdemovic,* Case No. IT-96-22-T*bis,* Sentencing Judgement, 5 Mar. 1998.

SFRY Socialist Federal Republic of Yugoslavia.

Statute Statute of the International Tribunal.

T. (2 March 2000) Transcript of hearing on appeal in *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-A. All transcript page numbers referred to in the course of this Judgement are from the unofficial, uncorrected version of the English transcript. Minor differences may therefore exist between the pagination therein and that of the final English transcript released to the public.

Tadic Appeals Judgement *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, Judgement, 15 July 1999.

Tadic Sentencing Judgment *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T, Sentencing Judgment, 14 July 1997.

Tadic Sentencing Appeals Judgement *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A and IT-94-1-A*bis*, Judgement in Sentencing Appeals, 26 Jan. 2000.

ANNEXES

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Annex A

International Criminal Justice and Children, published by No Peace without Justice and UNICEF Innocenti Research Centre, 2002

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INTERNATIONAL CRIMINAL JUSTICE AND CHILDREN

No Peace Without Justice
UNICEF Innocenti Research Centre
September 2002

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Cover Photograph:
Unicef/HQ98-0565/
Giacomo Pirozzi/
Sierra Leone

Backcover Photograph:
Unicef/HQ94-0158/
Betty Press/Zaire

Graphic design
by AC&P

Print:
XPress S.r.l
Rome - Italy

No Peace Without Justice is an independent international non-governmental organization working for a fair, effective and independent international criminal justice system to combat impunity for war crimes, crimes against humanity and genocide. No Peace Without Justice wishes to acknowledge the financial assistance of the European Community and Open Society Institute to its programmes. The views expressed herein are those of the authors and therefore in no way reflect the official positions of the European Commission or Open Society Institute

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The UNICEF Innocenti Research Centre in Florence, Italy, was established in 1988 to strengthen the research capability of the United Nations Children's Fund (UNICEF) and to support its advocacy for children worldwide. The Centre's publications are contributions to the global debate on child rights issues, in order to stimulate further dialogue. For that reason, the Centre (formally known as the International Child Development Centre) may produce publications that do not necessarily reflect current official UNICEF policies and approaches. The financial support for this publication granted by the Department for International Development (DfID) of the United Kingdom, is gratefully acknowledged

Acknowledgements

No Peace Without Justice (NPWJ) and UNICEF Innocenti Research Centre embarked on this project in order to foster a dialogue between child rights advocates and experts in international criminal law, on the emerging system of international criminal justice and how it relates to children.

This book would not have been possible without the dedication of those persons responsible for its preparation, who saw it through to completion. That team was led by Niccolò Figà-Talamanca, Program Director, NPWJ; and Bert Theuermann, in the Office of Emergency Programmes, UNICEF, together with substantial research and editorial input provided by Alison Smith, NPWJ; and Saudamini Siegrist, UNICEF.

The initial research and drafting for this publication was undertaken by Barbara Bedont and Monika Sandvik-Nylund, on a programme of assignment from No Peace Without Justice to UNICEF, as part of the "NPWJ Judicial Assistance Program". We would also like to express special thanks to Petra Morrison and Pamela Knight for their copy editing skills.

We would like to acknouledge, with special thanks, the input received from the Office of the Prosecutor for the International Criminal Tribunal for the former Yugoslavia (ICTY) and for Rwanda (ICTR). We also gratefully acknowledge comments provided by the International Centre for Transitional Justice and the Secretariat of the NGO Coalition for the International Criminal Court.

The drafting exercise also benefited greatly from a presentation by Emma Bonino, Alison Smith and Bert Theuermann of the draft publication during the International Conference celebrating the entry into force of the Rome Statute on the occasion of its fourth anniversary, convened by the Government of Italy and NPWJ, on 15 July 2002 at Villa Miani, in Rome. No Peace Without Justice and UNICEF Innocenti are grateful for the encouragement and input received from Conference participants.

In addition we would like to thank the following experts who generously reviewed the draft and supported the drafting process: Yodit Abdisa, Kelly Dawn Askin, Gopalan Balagopal, Jo Becker, Graham Blewitt, Rachel Brett, Nigel Cantwell, Geert Cappelaere, Ilene Cohn, Peter Crowley, Roisin De Burca, Carla Del Ponte, Silvia Danailov, Anne-Claire Duffay, Isaac Flattau, Rana Flowers, Manuel Fontaine, Mark Freeman, Liz Gibbons, Priscilla Hayner, Saad Henry, Kate Hunt, Jonathan Huston, Nils Kastberg, Karin Landgren, Iain Levine, Patricia Lone, Suba Mahalingam, Geeta Narayan, Majorie Newman-Williams, Rada Noeva, Bo Viktor Nylund, Valerie Oosterveld, Leila Pakkala, Nadine Perrault, Lila Pieters, Richard Rowe, Maria Santos Pais, Jennifer Schense, Vanessa Sedletzki, Paul Seils, Joydeep Sengupta, Dan Seymour, Jayne Stoyles, Yvonne Terlingen, Jennifer Trahan, Esther van der Velde, Christian Wenaweser, Maricke Wierda, Renate Winter, Elke Wisch, Valentin Zellweger and Paul van Zyl.

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Foreword

Today's conflicts target children for the worst possible violence and abuse. It is our shared duty – our moral obligation – to end that outrage. We cannot stand by in silence while children are made victims of murder, rape and mutilation; while children are abducted and forced to fight in wars, and take part in wartime atrocities.

This guide on children and international justice and truth-seeking mechanisms is part of an ongoing effort, together with many partners, to ensure that children can grow up in a world safe from harm. It is a practical guide that summarizes the legal protection framework for children in armed conflict, and provides an introduction to the functions and statutes of justice and truth-seeking mechanisms, in particular as they relate to children. Practical experiences of children in such processes are limited so far, and many questions remain, which will require further reflection, study and application. We attempt in these pages to explore the emerging issues and address the critical gap in accountability for crimes against children, outlining practical steps that can protect children under international criminal law.

We call upon child rights advocates and international criminal justice experts to join in this effort. By giving careful attention to the broader context of international criminal justice and the special needs of children, we believe that together we can make a difference for children in this world. In fact, the success and sustainability of peace processes depends on young people who will carry forward their hopes for the future. We cannot let them down. We cannot fail to provide the leadership that will, in turn, inspire their own efforts to help build a world without violence, where justice is the foundation for stable societies, for democracy and the rule of law.

We must not delay because children cannot wait. Let their impatience motivate our actions. We must be clear that the era of impunity is over, that we are entering a new era of justice and peace.

EMMA BONINO
MEMBER OF THE EUROPEAN PARLIAMENT

CAROL BELLAMY
EXECUTIVE DIRECTOR, UNICEF

Executive summary

In the outcome document of the United Nations Special Session on Children, 'A world fit for children', adopted in May 2002 by the General Assembly, governments undertake to:

> *"Put an end to impunity, prosecute those responsible for genocide, crimes against humanity, and war crimes, and exclude, where feasible, these crimes from amnesty provisions and amnesty legislation, and ensure that whenever post-conflict truth and justice-seeking mechanisms are established, serious abuses involving children are addressed and that appropriate child-sensitive procedures are provided."*

Why is justice for children important?

Children are among the principal victims of war. In the last decade, an estimated 2 million children have died and 6 million have been wounded as a direct result of armed conflict. At any one time over 300,000 child soldiers, some as young as eight, are exploited in armed conflicts in over 30 countries around the world. They have been made targets of the worst possible violence and abuse. They have been abducted, raped, recruited into armed forces and groups and forced to participate in atrocities. Impunity for these crimes adversely affects not only the individual child victim, but whole generations of children. It undermines their development and the formation of their identity, values and political beliefs, thus affecting their ability to function as future leaders and decision makers.

Yet crimes committed against children have not received due attention in previous and current international justice and truth-seeking mechanisms, most often being mentioned only as part of atrocities committed against the civilian population in general.

Unless accountability mechanisms address crimes committed against children, and perpetrators of war crimes, crimes against humanity and genocide are brought to justice, children will continue to suffer, with negative consequences for future peace and stability.

Addressing the experiences of children in international justice and truth-seeking mechanisms is therefore not just desirable: it is essential.

Key actions to end impunity for crimes against children

- Ensure that accountability mechanisms address crimes against children, through investigation of crimes, prosecution of perpetrators and redress for the victims;
- Develop child-friendly procedures for children's involvement in truth and justice-seeking mechanisms.

Accountability fulfils a number of important functions

For the individual child victim or child affected by the conflict:

- Provides child victims with an opportunity for redress;
- Contributes to the process of healing and helps children understand that they are not to blame for what has happened to them and their society.

For promotion and protection of children's rights:

- Calls attention to violations of children's rights, which are more easily hidden and often overlooked by authorities and by the international community;
- Records violations committed against children;
- Helps reveal overarching criminal policies, which is vital to understanding the broader context of what happened to children.

For future peace and stability:

- Helps to break the cycle of violence and restore confidence in democracy and the rule of law;
- Increases the chances of success for the peace process, and strengthens the legitimacy and authority of the new government.

Accountability mechanisms can take many forms

- International Criminal Court;
- *Ad hoc* tribunals: International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda;

- Special courts and tribunals; for example, the Special Court for Sierra Leone;
- Truth commissions;
- National courts;
- Combinations of the above or further innovations.

Crimes against children

The ICC, *ad hoc* Tribunals, national courts and other justice mechanisms should proactively investigate and take legal action against persons who commit crimes under international law against children.

Children can become victims of any of the criminal acts that fall within the jurisdiction of the ICC. The definitions for genocide, crimes against humanity and war crimes also include a number of crimes specific to children or to which children are particularly vulnerable, such as:

Genocide

- Forcible transfer of children from one group to another;
- Measures intended to prevent birth.

Crimes against humanity

- Crimes of sexual violence, such as rape, sexual slavery, enforced prostitution and enforced sterilization.

War crimes

- Intentional attacks on schools;
- Crimes of sexual violence, such as rape, sexual slavery, enforced prostitution and enforced sterilization;
- Using starvation as a method of warfare;
- Use of children under age 15 as child soldiers.

Stopping the use of child soldiers

The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict prohibits the

compulsory recruitment of children under the age of 18 and their direct participation in hostilities. The Protocol, which entered into force on 12 February 2002, also requires States to increase the minimum age for voluntary recruitment and introduces strict safeguards for voluntary recruitment of children under the age of 18. All forms of recruitment and participation of children under the age of 18 are banned for non-State armed groups. The Protocol reflects an emerging international consensus that 18 years should be the minimum age for recruitment into armed forces and groups and for participation in hostilities. The Rome Statute places the recruitment or use of child soldiers under 15 under the jurisdiction of the Court as a war crime, which is an important step towards the enforcement of international law prohibiting children's participation in hostilities.

