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SCSL-2003-13-PT
(1198 - 1290)

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

IN THE TRIAL CHAMBER

Before: Judge Bankole Thompson
Judge Pierre Boutet
Judge Benjamin Mutanga Itoe

Registrar: Mr Robin Vincent

Date filed: 30 October 2003

THE PROSECUTOR

Against

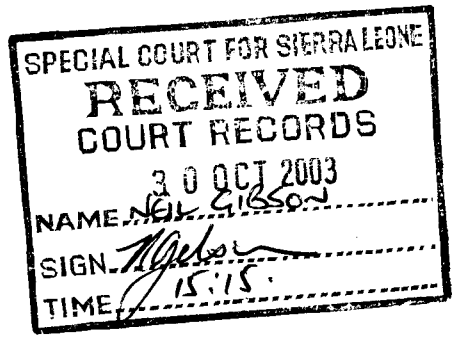
SANTIGIE BORBOR KANU also known as 55 also known as FIFTY-FIVE also known as SANTIGIE KHANU also known as SANTIGIE KANU also known as S.B. KHANU also known as S.B. KANU also known as SANTIGIE BOBSON KANU also known as BORBOR SANTIGIE KANU

CASE NO. SCSL – 2003 – 13 – PT

PROSECUTION RESPONSE TO THE DEFENCE MOTION ON ABUSE OF PROCESS DUE TO INFRINGEMENT OF THE PRINCIPLE OF *NULLUM CRIMEN SINE LEGE*

Office of the Prosecutor:
Mr Desmond de Silva, QC, Deputy Prosecutor
Mr Walter Marcus-Jones, Senior Appellate Counsel
Mr Christopher Staker, Senior Appellate Counsel
Mr Abdul Tejan-Cole, Appellate Counsel

Defence Counsel:
Mr Geert Jan Alexander Knoops



SPECIAL COURT FOR SIERRA LEONE
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I. INTRODUCTION

1. The Prosecution files this response to the Defence document entitled "Motion on Abuse of Process Due to Infringement of Principles of Nullum Crimen Sine Lege and Non-Retroactivity as to Several Counts" (the "**Motion**"), filed on behalf of Santigie Borbor Kanu (the "**Accused**") on 20 October 2003.[1]

2. For the reasons given below, the Motion should be dismissed in its entirety.

II. ARGUMENT

3. The Motion seeks various forms of relief in respect of an alleged abuse of process. The Motion further suggests (at paras. 13-14) that this abuse of process should be attributed to the Prosecution. However, the Motion advances no authorities on the existence or scope of the doctrine of abuse of process in international criminal law, or

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[1] Registry Page ("RP") 777-781.

the remedies that can be granted in respect of an abuse of process, and the circumstances in which they will be granted. Nor does the Motion present any detailed arguments on how these legal authorities would apply to the specific circumstances of this case. The Prosecution should not be required to respond to a vague Defence allegation that is not supported by detailed argument.

4. The Defence argues that the prosecution of the Accused for the crimes with which he is charged would violate the principle of *nullum crimen sine lege*. It is of course open to the Defence to argue that. It is of course equally open to the Prosecution to take a contrary position. In the event of a conflicting position between the Prosecution and the Defence in relation to an issue, it will be for the Chamber to rule on the matter at the appropriate time. In the Prosecution's submission, the Motion does not establish how it is *an abuse of process* for the Prosecution to proceed on the basis of a position that is inconsistent with that of the Defence. It is nowhere suggested, for instance, that the Prosecution does not seriously believe that these proceedings are properly brought, and that it is deliberately bringing a baseless indictment for some improper motive. Merely because the defence disagrees with a proposition, it cannot be an *abuse of process* for the Prosecution to take that position. Even if the Court were ultimately to rule in favour of the Defence on a contested issue, this would not mean that there had been an abuse of process by the Prosecution. The Motion seems to suggest that there would be an abuse of process every time that a Chamber rules against the Prosecution in relation to any issue. That is certainly not correct.

