A. THE FALLIBILITY OF "HUMAN PERCEPTION AND RECOLLECTION:" IDENTIFICATION STANDARDS OF INTERNATIONAL TRIBUNALS

In both national and international criminal cases, deficiencies in identification evidence also lead to miscarriages of justice. As far back as 1967, a U.S. court held that the "influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor; perhaps it is responsible for more errors than all other factors combined."! On this subject the jurisprudence of international criminal tribunals, such as the ICTY and ICTR, may be regarded as sophisticated in that it incorporates the notion of protecting against miscarriages of justice. Especially in light of the gravity of international crimes and the potential penalties at stake, international tribunals have developed important legal standards and thresholds as to the admission of identification evidence. This chapter focuses on these criteria and transposes them onto national criminal proceedings as possible protection against miscarriages of justice. In particular, the ICTY (which has in fact been influenced by several national courts) has set forth the following general parameters on identification evidence:

(1) The ICTY in Prosecutor v. Kunarac et al. held that identification evidence must be treated with caution due to the "many difficulties inherent in the identification process, resulting from the vagaries of human perception and recol-

lection." This implies that both the credibility of the witness in question and the reliability of the circumstances under which the identification took place have to be taken into account when assessing identification evidence.'

(2) The ICTY Appeals Chamber in *Prosecutor v. Kupreskic* indicated that Trial Chambers "must always in the interests of justice, proceed with extreme caution when assessing evidence given by a single identification witness under difficult circumstances." Regard should be had to the expert testimony in the *Krupeskic* case that the relationship between the certainty conveyed by the witness and accurate identification is weak.

B. **RETRIAL STANDARDS WITHIN COMMON LAW**

Before going into the potential retrial arguments deriving from the case law of international criminal tribunals, it is relevant to determine the requisite standards within common law. One of the leading cases in this respect is the case of *R. v. Turnbull & Others* where Lord Widgery CJ, giving the judgment of a Full Court, said:

First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be

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*See* Prosecution v. Kunarac et al., Judgment, Feb. 22, 2001; *see also* Prosecutor v. Kunarac et al., Decision on Motion for Acquittal, July 3, 2000, at 8.

3  *See* RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE 175 (2002).