Children's involvement in the ICC

The ICC has no jurisdiction to prosecute persons below the age of 18. Therefore, children can participate in the Court only as victims or witnesses. In addition to defining crimes concerning children, the Rome Statute of the ICC and the Rules of Procedure and Evidence include special provisions for the protection of children during the investigation and prosecution of cases.

For any child, the experience of giving testimony or being questioned by lawyers or investigators can be intimidating. In proceedings before the ICC, children may be asked to recall and mentally revisit horrors they have struggled to forget. There is a clear and imminent risk of retraumatization unless child-friendly procedures are adopted and staff experienced with children and psychosocial support are at hand.

The guiding principles of the Convention on the Rights of the Child (CRC) apply with respect to children who come before judicial bodies. The following principles should therefore be reflected in procedures and measures of the ICC designed for child victims and witnesses:

- The best interest of the child should guide all policies and practices (CRC article 3);
- The child has a right to be heard (CRC article 12);
- Physical and psychological recovery of a child victim, and social reintegration, should be promoted (CRC article 39).

The Rules of Procedure and Evidence address the need for special arrangements with regard to the legal representation of children. In the case of a child victim, an application to participate may be made by a person acting on behalf of the victim. The Rules of Procedure and Evidence provide that a child support person may be assigned to a child victim or witness to assist throughout all stages of the proceedings. The individual circumstances of each child – including the child's age and gender, and the child's wishes – should be primary guiding factors when appointing legal representatives and child support persons. For example, for girls who are victims of sexual violence, female staff of the Court should always be present and a female lawyer should conduct the questioning, provided that is the wish of the child, in order to ensure a safe and comfortable environment.

The Victims and Witnesses Unit of the ICC is mandated to provide protective and security arrangements, counselling and other assistance to ensure the safety of witnesses and victims during investigations, trial and after the trial. In addition to *protective* measures, the Unit will provide *special* measures to facilitate the testimony of a child, traumatized person, or victim of sexual violence. These measures can include, for example, hearings *in camera*, sight-screens between the victim and the accused, pre-recorded testimonies, video conferencing or closed-circuit television, and the use of pseudonyms.

Other issues relating to children's legal representation, which are not dealt with in the Rules, will be worked out in the future. This presents an opportunity for all those with an interest in children's rights and international criminal justice to ensure that all relevant issues affecting children are taken into account and dealt with in the best possible way.

Staffing: A child-friendly ICC

The extent to which the ICC can successfully investigate and prosecute crimes committed against children and address the special requirements and vulnerabilities of child victims and witnesses will largely depend on whether the ICC has staff who possess adequate expertise in issues related to children. The Rome Statute explicitly provides that:

- When selecting judges, States Parties must take into account the need to include judges with legal expertise on specific issues, including violence against women and children;
- The Prosecutor shall appoint advisers with legal expertise on specific issues, including sexual and gender violence and violence against children;
- The Victims and Witnesses Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence. The Unit may also include staff with expertise in children's issues, in particular traumatized children, and gender and cultural diversity;
- The Victims and Witnesses Unit shall make available training on issues of trauma and sexual violence to the ICC.

Partnerships: Civil society and the ICC

The ICC creates both opportunities and challenges for child rights advocates. Ending impunity for crimes committed against children, while at the same time developing procedures and policies to ensure that the needs of child victims and witnesses are properly taken into account, will require concentrated effort and preparation.

Child rights advocates can be a vital source of information with respect to crimes committed against children, particularly as they may have information that discloses the widespread or systematic nature of the commission of crimes.

Child protection agencies may be in possession of information that is sensitive or that should otherwise be kept in confidence. The Rules of Procedure and Evidence contain specific guidelines concerning non-disclosure of privileged and confidential information, providing for

situations in which a person will not be compelled to disclose information and protected categories of relationships, in particular those related to or involving victims.

Child rights advocates can also help ensure that the ICC properly addresses the rights and needs of child victims and witnesses, and that crimes committed against children receive due attention. Training of judges, prosecutorial staff and staff of the Victims and Witnesses Unit will be essential to ensure the development of proper measures for involving children in the ICC. The training should cover international child rights standards, how to deal with war-affected children, and best practices for the participation of child victims and witnesses in judicial proceedings.

Educating children about the ICC is essential so that they have access to all relevant and appropriate information and can make informed choices about their involvement with the ICC. Thus global and national advocacy activities should seek to inform children about the work of the ICC and other international justice and truth-seeking mechanisms. Children's participation should be voluntary and, in all instances, special safeguards for their protection must be in place

The ICC and national justice systems

The Rome Statute of the ICC is based on the principle of complementarity, which recognizes that States have primary responsibility to prosecute crimes under international law. The ICC will defer to national criminal justice systems if a State indicates that it is investigating, prosecuting or has concluded criminal proceedings in a certain case. The ICC will exercise its jurisdiction only if States have chosen not to proceed, if they are inactive or if they are clearly unable or unwilling genuinely to pursue a case.

A first step for child rights advocates at the national level is to campaign for as many States as possible to become parties to the Rome Statute. Given the jurisdictional limitations on cases that can be

brought before the ICC, widespread ratification from all regions in the world is essential. In States that are already parties to the Statute, child rights advocates can assume an active role in assisting the process of reforming national laws in accordance with the Rome Statute, particularly as it relates to children.

States should review their national legislation and make amendments as necessary to ensure compatibility with the Rome Statute, especially:

- Genocide, war crimes and crimes against humanity should be made crimes under national law, and the definitions used should be at least of the same scope as those contained in the Rome Statute;
- Penalties under national criminal law should reflect the seriousness of the crime;
- National law should not allow Head of State immunity, or any other immunity, for crimes within the jurisdiction of the ICC;
- Procedures enabling judicial cooperation with the ICC should be established under national law.

The process of national law reform, to ensure compliance with the Rome Statute, may offer a window of opportunity to advocate for additional changes that are desirable from a wider human rights and child rights perspective. Child rights advocates should therefore be aware of legislative aspirations and trends in the country in which they are working, in order to take advantage of opportunities to raise juvenile justice standards and introduce concepts such as restorative justice, or child-friendly procedures for child victims and witnesses.

Ad hoc Tribunals

The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have been established to prosecute war crimes, crimes against humanity and genocide in the former Yugoslavia and Rwanda. The two *ad hoc* Tribunals are similar in structure and operational aspects, although each has a distinct mandate designed to address the conditions and circumstances of a specific conflict.

Both Tribunals have jurisdiction over "natural persons pursuant to the provisions of the present Statute", without specifying a minimum age. The fact that children have not been indicted or prosecuted by either the ICTY or ICTR is arguably an indication that neither Tribunal considered it was an appropriate forum for trying children responsible for crimes within its jurisdiction.

The Tribunals have adopted victim-sensitive practices, based on the requirements in their Statutes to ensure that protective measures are available for victims and witnesses. In numerous cases, prosecutors have requested special measures to protect the identity of victims and witnesses from the public, such as the use of pseudonyms or *in camera* proceedings. Such special measures would also be available for child witnesses.

Special Court for Sierra Leone

The Special Court for Sierra Leone has been established to try those who bear the greatest responsibility for crimes committed in Sierra Leone since 30 November 1996. The Special Court is thus directed towards the leaders who were responsible for planning and implementing strategies of warfare in Sierra Leone that included atrocities directed against civilians. While the Statute gives the Special Court jurisdiction over persons aged 15 years or above at the time of the alleged commission of the crime, it is unlikely that anyone under the age of 18 would satisfy the personal jurisdiction requirements. This is highlighted by the statutory direction to the Prosecutor to consider other methods, such as alternate truth and reconciliation mechanisms, to deal with child offenders.

The Statute for the Special Court includes a number of child-specific crimes, including the recruitment of child soldiers under 15 and their use in hostilities, and the abuse of girls under the age of 14. The Statute also includes a number of child-specific provisions in its institutional design, including the appointment of judges with expertise in children's rights and the appointment of staff within the Victims and Witnesses Unit who have expertise in children's trauma.

Given the probability of children appearing before the Special Court as witnesses, the Special Court is likely to set precedents for the involvement, treatment and protection of children in relation to international criminal justice mechanisms.

Prosecutions in national courts

Prosecution of serious violations of international law in national courts has several advantages over trials in international courts and tribunals. Trials take place in the country where the crimes were committed, enabling the local population both to follow the proceedings and to claim ownership more easily. There is better access to evidence and the participation of the population can help build a collective historical memory. Another advantage is that national prosecutions can help rebuild confidence in the judiciary and the criminal justice system and further the rule of law and human rights principles.

However, there are also several challenges to prosecution by national courts. In particular, in post-conflict situations it takes time to restore administrative and judicial systems, which are frequently destroyed during conflicts. Another challenge is that national legal standards and judicial procedures may not be in conformity with international human rights principles. This can have serious repercussions for children who are alleged to have committed crimes under international law. In the absence of a functioning court system, children may remain in custody without trial for months or even years. Files and records may be destroyed. The community, too, may exact its revenge directly on suspected offenders without regard for due process.

National legal systems should ensure that children in conflict with the law have special protection. In particular children have the right to treatment that takes full account of their age, circumstances and needs. In all circumstances, national juvenile justice systems should be in line with international standards.

Child perpetrators

Age of criminal responsibility

The CRC requires States to define a minimum age for criminal responsibility, but does not specify what that age should be. The Committee on the Rights of the Child stresses that the age should not be set too low. Whatever the age, States retain their obligations under international law in relation to persons under 18 who are alleged to have committed a crime.

Age and criminal jurisdiction

- ICC: No jurisdiction over persons under 18;
- ICTY and ICTR: Jurisdiction over persons under 18 not excluded. However, no person under 18 has been prosecuted to date;
- Special Court for Sierra Leone: Jurisdiction over persons between 15 and 18 years of age. However, it is likely the Special Court will not prosecute children, since it is required to focus on those who bear the greatest responsibility for the crimes;
- National courts: Jurisdiction depends on minimum age set for criminal responsibility.

Standards for treatment of child perpetrators

The Committee on the Rights of the Child has stressed that children who commit crimes should also be seen primarily as victims. When dealing with children who have participated in genocide, crimes against humanity or war crimes, general principles applicable to juvenile offenders continue to apply. Objectives should be:

- Reintegration in the environment that fosters the self respect and dignity of the child, and return to a "constructive role" in society (CRC article 39 and 40);
- Reinforcing the child's respect for the rights of others (CRC article 40).

While accountability for crimes under international law serves the best interest of children, international child rights and juvenile justice standards recommend that alternatives to judicial proceedings guided by relevant international legal standards should

be applied (CRC article 40(3)(b), UN Standard Minimum Rules for the Administration of Juvenile Justice ('Beijing Rules'), rule 11).