5. In any event, the Prosecution submits that there has been no violation of the principle of *nullum crimen sine lege*. The Prosecution does not take issue with the proposition that it is a fundamental principle of international criminal law that a person is not to be held criminally responsible unless the conduct in question constitutes a crime at the time it takes place. This principle is reflected, *inter alia*, in Article 15(2) of the International Covenant on Civil and Political Rights, Article 22(1) of the Statute of the International Criminal Court, and in the case law of the International Criminal

Tribunal for the Former Yugoslavia (the "**ICTY**")[2] and the International Criminal Tribunal for Rwanda (the "**ICTR**").[3] However, there has been no violation of that principle in this case.

6. The Motion argues that the charges of crimes against humanity in the Indictment in this case violate the principle of *nullum crimen sine lege*, on the basis that, at the time of the conduct of the Accused with which he is charged, crimes against humanity did not exist in the criminal law system of Sierra Leone and were not defined as such as a criminal offence within Sierra Leone domestic law.

7. However, for the reasons given in the "Prosecution Response to the Defence Motion Challenging Jurisdiction of the Court",[4] filed by the Prosecution in these proceedings on 30 October 2003, the Special Court, as a creature of an international treaty, exists and functions in the sphere of international law—the judicial power that it exercises is not the judicial power of the Republic of Sierra Leone, and the Special Court is not subject to the municipal law or constitution of any State, any more than the International Criminal Court would be. An international criminal court or tribunal does not violate the principle of *nullum crimen sine lege* merely because the crimes for which it tries an accused were not crimes under the municipal law of the State on the territory of which the crimes were committed. The principle of *nullum crimen sine lege* requires only that the relevant acts were unlawful at the time of their commission as a matter of international law.[5] If the Defence argument were correct, any State could avoid the jurisdiction of an international criminal tribunal, including one established by the United Nations Security Council under Chapter VII of the

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2 See, e.g., *Prosecutor v. Kunarac et al., Judgement*, Case No. IT-96-23, IT-96-23/1-A, Appeals Chamber, 12 June 2002, para. 67 ("The determination of what constitutes a war crime is therefore dependent on the development of the laws and customs of war at the time when an act charged in an indictment was committed"); *Prosecutor v Deliac (Celebici)*, IT-96-21-T, Trial Chamber, 16 November 1998,, paras. 402-405; *Prosecutor v. Stakic, Judgement*, Case No. IT-97-24-T, Trial Chamber, 31 July 2003, paras. 411-412; *Prosecutor v. Hadzihasanovic et al., Decision on Joint Challenge to Jurisdiction*, Case No. IT-01-47-PT, Trial Chamber, 12 November 2002, paras. 55-62.

3 E.g., *Prosecutor v. Rutaganda, Judgement and Sentence*, Case No. ICTR-96-3-T, Trial Chamber I, 6 December 1999, para. 86.

4 Prosecution Response to the Defence Motion Challenging Jurisdiction of the Court, filed by the Prosecution on 30 October 2003, attached as annex 9.

5 See, e.g., *Prosecutor v. Delalic et al. (**"Celebici Appeal Judgement"**), Judgment*, Case No. IT-96-21-A, Appeal Chamber., 20 February 2001, para. 178 (indicating that the ICTY merely identifies and applies existing customary international law).

United Nations Charter, by ensuring that crimes under international law are not incorporated into its municipal law.