The concept of restorative justice – achieved through alternatives to criminal courts – has gained support among child rights advocates. This approach is aimed at the offender understanding and taking responsibility for his or her actions and also involves achieving reconciliation between the offender and the victim and the wider community. Any proceedings undertaken in this regard must fully respect the rights of the child and contain at a minimum the same procedural guarantees they would have in criminal proceedings.

There is growing support – in child rights and juvenile justice standards as well as international practice – to provide alternatives to judicial proceedings for alleged child perpetrators of crimes under international law. When available, truth commissions have been recognized as an appropriate alternative to criminal proceedings for children who may have participated in atrocities during times of war and civil unrest.

Sentencing

International child protection standards set limits on the sentencing of child offenders:

- Death penalty or life imprisonment without possibility of release must not be imposed on children (CRC article 37(a));
- Imprisonment should only be used as a last resort and for the shortest period of time (CRC article 37(b));
- Alternatives to institutional care should be sought, such as counselling, probation, foster care, education and vocational training (CRC article 40(4)).

Children and truth commissions

Truth commissions have been established to deal with past human rights abuses, as a complement to criminal justice mechanisms. These commissions set out to establish a historical record of past atrocities, including events and developments preceding the atrocities, and to

make recommendations for the future. Truth commissions can assign institutional or individual responsibility for past abuses and analyse shortcomings that facilitated or allowed atrocities to take place. Truth commissions can give victims a forum in which their sufferings and losses become known and recognized. While many truth commissions have in one way or another touched upon crimes committed against children, the experiences of children have not been addressed in a systematic way. The mandate of truth commissions should incorporate children's perspectives, including the official acknowledgement of what happened to children and the making of recommendations specifically addressing the rights and needs of children. In so doing, truth commissions must ensure that appropriate procedures are in place to facilitate the involvement of children.

When criminal justice mechanisms are also operating, truth commissions can play a vital role in supporting the work of those mechanisms by providing investigators with an overall picture of the conflict and drawing their attention to specific crimes, particularly those involving children. In appropriate circumstances, judicial and non-judicial methods can operate together to provide an overall accountability mechanism, ensuring that those responsible for violating the laws of war are brought to account, and providing a mechanism by which victims' voices can be heard.

In order to facilitate children's participation, special procedures and practices should be adopted to ensure children feel safe and comfortable when recounting their experiences. These can include staff trained in work with traumatized children, a child-friendly environment for interviews, keeping the identities of children confidential, and closed sessions and special hearings for children.

Traditional methods of justice and truth-seeking for children

In addition to judicial mechanisms and truth-seeking bodies, many societies have developed traditional systems for accountability, which constitute an important complement to legal proceedings and truth processes.

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For children who are victims of atrocities, traditional justice measures can provide an alternative, community-based system of accountability. For child victims, it can be reassuring to see perpetrators brought to justice by the very same community that was targeted, following norms and traditions to which the children are more accustomed.

One very real challenge with traditional justice mechanisms is ensuring the rights of victims, witnesses and perpetrators are respected. Consequently, child rights advocates who have gained the trust of communities will have an important role to play in ensuring that the proposed traditional justice mechanisms are compatible with child rights, for example by offering assistance to local leaders and elders. It is essential that traditional justice mechanisms maintain basic international human rights standards and international standards of juvenile justice.

Recommendations

Child rights advocates are urged to:

- Provide training to facilitate understanding of the ICC and other accountability mechanisms;
- Work with the ICC and other accountability mechanisms to ensure that children's rights are properly integrated into their operational procedures, by providing training and expertise on child-friendly procedures;
- Inform and educate children about the ICC and other accountability mechanisms;
- Participate in discussions of children's representation in the ICC and other accountability mechanisms to ensure that procedures and guidelines reflect children's rights, particularly the right to participate in decisions affecting their lives;
- Advocate for States to undertake comprehensive national law reform to ensure that children's rights are properly protected as part of their ratification and implementation processes;
- Cooperate with the ICC and other accountability mechanisms in the provision of information relating to crimes committed against children;
- Advocate to increase the age for the crime of recruitment to 18 years at the first review conference of the Rome Statute.

The International Criminal Court is urged to:

- Focus specifically on crimes committed against children when drawing up indictments;
- Work with child rights advocates to ensure that children's rights are properly integrated into its operational procedures;
- Ensure adequate psychosocial and other support is available for all children who come in contact with the ICC at any stage during the investigations and prosecutions, including follow-up support once investigations and trials have concluded;
- Receive information in confidence from child rights advocates and others about crimes committed against children, wherever possible.

International accountability mechanisms are urged to:

- Focus specifically on crimes committed against children when drawing up indictments or preparing reports and recommendations;
- Develop procedures and mechanisms to deal with child victims and witnesses, to seek the views of children on decisions affecting their lives, and to facilitate their participation in such processes;
- Work with child rights advocates to ensure children's rights are properly integrated into their operational procedures;
- Ensure that adequate psychosocial and other support is available for all children who are involved with the institution at any stage during its work, including follow-up support once its work is concluded;
- Cooperate in ensuring that crimes committed against children are not overlooked, for example through the sharing of expertise and information, where appropriate.

States are urged to:

- Ratify the Rome Statute of the International Criminal Court and adopt comprehensive implementing legislation, including by incorporating crimes within the jurisdiction of the ICC into national law;
- Undertake comprehensive national law reform to ensure children's rights are properly protected as part of their ratificaton and implementation processes;
- Ensure that a sufficient proportion of candidates for judicial and other positions within justice and truth-seeking mechanisms have expertise in child rights issues;
- Ratify the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and adopt a 'straight 18' ban on all recruitment – compulsory or voluntary – and participation in hostilities of children under 18;
- Take appropriate measures to promote the physical and psychological recovery and social reintegration of child victims;
- Ensure that appropriate mechanisms are available to deal with child perpetrators and that such mechanisms fully respect the rights of the child and maintain international juvenile justice standards.

In order for States to fulfil this obligation effectively, it is increasingly recognized that courts and other decision-making bodies need to be adapted to facilitate children's participation.[41] Likewise, international justice and truth-seeking mechanisms should establish procedures that fulfil this right, by taking children's views and needs into consideration and providing the child with a safe and comfortable environment in which to testify. Such procedures could include providing adequate assistance for the child, such as through child support persons, and, if necessary, shielding the child from visual contact with the accused by using sight-screens, videotaped testimonies or closed-circuit television. Nevertheless, while general guidelines should be developed, effective fulfilment of the right means consulting with each child, on a case-by-case basis, to ensure that the measures employed in any particular case are best suited to that particular child.

Participatory rights reflect the very basis of the CRC, namely that children are not objects in need of protection but human beings holding rights, including the right to express their views on matters that affect their lives. The guiding principles of the CRC highlight the need to fulfil these rights through the development of mechanisms to protect children who come into contact with criminal justice systems and also provide guidance on how this task should be approached.

2.3 Protection of children in times of war

2.3.1 Special protection for children during armed conflict

The protection of children affected by armed conflict is based on two complementary bodies of international law, namely international humanitarian law and international human rights law. The CRC – applicable in times of peace and war – joins the two together into a comprehensive international legal framework for the protection of children during times of armed conflict.[42]

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[41] *UNICEF handbook*, op. cit., p. 151.

[42] It should be noted that the norms of international humanitarian law will take precedence over the provisions of any other law, including the Convention on the Rights of the Child, in the event of a conflict between the two laws. See International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, para. 25.

International humanitarian law – also known as the 'laws of armed conflict' or the 'laws of war' – consists of a series of international conventions that fall into two distinct categories. One category focuses on permissible means and methods of warfare, *inter alia*, the types of weapons that may be used and the ways in which those weapons may be employed. The other category focuses on the protection of civilians and persons who are *hors de combat*, i.e. persons not actively taking part in the conflict, such as wounded and sick combatants and prisoners of war.[23]

The prohibition on intentionally directing attacks against civilians, which is applicable irrespective of the nature of the armed conflict, is one of the cornerstones of international humanitarian law and applies to children just as it does to other civilians.[24] This prohibition derives from one of the key tenets of international humanitarian law, that a distinction be made between legitimate and illegitimate military targets. Accordingly, some targets will always be illegitimate, such as non-defended towns and objects employed solely for the provision of humanitarian assistance, while some targets will always be legitimate, such as military installations. Additionally, some methods of attack, such as carpet bombing, and some weapons, such as indiscriminate weapons, may not be employed. A key feature underpinning humanitarian law is the principle of proportionality, according to which the military advantage expected to be gained in any attack must be balanced against the likely incidental or collateral damage to non-military persons and objects. Thus in all cases where either the target, methods, or weapons are not prohibited, the military commander must apply the principle of proportionality to weigh whether or not a particular target can be attacked in a particular way using particular weapons.

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[23] Traditionally these two categories of the laws of war are referred to as 'Hague Law' (methods and means of warfare) and 'Geneva Law' (protection of persons who are *hors de combat*).

[24] For a discussion on the protection of civilians and a general discussion on international humanitarian law, see Hilaire McCoubrey, *International humanitarian law: Modern developments in the limitation of warfare*, Ashgate Publishing, second edition, 1998.

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An important feature of humanitarian law is the distinction between international and non-international armed conflicts, as the rules can differ depending on the nature of the conflict. While the provisions of the Geneva Conventions in general apply during times of international armed conflict, common article 3 to the Geneva Conventions contains the minimum standards of conduct that are applicable during any armed conflict, whether it is international or non-international. The Additional Protocols expand on the law contained in the Geneva Conventions, with Additional Protocol II elaborating the norms of humanitarian law that are applicable during a non-international armed conflict.

For the purposes of the protection of children, the key legal instruments are the four Geneva Conventions of 1949 and their two Additional Protocols of 1977.[25] Among these, the Fourth Geneva Convention and the two Additional Protocols are the most relevant, as they regulate the protection of civilians during armed conflicts. However, the first three Geneva Conventions are also of relevance for captured or rescued child soldiers, as they regulate the protection of members of armed forces who are *hors de combat*, because they are sick, wounded, shipwrecked or prisoners of war. The general principle of international humanitarian law specifically relating to the protection of children during an armed conflict was introduced in the Additional Protocols in 1977, stating that at a bare minimum: "Children shall be provided with the care and aid they require".[26] This principle is expanded on in relation to international armed conflicts, stating that: "Children shall be the object of special respect".[27]

[25] First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949); Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949); Third Geneva Convention relative to the Treatment of Prisoners of War (12 August 1949); Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (12 August 1949); Additional Protocol I to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts (8 June 1977); and Additional Protocol II to the Geneva Conventions Relating to Victims of Non-International Armed Conflicts (8 June 1977)

[26] Additional Protocol II, article 4(3).

[27] Additional Protocol I, article 77.