8. The Motion further argues that it is "questionable" whether it complies with the principle of *nullum crimen sine lege* to charge the Accused with violations of common Article 3 of the Geneva Conventions, Additional Protocol II, and other serious violations of international humanitarian law, on the basis that the laws embedded in these instruments were at the material time "not fully implemented within the Sierra Leone (criminal) law system".[6] For the same reasons as in the paragraph above, this argument must be rejected. At the times material to the Indictment in this case, violations of common Article 3 entailed individual criminal responsibility under international law.[7] Furthermore, Article 4 of the Statute of the International Criminal Tribunal for Rwanda, which was adopted on 8 November 1994, clearly recognised that at least from the time of the beginning of the temporal jurisdiction of that Tribunal,[8] certain violations of Additional Protocol II entailed individual criminal responsibility. The adoption of the ICTR Statute "may serve as evidence of the *opinion juris* of states in respect of individual criminal responsibility for serious violations of common Article 3 or Additional Protocol II". When the Special Court Statute was framed, express consideration was given to the principle of *nullum crimen sine lege*, and the need to ensure that it was respected.[9] The Motion presents no detailed argument seeking to establish that the Statute in its final form failed to respect this principle. Again, the Prosecution should not be required to respond to a vague Defence allegation that is not supported by detailed argument.

IV. CONCLUSION

The Court should therefore dismiss the Motion in its entirety.

Freetown, 30 October 2003.

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6 Motion, paras. 8 and 12.

7 *Celebici Appeal Judgment*, note 4 , paras. 153-174.

8 1 January 1994: see Article 1 of the Statute of the ICTR.

9 Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, U.N. Doc. S/2000/915, 4 October 2000, paras. 12-18.

For the Prosecution,

Desmond de Silva, QC Deputy Prosecutor	Walter Marcus-Jones Senior Appellate Counsel
pp Christopher Staker Senior Appellate Counsel	Abdul Tejan-Cole Appellate Counsel

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3. *Prosecutor v. Stakic, Judgement*, Case No. IT-97-24-T, Trial Chamber, 31 July 2003 [Extract].

4. *Prosecutor v. Hadzihasanovic et al., Decision on Joint Challenge to Jurisdiction*, Case No. IT-01-47-PT, Trial Chamber, 12 November 2002 [Extract].

5. *Prosecutor v. Rutaganda, Judgement and Sentence*, Case No. ICTR-96-3-T, Trial Chamber I, 6 December 1999 [Extract].

6. *Prosecutor v. Delalic et al. (Celebici case), Judgment*, Case No. IT-96-21-A, Appeals Chamber, 20 February 2001 [Extract].

7. Statute of the ICTR [Extract].

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

9. Prosecution Response to the Defence Motion Challenging Jurisdiction of the Court, filed by the Prosecution on 30 October 2003.

ANNEX 1

Prosecutor v. Kunarac et al., Judgement, Case No. IT-96-23, IT-96-23/1-A, Appeals Chamber, 12 June 2002 [Extract].

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IN THE APPEALS CHAMBER

Before:

Judge Claude Jorda, Presiding

Judge Mohamed Shahabuddeen

Judge Wolfgang Schomburg

Judge Mehmet Güney

Judge Theodor Meron

Registrar:

Mr. Hans Holthuis

Judgement of:
12 June 2002

PROSECUTOR

V

DRAGOLJUB KUNARAC

RADOMIR KOVAC

AND

ZORAN VUKOVIC

JUDGEMENT

Counsel for the Prosecutor:

Mr. Anthony Carmona

Ms. Norul Rashid

Ms. Susan Lamb

Ms. Helen Brady

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Counsel for the Accused:

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

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

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

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 is seised of appeals against the Trial Judgement rendered by Trial Chamber II on 22 February 2001 in the case of *Prosecutor* v *Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*.

Having considered the written and oral submissions of the parties, the Appeals Chamber

HEREBY RENDERS ITS JUDGEMENT.

INTRODUCTION

A. Findings

1. The Appeals Chamber endorses the following findings of the Trial Chamber in general.

2. From April 1992 until at least February 1993, there was an armed conflict between Bosnian Serbs and Bosnian Muslims in the area of Foca. Non-Serb civilians were killed, raped or otherwise abused as a direct result of the armed conflict. The Appellants, in their capacity as soldiers, took an active part in carrying out military tasks during the armed conflict, fighting on behalf of one of the parties to that conflict, namely, the Bosnian Serb side, whereas none of the victims of the crimes of which the Appellants were convicted took any part in the hostilities.

3. The armed conflict involved a systematic attack by the Bosnian Serb Army and paramilitary groups on the non-Serb civilian population in the wider area of the municipality of Foca. The campaign was successful in its aim of "cleansing" the Foca area of non-Serbs. One specific target of the attack was Muslim women, who were detained in intolerably unhygienic conditions in places like the Kalinovik School, Foca High School and the Partizan Sports Hall, where they were mistreated in many ways, including being raped repeatedly. The Appellants were aware of the military conflict in the Foca region. They also knew that a systematic attack against the non-Serb civilian population was taking place and that their criminal conduct was part of this attack.

4. The Appeals Chamber now turns to the findings of the Trial Chamber in relation to each individual Appellant.

1. Dragoljub Kunarac

5. Dragoljub Kunarac was born on 15 May 1960 in Foca. The Trial Chamber found that, during the relevant period, Kunarac was the leader of a reconnaissance unit which formed part of the local Foca Tactical Group. Kunarac was a well-informed soldier with access to the highest military

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54. 1. The Existence of an Armed Conflict and Nexus therewith

55. There are two general conditions for the applicability of Article 3 of the Statute: first, there must be an armed conflict; second, the acts of the accused must be closely related to the armed conflict.[44]

56. An "armed conflict" is said to exist "whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State".[45]

57. There is no necessary correlation between the area where the actual fighting is taking place and the geographical reach of the laws of war. The laws of war apply in the whole territory of the warring states or, in the case of internal armed conflicts, the whole territory under the control of a party to the conflict, whether or not actual combat takes place there, and continue to apply until a general conclusion of peace or, in the case of internal armed conflicts, until a peaceful settlement is achieved.[46] A violation of the laws or customs of war may therefore occur at a time when and in a place where no fighting is actually taking place. As indicated by the Trial Chamber, the requirement that the acts of the accused must be closely related to the armed conflict would not be negated if the crimes were temporally and geographically remote from the actual fighting.[47] It would be sufficient , for instance, for the purpose of this requirement, that the alleged crimes were closely related to hostilities occurring in other parts of the territories controlled by the parties to the conflict.[48]

58. What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed. It need not have been planned or supported by some form of policy . The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established, as in the present case, that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict. The Trial Chamber's finding on that point is unimpeachable.

59. In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, *inter alia*, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties.

60. The Appellants' proposition that the laws of war only prohibit those acts which are specific to an actual wartime situation is not right. The laws of war may frequently encompass acts which, though they are not committed in the theatre of conflict, are substantially related to it. The laws of war can apply to both types of acts . The Appeals Chamber understands the Appellants' argument to be that if an act can be prosecuted in peacetime, it cannot be prosecuted in wartime. This betrays a misconception about the relationship between the laws of war and the laws regulating a peacetime situation. The laws of war do not necessarily displace the laws regulating a peacetime situation; the former may add elements requisite to the protection which needs to be afforded to victims in a wartime situation.

61. Concerning the Appellants' argument that they were prevented from disproving that there was an armed conflict in the municipalities of Gacko and Kalinovik, the Appeals Chamber makes the following remarks: a party should not be permitted to refrain from making an objection to a matter which was apparent during the course of the trial, and raise it only in the event of a finding against the party.[49] If a party fails to raise any objection to a particular issue before the Trial Chamber , in the absence of special circumstances, the Appeals Chamber will find that the party has waived its right to adduce the issue as a valid ground of appeal.[50] Likewise, a party should not be permitted to raise an issue which it considers to be of significance to its case at a stage when the issue can no longer be fully litigated by the opposing party.