In addition to these general principles, the Geneva Conventions and Additional Protocols contain a number of provisions specifically relating to the treatment of children during an armed conflict. These include specific references to education,[28] the evacuation of children,[29] identification, family reunification and care of unaccompanied children,[30] detained children,[31] free passage of food and clothing consignments intended for children, safety zones for children,[32] participation in hostilities[33] and a ban on recruitment under the age of 15.[34] In addition, women, including girls, are to be protected against "attacks on their honour",[35] namely sexual violence and sexual assault, especially rape and enforced prostitution.

These provisions are echoed and complemented by the CRC, which, like the Geneva Conventions, contains specific provisions that seek to enhance children's protection in times of war. Article 38 of the CRC formulates the general principle as follows:

> *"... States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict."*[36]

Furthermore, under the CRC, States are obliged to:

> *"take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse... or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child."*[37]

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[28] Additional Protocol II, article 4(3).

[29] See Fourth Geneva Convention, articles 14, 17 and 24; Additional Protocol I, article 78; and Additional Protocol II, article 4(3)(e).

[30] Fourth Geneva Convention, articles 24-26, 50 and 82; Additional Protocol I, articles 74-76; and Additional Protocol II, articles 4 and 6.

[31] Fourth Geneva Convention, articles 51, 76, 82, 85, 89, 94 and 119; Additional Protocol I, article 77; and Additional Protocol II, article 4.

[32] See Fourth Geneva Conventions, articles 23, 14 and 17.

[33] Additional Protocol I, article 77.

[34] Additional Protocol II, article 4(3).

[35] Fourth Geneva Convention article 27.

[36] CRC, article 38.

[37] CRC, article 39. For a discussion of this article see Bo Viktor Nylund, "International law and the child victim in armed conflict. Is this the 'first call for children'?", *International Journal of Children's Rights*, vol. 6, no. 1, 1998, pp. 23-53.

States have therefore undertaken to protect and care for children affected by armed conflict, including promoting their recovery and reintegration. The elements of recovery and reintegration introduced by the CRC are important complements to the protection afforded by humanitarian law. States owe this obligation to all children who have been victimized during a war, for example by sexual exploitation, displacement, forcible transfer or as victims of genocide, as well as former child soldiers, who may face significant challenges during reintegration. This obligation would extend to protecting and caring for children involved in post-conflict justice and truth-seeking mechanisms, including the ICC.[16]

The Geneva Conventions and Additional Protocol I list a number of violations committed in international conflicts that are considered to be "grave breaches" of humanitarian law. These include wilful killing, torture or inhuman treatment, wilfully causing great suffering or serious injury, unlawful deportation, extensive destruction of property not justified by military necessity and making civilians and non-defended localities the object of attack.[17] States are obliged to bring to justice any person, regardless of nationality, who is alleged to have committed grave breaches of the Geneva Conventions. While the list of grave breaches does not include any of the child-specific provisions of the Geneva Conventions, serious atrocities committed against children are covered by the general categories of grave breaches.

The Rome Statute of the ICC defines war crimes as either grave breaches of the 1949 Geneva Conventions or other serious violations of the laws and customs applicable in armed conflicts. In the context of non-international conflicts, the ICC Statute defines

[16] It should be noted that the ICC also has an obligation to protect and care for children who are involved with proceedings before the ICC; see the later discussion in chapter three of the ICC Victims and Witnesses Unit. It is therefore important that States and the ICC coordinate their efforts in this area so as not to neglect other aspects of the care of children who are involved with the ICC.

[17] See Fourth Geneva Convention, article 147, and Additional Protocol I, article 85(3).

war crimes as serious violations of common article 3 to the Geneva Conventions[40] or serious violations of customary law applicable in non-international conflicts.[41] The Statute lists a number of acts that constitute these crimes, including wilful killing, torture, the taking of hostages, and pillaging and looting, which are further clarified in the draft Elements of Crimes and will be discussed in more detail in the following chapter.[42]

2.3.2 Use of child soldiers

One issue that has attracted attention and concern is the use of child soldiers.[43] There has been considerable progress in recent years in the development of legal standards to prohibit the use of child soldiers during times of war, largely due to the lobbying efforts of child rights advocates and others.

The Additional Protocols of 1977 to the Geneva Conventions oblige States Parties to refrain from recruiting persons under the age of 15 and to ensure that children under 15 years do not take a direct part in hostilities. Fifteen is also the age limit originally specified for the use of child soldiers in the CRC.[44] The near-universal ratification of the CRC and the adherence of many States to the Additional Protocols to the Geneva Conventions mean that the prohibition on the recruitment and use of child soldiers under the age of 15 has passed into customary international law. The customary status of the ban is primarily significant in relation to non-State entities, who are also bound by the general rule prohibiting the use of persons under 15 in armed conflict, despite not

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[40] Article 3 common to all four Geneva Conventions has been called the 'convention within the convention'. The article applies also to non-international conflicts and provides minimum guarantees for the protection of persons not taking part in the hostilities.

[41] See the Rome Statute of the ICC, article 8(2)(a) and (d).

[42] The draft Elements of Crimes were adopted by the ICC Preparatory Commission in June 2000 and will be submitted for adoption by the Assembly of States Parties at its first meeting in September 2002. For the sake of brevity, the draft will be referred to below as the Elements of Crimes.

[43] See also chapter three for a more detailed discussion of the crime of using children under 15 as soldiers.

[44] In addition, when States recruit children aged between 15 and 18, CRC article 38 provides that States 'shall endeavour to give priority to those who are oldest'.

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being parties to any of the relevant conventions.[7] The fact that the prohibition has the status of customary international law has also led to its inclusion in the Rome Statute, which confirms that conscripting or enlisting children under 15 or using them to participate in hostilities is a crime under international law during any armed conflict.[8] The recognition of under-age recruitment as a crime within the jurisdiction of the Court is an important step for enforcing the international prohibition against the use of child soldiers.

Since 1989, the ban on the recruitment of children has been considered in a number of instruments that prohibit the recruitment and use of children under 18. For example, in 1990, the African Charter on the Rights and Welfare of the Child obliged States Parties to refrain from any recruitment of children and ensure that no person under 18 years takes a direct part in hostilities.[9] ILO Convention 182 on the Worst Forms of Child Labour qualifies the forced or compulsory recruitment of children and their direct participation in armed conflicts as one of the "worst forms of child labour", and defines children as "all persons under the age of 18".[10]

Most significantly, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict of May 2000 entered into force on 12 February 2002. The Optional Protocol prohibits the compulsory recruitment of children under the age of 18 and their direct participation in hostilities, and requires States to increase the minimum age for voluntary recruitment. Strict safeguards are introduced for voluntary recruitment of children under the age of 18. For non-State armed groups, the standards are even stricter, banning all forms of recruitment and participation of children

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[7] See 'Report of the Secretary-General on the establishment of a Special Court for Sierra Leone', United Nations, S/2000/915, 4 October 2000, para. 17, which discusses the customary legal status of this crime in relation to non-international armed conflicts.

[8] Rome Statute, article 8(2)(b)(xxvi) and (e)(vii).

[9] African Charter on the Rights and Welfare of the Child, articles 2 and 22.

[10] ILO Convention 182 on the Worst Forms of Child Labour, article 3(a). The Convention was adopted on 17 June 1999 and had been ratified by 127 States as of 9 August 2002.

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under the age of 18. Under the Optional Protocol, States are also required to report regularly to the Committee on the Rights of the Child on measures taken to implement the Protocol.[49] With a growing number of ratifications, the Optional Protocol reflects an emerging international consensus of 18 years as the minimum age for recruitment into armed groups and for participation in hostilities.[50]

2.3.3 Protection of children in armed conflicts: an issue of maintaining international peace and security

The importance of the protection of children during armed conflict has been increasingly recognized in international political arenas. Since 1999, the United Nations Security Council has adopted several resolutions on children and armed conflict,[51] calling on States to respect the rights of children and ensure their protection; condemning the use of child soldiers; and highlighting the importance of special measures to prevent sexual violence against children.[52] The Security Council has also emphasized the responsibility of States to end impunity and to bring perpetrators of crimes against children to justice.

In his 2001 report to the Security Council on children and armed conflict, the Secretary-General of the United Nations devoted an entire chapter to impunity and children's involvement in justice and truth-seeking processes. A key recommendation was that both justice and truth-seeking processes in the aftermath of conflict should systematically pay attention to "the full range of children's wartime

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[49] Optional Protocol to the CRC on the Involvement of Children in Armed Conflict, article 8.

[50] As of 9 August 2002, the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict had been signed by 109 States and ratified by 35 States.

[51] Security Council resolutions 1261 of 28 August 1999; 1314 of 11 August 2000; and 1379 of 20 November 2001. It should be noted that the Security Council has adopted other resolutions on the protection of civilians in general which have significance for children in armed conflicts; see resolutions 1265 of 17 September 1999 and 1296 of 19 April 2000. Also noteworthy is the *aide mémoire* on the protection of civilians appended to the Security Council Presidential Statement of 15 March 2002, S/PRST/2002/6.

[52] See, in general, Security Council resolutions 1261, 1314 and 1379.

experiences, the circumstances that allowed such abuses to occur and the long-term interventions required to ensure rehabilitation and reintegration".[33]

The Security Council urges States to "Put an end to impunity, prosecute those responsible for genocide, crimes against humanity, war crimes, and other egregious crimes perpetrated against children and exclude, where feasible, these crimes from amnesty provisions... and ensure that post-conflict truth-and-reconciliation processes address serious abuses involving children".
Security Council resolution 1379 (2001)

What is particularly significant about these resolutions and the fact that the protection of children and civilians in general is a recurrent item on the agenda of the Security Council is that violations against children and civilians are characterized as a potential threat to international peace and security. In resolution 1314, the Security Council notes:

> *"the deliberate targeting of civilian populations or other protected persons, including children, and the committing of systematic, flagrant and widespread* violations of international humanitarian and human rights law, including that relating to children, *in situations of armed conflict* may constitute a threat to international peace and security, *and in this regard [the Security Council] reaffirms its readiness to consider such situations and, where necessary to adopt appropriate steps*".[34]

By categorizing crimes committed against children as "a potential threat to international peace and security", the groundwork is being laid for the future imposition of measures adopted under Chapter VII of the United Nations Charter as a response to such crimes.[35] Furthermore, the Rome Statute of the ICC provides that the Court may be given jurisdiction over a situation if the Security Council, acting under Chapter VII, refers that situation to the ICC. It is therefore

[33] Children and armed conflict: Report of the Secretary-General, United Nations, A/56/342-S/2001/852, 7 September 2001, action point 20.

[34] Security Council resolution 1314, para. 9 emphasis added.

[35] See Chapter VII of the United Nations Charter.

possible for the Security Council to find that a situation characterized by crimes committed against children is a threat to international peace and security, and, acting under Chapter VII of the UN Charter, refer that situation to the ICC. The Security Council has the power to refer situations to the ICC regardless of where the crimes have occurred and the nationalities of the alleged perpetrators, thereby overriding jurisdictional thresholds that apply to any other case brought to the ICC.[36] Thus, the ICC has the potential to strengthen the role of the Security Council in enforcing the protection of children affected by armed conflict.