62. In the present instance, the Appellants raised the question of the existence of an armed conflict in the municipalities of Gacko and Kalinovik for the first time in their Defence Final Trial Brief without substantiating their argument, thereby depriving the Prosecutor of her ability to fully litigate the issue.[51] The Appeals Chamber finds this to be unacceptable. If, as the Appellants suggest , the issue was of such importance to their case, the Appellants should have raised it at an earlier stage, thus giving fair notice to the Prosecutor and allowing her to fully and properly litigate the matter in the course of which she could put this issue to her witnesses. This the Appellants failed to do. This ground of appeal could be rejected for that reason alone.

63. In addition, and contrary to what is alleged by the Appellants, the Appeals Chamber finds that the Appellants were never prevented by the Trial Chamber from raising any issue relevant to their case. In support of their argument on that point, the Appellants refer to an incident which occurred on 4 May 2000. According to the Appellants, on that day, the Trial Chamber prevented them from raising issues pertaining to the existence of an armed conflict in the municipalities of Gacko and Kalinovik.[52] It is clear from the record of the trial that the Appellants did not attempt to challenge the existence of an armed conflict in Gacko and Kalinovik as they alleged in their appeal, nor that they were in any way prevented from asking questions about that issue in the course of the trial. [53]

64. Finally, the Appellants conceded that there was an armed conflict "in the area of Foca" at the relevant time and that they knew about that conflict and took part therein.[54] Referring to that armed conflict, the Appellants later said that it existed only in the territory of the "[m]unicipality of Foca".[55] The Appeals Chamber notes that the municipalities of Gacko and Kalinovik are contiguous and neighbouring municipalities of Foca. Furthermore, the Appeals Chamber considers that the Prosecutor did not have to prove that there was an armed conflict in each and every square inch of the general area. The state of armed conflict is not limited to the areas of actual military combat but exists across the entire territory under the control of the warring parties. The Appeals Chamber finds that ample evidence was adduced before the Trial Chamber to demonstrate that an armed conflict was taking place in the municipalities of Gacko and Kalinovik at the relevant time.[56] The Trial Chamber did not err in concluding that an armed conflict existed in all three municipalities, nor did it err in concluding that the acts of the Appellants were closely related to this armed conflict.[57]

65. The Trial Chamber was therefore correct in finding that there was an armed conflict at the time and place relevant to the Indictments, and that the acts of the Appellants were closely related to that conflict pursuant to Article 3 of the Statute. The Appeals Chamber does not accept the Appellants' contention that the laws of war are limited to those acts which could only be committed in actual combat . Instead, it is sufficient for an act to be shown to have been closely related to the armed conflict, as the Trial Chamber correctly found. This part of the Appellants' common grounds of appeal therefore fails.

2. Material Scope of Article 3 of the Statute and Common Article 3 of the Geneva Conventions

66. Four conditions must be fulfilled before an offence may be prosecuted under Article 3 of the Statute:[58] (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

67. The determination of what constitutes a war crime is therefore dependent on the development of the laws and customs of war at the time when an act charged in an indictment was committed. As was once noted, the laws of war "are not static , but by continual adaptation follow the needs of a changing world".[59] There is no question that acts such as rape (as explained in paragraph 195), torture and outrages upon personal dignity are prohibited and regarded as criminal under the laws of war and that they were already regarded as such at the time relevant to these Indictments.

68. Article 3 of the Statute is a general and residual clause covering all serious violations of international humanitarian law not falling under Articles 2, 4 or 5 of the Statute.[60] It includes, *inter alia*, serious violations of Common article 3. This provision is indeed regarded as being part of customary international law,[61] and serious violations thereof would at once satisfy the four requirements mentioned above.[62]

69. For the reasons given above, the Appeals Chamber does not accept the Appellants' unsupported assertion that Article 3 of the Statute is restricted in such a way as to be limited to the protection of property and the proper use of permitted weapons , that it does not cover serious violations of Common article 3 and that it is only concerned with the rights of warring parties as opposed to the protection of private individuals. This does not represent the state of the law. Accordingly, this part of the Appellants' common grounds of appeal relating to Article 3 of the Statute is rejected.