These developments should be viewed against the backdrop of earlier advocacy efforts by UNICEF, the Office of the United Nations High Commissioner for Refugees (UNHCR), other UN agencies and non-governmental organizations working with children affected by conflict. In particular, groundbreaking work has been done by Graça Machel, an expert appointed by the Secretary-General in 1994 to prepare a global assessment of the impact of armed conflict on children.[37] Based on her recommendations in the 1996 report, 'Impact of armed conflict on children', a new position of Special Representative of the Secretary-General on Children and Armed Conflict was established. In 1997, Olara Otunnu was appointed to this position to act as a public advocate and 'moral voice' on behalf of children in armed conflict.[38] Thanks to the combined efforts of these actors, the plight of children in armed conflicts has remained high on the global peace and security agenda.

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[36] See chapter three for a discussion of the jurisdictional limitations of the ICC.

[37] 'Impact of armed conflict on children: Report of the expert of the Secretary-General, Ms. Graça Machel', United Nations, A/51/306, 26 August 1996.

[38] 'Protection of children affected by armed conflict: Report of the Special Representative of the Secretary-General for Children and Armed Conflict, Mr. Olara Otunnu', United Nations, A/53/482, 12 October 1998, para. 4.

either Tribunal. In addition to the specific nature of the situation concerned, the reasons for this are most likely the lack of child-specific provisions in the Statutes of both Tribunals and the lack of statutory requirements for staff with expertise in child rights. It may also reflect a reluctance to call children as witnesses, because of concerns regarding the impact on children of giving testimony and their capacity to provide testimony in a manner consistent with fair trial guarantees. Nevertheless, the precedents and practices, or lack thereof, in the *ad hoc* Tribunals in relation to children during trial and pre-trial stages, including during investigations, should be collated and analysed from a child rights perspective. The findings of such a study, particularly an assessment of the practices and policies regarding the involvement of children, could become an important reference tool for the ICC in determining how to deal with crimes committed against children.

5.1.2 The Special Court for Sierra Leone

Children were targeted in many ways during the decade-long conflict in Sierra Leone, either as part of the civilian population or, very often, specifically because they were children. Atrocities committed against civilians included the widespread and systematic amputation of limbs, often carried out by children against children and adults. Thousands of children, both girls and boys, were abducted and forced to serve as combatants or to perform various functions for armed groups, including serving as sex slaves.

The Special Court for Sierra Leone has been established by an international agreement between Sierra Leone and the United Nations, in response to the atrocities committed during the conflict.[85] While the idea of criminal prosecutions had been raised prior to the negotiations on the Lomé Peace Agreement, it gained momentum both internationally and within Sierra Leone after the breakdown of the Lomé Agreement, which had included an amnesty for all combatants. Although the Special Court was established by international treaty, it

[85] For a good overview of the Special Court, see www.specialcourt.org

has been described as a 'hybrid' court because of the extensive national involvement, both in substantive and in practical terms. In addition, a national Truth and Reconciliation Commission will consider the causes of the conflict, giving as many people as possible an opportunity to recount their experiences and contribute to the historical record, and also make recommendations for the future. The Special Court and the Truth and Reconciliation Commission will inevitably encounter large numbers of children involved in the conflict, whether as victims, witnesses or perpetrators. Since children have rarely been involved in international justice and truth-seeking mechanisms, the institutions set up in Sierra Leone are likely to set useful precedents for policies and practices for children's involvement in future judicial and non-judicial mechanisms.

The Special Court has the mandate to prosecute those persons who bear the greatest responsibility for crimes committed during the conflict, both crimes under international law as well as some specified provisions of Sierra Leonean criminal law.[252] Thus the Special Court is directed towards the leaders[253] who were responsible for planning and implementing strategies of warfare in Sierra Leone that included atrocities directed against civilians. While the Statute gives the Special Court jurisdiction over persons aged 15 years or older at the time of the alleged commission of the crime,[254] it is doubtful that anyone under the age of 18 would satisfy the personal jurisdiction requirements. While children were often given the title of 'commander', it is extremely unlikely that anyone between 15 and 18 held a position of real leadership, i.e. where they would bear "the greatest responsibility" for the crimes committed during the conflict. This is highlighted by the statutory direction to the Prosecutor to consider other methods,[255] such as

[252] Statute of the Special Court, articles 1-5. Articles 2 to 4 of the Statute deal with crimes under international law; crimes under Sierra Leonean law are dealt with in article 5.

[253] For example, article 1(1) of the Statute of the Special Court states that the Court will try those who bear the greatest responsibility for crimes committed in Sierra Leone, "including those leaders who, in committing such crimes, have threatened the establishment and implementation of the peace process in Sierra Leone."

[254] Statute of the Special Court, article 7(1).

[255] Ibid., article 15(5).

alternate truth and reconciliation mechanisms, to deal with child offenders.[355] The United Nations Security Council has also expressed the view that it is extremely unlikely juvenile offenders will come before the Special Court and that other institutions, such as the Truth and Reconciliation Commission, are better suited to address cases involving children.[356] However, if a person between 15 and 18 at the time of the alleged commission of a crime should appear before the Court and be convicted, the Court cannot sentence them to imprisonment. Rather, the Court is limited to alternate and non-custodial sentences, such as counselling, foster care, training programmes and disarmament, demobilization and reintegration programmes.[357]

The specific crimes within the jurisdiction of the Special Court include crimes against humanity, war crimes as defined in common article 3 and Additional Protocol II to the Geneva Conventions, as well as "other serious violations of international humanitarian law".[358] The Statute contains crimes particularly relevant to children, such as rape, sexual slavery, enforced prostitution and indecent assault.[359] Prosecutions can also be brought for the conscription or enlisting of children under the age of 15 into armed groups or making them participate actively in hostilities.[360] Within the crimes under Sierra Leone law, prosecutions can be brought against persons accused of abusing girls under the age of 14 or abducting girls "for immoral purposes".[361]

Several child-specific provisions have been included in the Statute for the Special Court. Due consideration must be paid to appointing judges and staff with experience in juvenile justice.[362] A Victims and Witnesses Unit will be set up and must include personnel with expertise on trauma related to violence against children.[363] In addition, as noted, prosecutors must take care that child rehabilitation

[355] Letters from the Security Council President to the Secretary-General on the Special Court for Sierra Leone, S/2000/1234 of 22 December 2000, para. 1, and S/2001/95 of 31 January 2001; Letter from the Secretary-General to the Security Council, S/2001/40 of 12 January 2001.

[356] Statute of the Special Court, article 7(2).

[357] Ibid., articles 2–4.

[358] Ibid., articles 2(g) and 3(c).

[359] Ibid., article 4(c).

[360] Ibid., article 5(a).

[361] Ibid., articles 13(2) and 15(4).

[362] Ibid., article 16(4).

programmes are not placed at risk by the prosecution of juvenile offenders, and that alternative truth and reconciliation mechanisms are used where appropriate and available."[84]

The Special Court will initially follow the Rules of Procedure and Evidence of the ICTR in force at the time the Special Court was established; as already noted, these rules are not necessarily the most appropriate or desirable procedural rules from a children's rights perspective. Given the lack of participation by child witnesses and victims in the ICTR, these rules remain largely untested, particularly regarding their suitability to meet children's rights concerns. Since child witnesses are very likely to play a key role in the Special Court, the procedural rules will need to be adequate to the task. According to the Statute, the Rules of Procedure and Evidence of the Special Court can be amended by the judges having regard, where appropriate, to the provisions of the Sierra Leone Criminal Procedure Act, 1965.[85] Therefore, child rights advocates can play a useful role in advocating for the Rules to be amended to take proper account of the special position and requirements of children who are likely to come into contact with the Special Court. The child-specific rules and procedures of the ICC can provide a key reference in that regard.

The Truth and Reconciliation Commission and the Special Court have separate but related roles to play in establishing accountability for serious crimes committed against children. Indeed, the two institutions can complement each other's work, thereby making the work of each institution more effective. For example, while the Truth and Reconciliation Commission can report on the ways in which children were recruited and used, the Special Court can prosecute those responsible for recruiting and using children as soldiers. The information gathered by the Truth and Reconciliation Commission can assist in the reconstruction of the overall picture of the conflict, the impact of the conflict on children, the order of battle and the chain of command. The findings of the Truth and Reconciliation Commission

[84] Ibid., article 15(4) and (5). [85] Ibid., articles 14(1) and 14(2).

could also establish that attacks or certain criminal acts were widespread or systematic in nature, which is a necessary element to prove the commission of crimes against humanity. These findings, together with the Commission's recommendations, can enable investigators to focus on patterns of conduct related to the commission of crimes, including crimes against children, and can generate leads for the investigation of specific situations. In this way, the findings of the Truth and Reconciliation Commission can help build cases against those leaders who bear the greatest responsibility for the atrocities committed in Sierra Leone.

The establishment of these two institutions has great potential to provide a system of accountability for Sierra Leone. Therefore it is vital to inform the public about the nature and operations of the two institutions as well as their ongoing work. While the details of the relationship between both institutions will need to be worked out by the institutions themselves,[**] there is much that child rights advocates can do to prepare children for the roles they are likely to play. This is particularly important because children may have difficulty distinguishing Special Court proceedings from the Commission's work. It needs to be made clear that testimony before the Truth and Reconciliation Commission will not lead directly to punitive sanctions, although under conditions yet to be determined, information given to the Commission might be shared with the Special Court. Children will also need to understand that the Special Court is mandated to prosecute those who bear the greatest responsibility, therefore the people who stand trial may not be the people who personally committed crimes against them or the people the children witnessed committing crimes. Explaining these types of issues will help children understand the modalities and reasons for the different ways in which the Special Court and the Truth and

[**] See 'Report of the Planning Mission on the Establishment of the Special Court for Sierra Leone', United Nations, S/2002/246, 8 March 2002. For a discussion of legal and policy considerations regarding the relationship between the Truth and Reconciliation Commission and the Special Court, see the Sierra Leone Government briefing paper of January 2002 on this issue at www.specialcourt.org.

Reconciliation Commission will operate and how each is important for establishing accountability for what happened in Sierra Leone. A public education campaign designed for children will be essential to address these concerns and avoid misunderstandings.

The Special Court for Sierra Leone provides one example of an *ad hoc* body established to bring to justice perpetrators who have committed crimes during times of armed conflict. In East Timor a Serious Crimes Panel is operating and the establishment of a judicial body is under consideration for Cambodia. Child rights advocates can influence the work of these institutions in various ways. As with the ICC, they should lobby to ensure that crimes against children are addressed. They can also provide training and advice regarding child-friendly procedures and practices that are in the best interest of child victims and witnesses. They can lobby for children's concerns to be reflected in instruments – such as rules of procedure and evidence, and codes of conduct for counsel – and for experts in psychosocial interventions for children to be appointed to relevant positions, for example in the Victims and Witnesses Units. They should work to ensure that special programmes for children who come in contact with these mechanisms are well funded and effective. Additionally, in those cases where problems have been encountered during the institutional design or in implementation, child rights advocates can push for the effective establishment and operation of these institutions as a means of ensuring an end to impunity for crimes committed against children.

5.1.3 Prosecutions in national courts

It is important to emphasize that persons who commit war crimes, crimes against humanity or genocide can be brought to justice in domestic courts. According to the principle of complementarity reflected in the Rome Statute, national courts have primary jurisdiction over crimes under international law. The jurisdiction of the ICC is thus complementary to domestic judicial systems and will only be exercised when the State in question is either "unable or unwilling" to carry out the investigation or prosecution.

Annex B

Working for and with Adolescents, February 2002, pg 56 UNICEF, February 2002

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unicef
United Nations Children's Fund

Working for and with Adolescents

- Some UNICEF examples

February 2002

Adolescent Development and Participation Unit

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start perceived as dealing with "sensitive" issues. However, the perception has now improved.

Lessons Learned/Recommendations/What would you do differently if you could do it over?

- Project progress has been very satisfactory so far. It is however too early to draw final conclusions.
- Prior to the start of the project, we conducted a solid SITAN combined to a "comparative study on CRC and internal laws" both of which provided the necessary insight and knowledge for the project.

What program support tools/resources were developed that can be used/adapted by other country offices?

- Documentation on the Sion and Vienna workshops (1999) is available in English.
- A number of documents including the UN Model Law on juvenile justice, the three international instruments (Beijing Rules, Riyadh Guidelines, and Juveniles Deprived of Liberty), the Austrian Juvenile Justice Law, Out of Court Settlement in Austria, and Innocenti Digests on "Ombudswork for Children" and "Juvenile Justice" were translated into Farsi and shared with the UNICEF Tajikistan country office.
- We benefited immensely from the technical assistance provided by Austrian Judge Renate Winter and would like to recommend her to other Country Offices.

Youth Perspective: An interesting quote from an adolescent involved in the project.

"Now I'm not labeled and my family and others don't look at me as a criminal."

- From a juvenile offender in Tehran, whose sentence was to learn a vocation (analternative sanction).

"I didn't know that the judge could help me!"

- From a juvenile offender in Tehran, whose sentence was to stay in the Juvenile Correction and Rehabilitation Center in Tehran only during the weekends for three months so that he wouldn't fall behind school and exams."

Source of Information:

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Annex C

Brochure from University of Freibourg for Executive Master on Children's Rights 2003-2004

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Executive Master on Children's Rights

2003 - 2004

INTERNATIONAL INSTITUTE FOR THE RIGHTS OF THE CHILD

INSTITUTE FOR FAMILY RESEARCH AND COUNSELING

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Executive Master on Children's Rights

Contents

INTRODUCTION

The University of Fribourg (Switzerland) and the Institut Universitaire Kurt Bösch in Sion (Switzerland) have developed the «Executive Master on Children's Rights».

The UN Convention on the Rights of the Child, now 13 years in existence, has had an enormous impact on States, institutions, national legislation and practices. More and more administrative, judicial or political decisions are taken as a direct or indirect consequence of the implementation of the Convention. Also, an increasing number of professionals have to deal with this Convention as well as with other international legislative documents on children's rights. The full effects of the Convention are however far from being measured.

The Executive Master on Children's Rights responds to the need for extensive knowledge that results from the wide-reaching impact of the Convention. By offering a higher university degree that includes international and interdisciplinary perspectives, the programme extends and complements existing training courses or seminars on children's rights.

1. OBJECTIVES OF THE MASTER

The Executive Master on Children's Rights is a part-time two-year postgraduate programme that combines residential teaching and distant learning. The overall objectives of the Executive Master are:

- To acquire extended and specialised knowledge on children's rights in their theoretical as well as in their practical dimensions by the introduction of various concepts, approaches and experiences;
- To understand the role of international child rights instruments, in particular the UN Convention on the Rights of the Child, for the implementation and monitoring of children's rights;
- To privilege both an international and an interdisciplinary approach to the study of children's rights;
- To promote the reflection on how the children's rights concept and the principles underlying the Convention on the Rights of the Child can effectively be applied in daily practice.

2. INTENDED PARTICIPANTS

The Executive Master is designed for professionals who work with children's rights issues, including lawyers, psychologists, sociologists, judges, social workers, government officials, staff of non-governmental organisations, academics and journalists. Admittance presupposes a fair amount of practical experience and basic knowledge of children's rights issues.

3. ORGANISATION AND COORDINATION

The Executive Master on Children's Rights is organised in collaboration with

- The University of Fribourg, Switzerland, represented by its Law Faculty and the Institute for Family Research and Counseling, and
- The Institut Universitaire Kurt Bösch (IUKB), in association with the International Institute for the Rights of the Child (IDE), both in Sion/Bramois, Switzerland.

Scientific Committee:

- Prof. Pasqualina Perrig-Chiello, Director of IUKB, Sion;
- Prof. Alexandra Rumo-Jungo, University of Fribourg;
- Prof. Pascal Pichonnaz, University of Fribourg;
- Mr. Jean Zermatten, Director of IDE, Sion

Programme Director:

- Prof. Pascal Pichonnaz, University of Fribourg

Programme Coordinator:

- Mr. Karl Hanson, IUKB, Sion

4. METHODOLOGY

University professors and experts on children's rights will direct the Executive Master on Children's Rights. The participation of prominent academics and highly skilled field experts with various expertises and from different countries, assures that a diversity of disciplinary and cultural viewpoints on children's rights issues will be presented. Furthermore, the participation of students with different backgrounds and career-levels in an interactive learning environment offers a context for inspiring exchanges at a theoretical and practical level.

The programme's design allows students to combine their participation in the Executive Master with professional duties. It takes place over a two-year period and requires a limited presence of the participants. The methodology used includes teaching modules and distant learning methods, such as the elaboration of an individual training programme, practical training and the preparation of a thesis.

- **Modules**

The Programme comprises 8 mandatory modules, i.e. 4 modules per year, of one week each that require the presence of the participants in Switzerland. Each module is devoted to a particular theme and will be directed by an expert in the specific subject. Students are invited to play an active role during the modules that will make use of different working methods including lectures, group discussions, simulation games, field visits, poster sessions, round table discussions and public lectures.

Internationally known experts in the field of children's rights and children's issues from academia, inter-governmental bodies and non-governmental institutions will give the lectures.

At present the following professors have confirmed their participation in the course: Abilio Alvarez (Catholic University of Buenos Aires), David Archard (University of St Andrews), Guy Bodenmann (University of Fribourg), Alberto Bondolfi (IUKB and University of Lausanne), Jaap Doek (Free University of Amsterdam), Frieder Dünkel (University of Greifswald), Allison James (University of Hull), Michel Manciaux (Poincaré University of Nancy), Claudia Mazzucato (Catholic University of Milan), Nicolas Michel (University of Fribourg), Pasqualina Perrig-Chiello (IUKB and University of Berne), Pascal Pichonnaz (University of Fribourg), Nicolas Queloz (University of Fribourg), Alexandra Rumo-Jungo (University of Fribourg), Horst Schüler-Springorum (University of München), Jean Trépanier (University of Montréal), Eugeen Verhellen (Ghent University), Bea Verschraegen (University of Vienna), Paul Volken (University of Fribourg).

Also, the following experts agreed to intervene:
Lucien Beaulieu (President of IAYFJM), Nigel Cantwell (UNICEF), Geert Cappelaere (UNICEF), Oscar D'Amours (Magistrate), Paulo David (Secretary of the Committee on the Rights of the Child), Hervé Hamon (President of the Children's Court in Paris), Marta Santos Pais (UNICEF, former member of the Committee on the Rights of the Child), Renate Winter (Supreme Court for Kosovo), Jean Zermatten (Director of IDE).

During the modules, students will be given sufficient time to prepare and elaborate an individual training programme (ITP). During these sessions, there will be time to meet and discuss with tutors and to engage in group discussions with colleague students.

- **Individual Training Programme (ITP)**

During the periods between the modules, students must work on their individual training programme. For the elaboration and assistance of his/her ITP, each student will be allocated a tutor (supervisor) from amongst the staff at the University of Fribourg, IUKB or as appropriate and whose expertise is consistent with the chosen subject matters. An interactive web site with database and forum will be available to each student and staff member (www.childsrights.org).

The student's individual training programme includes:

- Mandatory reading;
- An observation study at the participant's workplace (or equivalent);
- An internship of minimum 15 days in an organisation that works in an international perspective on children's rights, other than the participant's principal activities;
- Research in relation to the thesis.

Students are required to take up an interdisciplinary approach for their ITP.

• **Thesis**
Students must prepare a Master's thesis (between 50 and 100 pages) in English, French, Spanish or German on a subject in relation to children's rights, inspired by a comparative and interdisciplinary approach. The deadline for submission is 15 October 2004; the thesis must be presented and defended during the final module.

5. COURSE OUTLINE

Each mandatory module of the Executive Master will consider a specific theme, including the following:

1. *Children's rights in context*
   An interdisciplinary introduction to the background, sources and development of children's rights.
2. *International legal instruments on children's rights*
   A study of the principles and implementation mechanisms of international conventions and declarations on the rights of the child.
3. *The best interests of the child*
   Examination of legal and social aspects of how the best interests of the child principle is applied in family and society.
4. *Exploitation of children*
   An examination of the importance, context and rights of children in particular exploitative practices, such as hazardous work, sexual exploitation, children in armed conflict, sports, publicity and media.
5. *The child, subject of rights*
   An interdisciplinary study of theories and practices on children's participation rights.
6. *Juvenile justice*
   A study of different models and practices of intervention towards children and youngsters accused of having committed an offence.
7. *International adoption, illicit transfer and kidnapping of children*
   A study of the international legal instruments and international cooperation regarding international adoption, illicit transfer and kidnapping of children.
8. *Implementation and monitoring strategies*
   A study of models and practices aimed at the protection and promotion of children's rights, including child-advocacy, prevention strategies, mediation, resilience, ombudswork and child rights education.

The details of the first module of the Executive Master on Children's Rights serve as an example of how the different modules are designed:

Module 1 – Children's rights in context

An interdisciplinary introduction to the background, sources and development of children's rights

The first module introduces the major subject matters that will be discussed during the Executive Master, emphasising both theoretical and interdisciplinary aspects of children's rights studies. The lectures are structured from the general to the specific. Philosophical and global views on children and children's rights will be examined, as well as sociological, psychological, legal and historical perspectives. Emphasis is given to the background and historical origins of the UN Convention on the Rights of the Child that runs as a thread throughout the Executive Master.

MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
	Lecture Children: Rights and Childhood (D. Archard)	**Lecture** Children's Rights: Background, motivation, strategies and main themes (E. Verhellen)	**Fare of ideas**	**Lecture** The development of international child rights law (P. Pichonnaz)	**ITP** Presentation
	Lecture Children's rights, globalisation and the North-South divide	**Round table** on children's competence and participation	**Lecture** Children's rights and childhood studies (A. James)	**Lecture** A historical approach to the legal status of children	Evaluation
Welcome address Presentation of the Programme	**Group discussion**	**Lecture** Background to the history and impact of the CRC (N. Cantwell)	**Lecture** Children's rights and development psychology (P. Parng-Chiello)	**Group discussion**	
Presentation of participants	**Simulation game** on interdisciplinarity	**Group discussion**	**Group discussion**	**Methodology Workshop**	
Public Lecture The CRC: A Dual Challenge (J. Doek)	**Simulation game** (continued)	**ITP** Meeting with tutors	**ITP** Meeting with tutors	**Public Lecture** Children's rights and ethical questions (A. Bondolfi)	
Welcome reception		Evening party			

6. CREDITS, ASSESSMENT AND CERTIFICATION

• **Credits**

The programme is held over a period of two years and consists of 1,500 training hours, which counts for 50 ECTS credits (European Credit Transfer System). They are divided as follows:

Modules	320 hours
Preparation	640 hours
Individual training programme	150 hours
Master's thesis	150 hours
Internship	100 hours
Distance learning, supervised by tutor	90 hours
Participation at seminars or conferences	50 hours
Total of 50 ECTS credits	***1,500 hours***

• **Assessment**

Students will be assessed throughout the programme based on several criteria:
- Presence and active participation in the modules;
- Examination at the end of each module;
- Assessment of the individual training programme;
- Presentation and defence of the thesis.

• **Certificate**

Students who successfully complete the programme, receive the degree of Executive Master on Children's Rights, from the University of Fribourg and the Institut Universitaire Kurt Bösch.

7. FEES

• **Registration fee**
80 CHF (app. 53 € / 53 $)

• **Tuition fee**
9,000 CHF (app. 6,000 € / 6,000 $)

• **Travel and living expenses**
Neither travel expenses nor housing and meals are included.

• **Insurances**
Students are responsible for covering their own accident and health insurance.

• **Fellowships**
Applicants are responsible for securing their own funding to participate to the Executive Master. A limited number of fellowships will be available.

8. TIME SCHEDULE AND VENUE

The mandatory modules take place in Switzerland, alternately at IUKB in Sion/Bramois and at the University of Fribourg. The following dates are scheduled.

Module 1: 7-12 April 2003, IUKB Sion
Module 2: 2-7 June 2003, IUKB Sion
Module 3: 22-27 September 2003, University of Fribourg
Module 4: 10-15 November 2003, IUKB Sion
Module 5: February 2004, University of Fribourg
Module 6: May 2004, IUKB Sion
Module 7: September 2004, University of Fribourg
Module 8: November 2004, IUKB Sion

9. ADMISSION AND SELECTION

• **Admission requirements**
Applicants are required to hold a university degree (or judged equivalent), and are expected to have at least two years of professional experience relevant to the programme. Applicants must have a very good working knowledge of English in order to participate actively in the modules. Languages accepted for writing exercises include English, French, Spanish and German.

• **Selection and admission procedure**
Applications should be submitted before **31 January 2003** on the IUKB application form and should include:
- a motivation letter;
- copies of degrees and diplomas;
- a curriculum vitae that includes professional history and work experience in children's rights;
- two letters of reference from persons in a position to judge the applicant's professional and/or academic abilities.

The Executive Committee will examine applications. If necessary, they may seek additional information from the referee persons or invite the candidate for an interview. All candidates shall be notified of the decision regarding their acceptance to the Executive Master before 15 March 2003. In case of disagreement with decisions of the Executive Committee, the applicant may turn to the Scientific Committee whose decisions are final.

• **Address**
The application form and all accompanying letters and documents must be submitted in English to the following address:

Institut Universitaire Kurt Bösch (IUKB)
Executive Master on Children's Rights
P.O. Box 4176 - CH-1950 Sion 4 - Switzerland

- **Deadline for application**
31 January 2003

- **Free auditors**
A limited number of free auditors who wish to attend a particular module will be accepted.

10. FURTHER INFORMATION

If you have any further questions on this programme, please do not hesitate to contact:

Institut Universitaire Kurt Bösch (IUKB)
Executive Master on Children's Rights
P.O. Box 4176 4
CH - 1950 Sion

Tel. +41 (27) 205 73 00
Fax +41 (27) 205 73 01
E-mail: emcr@iukb.ch
http://www.iukb.ch

University of Fribourg (Switzerland)

Situated in the centre of Switzerland and Europe, the University of Fribourg is unique in its bilingualism (French and German), its international character and its numerous specialties in teaching and research. The University brings together professors, teaching and research assistants, students and the administrative and technical staff, representing a community of some 10,000 people. The many nationalities represented among teachers and students make this University an international forum. Promoting international research and teaching, the University cooperates with universities from all parts of the world and offers students numerous exchange opportunities. Its motto «Science and Wisdom» underlines a concern for ethical responsibility in scientific activity and a positive attitude to interdisciplinary studies.

The ***Law Faculty of Fribourg*** was founded in 1762 as a School of Law and became a Law Faculty by the foundation of the University in 1889. With some 2000 students, it is the second largest Faculty in the country, regrouping students from all cantons of Switzerland and from abroad. The quality of its teaching is well-known and largely recognized. (www.unifr.ch/droit)

The ***Institute for Family Research and Counseling*** at the University of Fribourg was founded in 1993 and offers a broad spectrum in the field of family-related issues. Its aim is to create an interdisciplinary forum targeting those issues that are of importance to the family as well as to promote postgraduate programmes, research and counselling in this area. Since it was founded, the six following disciplines have consistently been integrated in the institute's structure: ethnology, economy, law, psychology, special education and theology. With the support of the University of Fribourg rectorship, the higher education council and individual patrons, the Family Institute has continued to grow since its creation and has developed a diverse palette of scientific activities in the area of family studies, the primary focus being placed upon interdisciplinary courses, postgraduate programmes and public relation work such as symposiums and other activities. (www.unifr.ch/iff)

Institut Universitaire Kurt Bösch (Switzerland)

The Institut Universitaire Kurt Bösch (IUKB) is a private foundation, established in Sion, located 150 km from Geneva, in the Rhone River Valley (Valais). Education and research in the fields of social systems, environment and culture form the main objectives set up by the foundation. The Institut Universitaire Kurt Bösch is recognised by the Swiss Government and the Republic of Valais Switzerland for postgraduate level education. (www.iukb.ch)

The ***International Institute for the Rights of the Child*** (IDE) was founded in 1995 and has an overall partnership agreement with IUKB. Its objectives are:

- to disseminate relevant information on the rights of the child in general and on the different aspects of these rights;
- to offer training to those charged with applying these rights and to those working with children in interested countries;
- to create a culture or a spirit of «child rights».

The activities of the IDE support the UN Convention on the Rights of the Child (1989) and the principal international instruments related to the rights of the child: penal law (juvenile justice), civil law (international adoption), labour law, sexual exploitation or children involved in conflict. The IDE seeks to meet its objectives through the organization of seminars at its permanent seat at the IUKB in Sion, or seminars and courses abroad. It has signed agreements with several foreign universities, and collaborates with a great number of NGOs active in this field. Since 2000 IDE has developed an interactive website that contains wide-ranging information, legislation and case law on international child rights. The multilingual website (French, English and Spanish) is accessible free of charge 24 hours a day (www.childrights.org)

Executive Master on Children's Rights
APPLICATION FORM

PLEASE PRINT

A complete application consist of:
1. A motivation letter;
2. Copies of degrees and diploma's;
3. A curriculum vitae that includes professional history and work experience in children's rights;
4. Two letters of reference from persons in a position to judge the applicant's professional and/or academic abilities

Personal Information

☐ Male ☐ Female

Family name: ..... First name: .....

Date of birth: ..... Place of birth: .....

Nationality: ..... Mother tongue: .....

Private address: .....

.....

.....

Private phone: ..... E-mail address: .....

Profession: ..... Function: .....

Professional address: .....

.....

.....

Professional phone: ..... E-mail address: .....

Please specify the address for all correspondence regarding this application.

☐ Private address ☐ Professional address

Highest Degree or Diploma: _____

Knowledge of English: ☐ Excellent ☐ Very Good ☐ Good

Preferred writing language: ☐ English ☐ French ☐ Spanish ☐ German

This application form and all accompanying letters and documents must be submitted in English to the following address:

Institut Universitaire Kurt Bösch (IUKB)
Executive Master on Children's Rights
P.O. Box 4176
CH-1950 Sion 4
Switzerland

Deadline for application: 31 January 2003

Date: _____ Signature: _____

Payment of registration fee (80 CHF)
☐ Please send me an invoice
☐ Credit Card

Initial payment of fees for the application process: Amount: CHF 80.–

Credit card: ☐ Eurocard / Mastercard ☐ Visa

Card number: ☐☐☐☐ ☐☐☐☐ ☐☐☐☐ ☐☐☐☐

CVV number: ☐☐☐ (The three last digits written at the back of your card in the space reserved for the signature)

Validity of the card: month _____ year: _____

Date: _____ Signature: _____

Annex D

Letter to Judge Winter dated 3 February 2004

Her Honour Judge Renate Winter
Appeals Chamber
Special Court for Sierra Leone
Freetown
Sierra Leone

Tuesday 3rd of February 2004

Dear Judge Winter

We write on behalf of our client, Chief Sam Hinga Norman, with reference to your past and current relationship with UNICEF.

As you are aware, UNICEF were recently granted permission by the Appeals Chamber to file an "amicus" brief in our client's Motion on the issue of whether the recruitment of child soldiers amounted to a crime under international criminal law during the period of the Indictment. The UNICEF brief was filed on the 21st of January 2004.

We are most surprised and concerned to discover that you are listed in the acknowledgements of the joint UNICEF and No Peace Without Justice Report entitled "International Criminal Justice and Children" published in September 2002 as someone who "generously reviewed the draft and supported the drafting process". At section 2.3.2 of the Report, the issue of child soldiers is considered and at page 45 the text states that "the Rome Statute... confirms that conscripting or enlisting children under 15 or using them to participate in hostilities is a crime under international law during any armed conflict". You will be aware that the issue of whether the Rome Statute created or confirmed the status of the recruitment of child soldier as a crime under international law was one of the substantive issues that was canvassed before the Appeals Chamber at the hearing in November. The Report further deals specifically with the Special Court for Sierra Leone and its power to prosecute for conscripting or enlisting children (page 115 and page 116).

Further, we note that in a UNICEF report entitled "Working for and with Adolescents" dated February 2002, UNICEF asserted (at page 56) that they "benefited immensely from the technical assistance provided by Austrian Judge Renate Winter and would like to recommend her to other country offices".

We are surprised that this relationship was not brought to our attention prior to the hearing last November. We would be grateful if you could thoroughly detail the nature all your past and current relationships with UNICEF and any published or other writings or research on the topic of child soldiers with which you have been directly involved.

Further we are aware that you are listed along with a number of senior UNICEF personnel as part of an expert panel for the Masters degree in Children's Rights that is run by the University of Freiburg. We would be grateful if you could inform us whether the issue of child soldiers forms part of the course and what is the nature of the course content on this topic.

In the light of the above matters we must put you on notice that our current view is that we have no option other than to apply for you to recuse yourself from any further participation in the decision of the Appeals Chamber on the child soldiers motion and therefore respectfully suggest it would be inappropriate for you to participate further in the discussions with your fellow judges on this issue.

We look forward to hearing from you as matter of urgency

Yours Sincerely

Tim Owen QC
James Jenkins –Johnston
Sulaiman Tejan-Sie
Quincy Whitaker

Cc: HHJ Geoffrey Robertson QC
Robin Vincent
Sylvain Roy

Annex E

Email correspondence with Ms Reiger

PM cc Jorgensen/SCSL@SCSL

Subject RE: Response from Justice Winter Link

Dear Quincy,

In response to your email of 9 March 2004, Justice Winter has instructed me to inform you that she reiterates that she sees no reason to recuse herself pursuant to Rule 15 of the Rules, and will not be making any further statement on the matter.

Kind regards,

Caitlin Reiger
Senior Legal Officer, Chambers
The Special Court for Sierra Leone
x7011

Tel.: +1-212-963-9915 ext 178-7011 (via NY)
+39-0831-25 7011 (via Italy)
+232-22-29 7011 (SL)
Mobile: +232 76 800 006
Fax: +1-212-963-9915 ext 178-7001
E-mail: reiger@un.org

Quincy Whitaker <q.whitaker@doughtystreet.co.uk>

09/03/2004 15:40

To: "Reiger@un.org" <Reiger@un.org>
cc:
Subject: RE: Response from Justice Winter

-----Original Message-----
From: Quincy Whitaker
Sent: 09 March 2004 15:16
To: 'Caitlin Reiger'
Subject: RE: Response from Justice Winter

Dear Caitlin
Further to our brief conversation last week, I would be grateful if you could inform Judge Winter that we still are waiting anxiously for a substantive reply to our letter, which did not in fact ask her to consider whether to recuse herself but asked her to detail her contact with UNICEF and specifically in relation to the report that we referred to We look forward to receiving her written statement dealing with all the matters we raised and trust that our letter of the 3rd of February will be considered as a request to receive the same.
Best Wishes and hope all goes well tomorrow

Quincy
-----Original Message-----
From: Caitlin Reiger [mailto:reiger@un.org]
Sent: 05 March 2004 13:29
To: Quincy Whitaker; SCSL Defence-Norman
Cc: Desmond de Silva; Nina Jorgensen; Sylvain Roy; Rupert Skilbeck
Subject: Response from Justice Winter

Dear Quincy

President Robertson has asked me to advise you that Justice Winter has written to him stating that having considered all the points addressed in your letter of 3 February 2004, she does not see any reason to recuse herself under Article 15 of the Rules. Justice Winter will provide a detailed written statement for the Court and the parties if requested next week.

Kind regards,

Caitlin Reiger
Senior Legal Officer, Chambers
The Special Court for Sierra Leone
x7011

Tel.: +1-212-963-9915 ext 178-7011 (via NY)
+39-0831-25 7011 (via Italy)
+232-22-29 7011 (SL)
Mobile: +232 76 800 006
Fax: +1-212-963-9915 ext 178-7001
E-mail: reiger@un.org

STATUTORY MATERIAL

Articles 12 and 21 of the Statute and Rule 15 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda

Article 12: Qualification and election of judges

1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

2. The members of the Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (hereinafter referred to as Athe International Tribunal for the former Yugoslavia@) shall also serve as the members of the Appeals Chamber of the International Tribunal for Rwanda.

3. The judges of the Trial Chambers of the International Tribunal for Rwanda shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

a) The Secretary-General shall invite nominations for judges of the Trial Chambers from States Members of the United Nations and non-member States maintaining permanent observer missions at the United Nations Headquarters;

b) Within thirty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in paragraph 1 above, no two of whom shall be of the same nationality and neither of whom shall be one of the same nationality as any judge on the Appeals Chamber;

c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less that eighteen and not more that twenty-seven candidates, taking due account of adequate representation on the International Tribunal for Rwanda of the principal legal systems of the world;

d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the nine judges of the Trial Chambers. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.

4 In the event of a vacancy in the Trial Chambers, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of paragraph 1 above, for the remainder of the term of office concerned.

5. The judges of the Trial Chambers shall be elected for a term of four years. The terms and conditions of service shall be those of the judges of the International Tribunal for the former Yugoslavia. They shall be eligible for re-election.

Article 21
Rights of the accused

1. All persons shall be equal before the International Tribunal.

2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.

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

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

(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) to be tried without undue delay;
(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;
(g) not to be compelled to testify against himself or to confess guilt.

Rule 15: Disqualification of Judges

(A) A Judge may not sit at a trial or appeal in any case in which he has a personal interest or concerning which he has or has had any association which might affect his impartiality. He shall in any such circumstance withdraw from that case. Where the Judge withdraws from the Trial Chamber, the President shall assign another Trial Chamber Judge to sit in his place. Where a Judge withdraws from the Appeals Chamber, the Presiding Judge of that Chamber shall assign another Judge to sit in his place.

(B) Any party may apply to the Presiding Judge of a Chamber for the disqualification of a Judge of that Chamber from a trial or appeal upon the above grounds. After the Presiding Judge has conferred with the Judge in question, the Bureau, if necessary, shall determine the matter. If the Bureau upholds the application, the President shall assign another Judge to sit in place of the disqualified Judge.

(C) The Judge who reviews an indictment against an accused, pursuant to Article 18 of the Statute and Rule 47 or 61, shall not be disqualified from sitting as a member of a Trial Chamber for the trial of that accused.

(E) If a Judge is, for any reason, unable to continue sitting in a part-heard case, the Presiding Judge may, if that inability seems likely to be of short duration, adjourn the proceedings; otherwise he shall report to the President who may assign another Judge to the case and order either a rehearing or continuation of the proceedings from that point.

However, after the opening statements provided for in Rule 84, or the beginning of the presentation of evidence pursuant to Rule 85, the continuation of the proceedings can only be ordered with the consent of the accused.

(F) In case of illness or an unfilled vacancy or in any other exceptional circumstances, the President may authorize a Chamber to conduct routine matters, such as the delivery of decisions, in the absence of one or more of its members.

Articles 13 and 21 of the Statute and Rule 15 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia

Article 13
Qualifications and election of judges

1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

2. The judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(a) The Secretary-General shall invite nominations for judges of the International Tribunal from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;
(b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in paragraph 1 above, no two of whom shall be of the same nationality;
(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twenty-two and not more than thirty-three candidates, taking due account of the adequate representation of the principal legal systems of the world;
(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the eleven judges of the International Tribunal. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-Member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.

3. In the event of a vacancy in the Chambers, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of paragraph 1 above, for the remainder of the term of office concerned.

4. The judges shall be elected for a term of four years. The terms and conditions of service shall be those of the judges of the International Court of Justice. They shall be eligible for re-election.

Article 21
Rights of the accused

1. All persons shall be equal before the International Tribunal.

2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.

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

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

(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) to be tried without undue delay;
(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;
(g) not to be compelled to testify against himself or to confess guilt.

Rule 15
Disqualification of Judges

(A) A Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case.

(B) Any party may apply to the Presiding Judge of a Chamber for the disqualification and withdrawal of a Judge of that Chamber from a trial or appeal upon the above grounds. The Presiding Judge shall confer with the Judge in question, and if necessary the Bureau shall determine the matter. If the Bureau upholds the application, the President shall assign another Judge to sit in place of the disqualified Judge.

(C) The Judge of the Trial Chamber who reviews an indictment against an accused, pursuant to Article 19 of the Statute and Rules 47 or 61, shall not be disqualified for sitting as a member of the Trial Chamber for the trial of that accused. Such a Judge shall also not be disqualified for sitting as a member of the Appeals Chamber, or as a member of a bench of three Judges appointed pursuant to Rules 65 (D) or 72 (E), to hear any appeal in that case.

(D) (i) No Judge shall sit on any appeal or as a member of a bench of three Judges appointed pursuant to Rules 65 (D) or 72 (E) in a case in which that Judge sat as a member of the Trial Chamber.

(ii) No Judge shall sit on any State Request for Review pursuant to Rule 108 *bis* in a matter in which that Judge sat as a member of the Trial Chamber whose decision is to be reviewed.

Article 41 of the Statute of the International Criminal Court

2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.

3. Judges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature.

4. Any question regarding the application of paragraphs 2 and 3 shall be decided by an absolute majority of the judges. Where any such question concerns an individual judge, that judge shall not take part in the decision.

Article 41
Excusing and disqualification of judges

1. The Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute, in accordance with the Rules of Procedure and Evidence.

2. (a) A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, *inter alia*, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.

(b) The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph.

(c) Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

Article 42
The Office of the Prosecutor

1. The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.

2. The Office shall be headed by the Prosecutor. The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof. The Prosecutor shall be assisted by one or more Deputy Prosecutors, who shall be entitled to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. They shall serve on a full-time basis.

3. The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. They shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The Prosecutor shall nominate three candidates for each position of Deputy Prosecutor to be filled. Unless a shorter term is decided upon at the time of their election, the Prosecutor and the Deputy Prosecutors shall hold office for a term of nine years and shall not be eligible for re-election.

Article 14 of the International Covenant on Civil and Political Rights

Article 14

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

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

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

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

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

(c) To be tried without undue delay;

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

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

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

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

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

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

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

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

760

Article 7 of the African Charter on Human and Peoples' Rights

Article 7

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

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

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

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

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

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

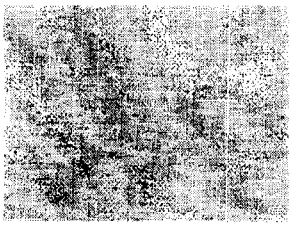
Article 6 of the European Convention on Human Rights

person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

ARTICLE 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
    - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
    - (b) to have adequate time and the facilities for the preparation of his defence;
    - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
    - (d) to examine or have examined witnesses against him and



to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

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