70. All three aspects of the common grounds of appeal relating to Article 3 of the Statute are therefore rejected and the appeal related to that provision consequently fails.

ANNEX 2

Prosecutor v. Deliac, ("Celebici"), IT-96-21-T, Trial Chamber, 16 November 1998 [Extract].

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IN THE TRIAL CHAMBER

Before:
Judge Adolphus G. Karibi-Whyte, Presiding
Judge Elizabeth Odio Benito
Judge Saad Saood Jan

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Judgement of: 16 November 1998

PROSECUTOR

v.

ZEJNIL DELALIC
ZDRAVKO MUCIC also known as "PAVO"
HAZIM DELIC
ESAD LANDZO also known as "ZENGA"

JUDGEMENT

The Office of the Prosecutor:
Mr. Grant Niemann
Ms. Teresa McHenry

Counsel for the Accused:
Ms. Edina Residovic, Mr. Eugene O'Sullivan, for Zejnil Delalic
Ms. Nihada Buturovic, Mr. Howard Morrison, for Zdravko Mucic
Mr. Salih Karabdic, Mr. Thomas Moran, for Hazim Delic
Ms. Cynthia McMurrey, Ms. Nancy Boler, for Esad Landzo

I.Introduction

The trial of Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo (hereafter "accused"), before this Trial 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 (hereafter "International Tribunal" or "Tribunal"), commenced on 10 March 1997 and came to a close on 15 October 1998.

Having considered all of the evidence presented to it during the course of this trial, along with the written and oral submissions of the Office of the Prosecutor (hereafter "Prosecution") and the Defence for each of the accused (hereafter, collectively, "Defence"), the Trial Chamber,

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H. Construction of Criminal Statutes

402. The principles *nullum crimen sine lege* and *nulla poena sine lege* are well recognised in the world's major criminal justice systems as being fundamental principles of criminality. Another such fundamental principle is the prohibition against *ex post facto* criminal laws with its derivative rule of non-retroactive application of criminal laws and criminal sanctions. Associated with these principles are the requirement of specificity and the prohibition of ambiguity in criminal legislation. These considerations are the solid pillars on which the principle of legality stands. Without the satisfaction of these principles no criminalisation process can be accomplished and recognised.

403. The above principles of legality exist and are recognised in all the world's major criminal justice systems. It is not certain to what extent they have been admitted as part of international legal practice, separate and apart from the existence of the national legal systems. This is essentially because of the different methods of criminalisation of conduct in national and international criminal justice systems.

404. Whereas the criminalisation process in a national criminal justice system depends upon legislation which dictates the time when conduct is prohibited and the content of such prohibition, the international criminal justice system attains the same objective through treaties or conventions, or after a customary practice of the unilateral enforcement of a prohibition by States.

405. It could be postulated, therefore, that the principles of legality in international criminal law are different from their related national legal systems with respect to their application and standards. They appear to be distinctive, in the obvious objective of maintaining a balance between the preservation of justice and fairness towards the accused and taking into account the preservation of world order. To this end, the affected State or States must take into account the following factors, *inter alia*: the nature of international law; the absence of international legislative policies and standards; the *ad hoc* processes of technical drafting; and the basic assumption that international criminal law norms will be embodied into the national criminal law of the various States.

406. The result of this difference has been well expressed by Professor Bassiouni, expressing the view that,

> [i]t is a well established truism in international law that if a given conduct is permitted by general or particular international law, that permissibility deprives the conduct of its criminal character under international criminal law. But if a given conduct is prohibited by general or particular international law it does not mean that it is criminal *ipso iure*. The problem thus lies in distinguishing between prohibited conduct which falls within the legally defined criminal category and that which does not. [429]

407. This exercise being one of interpretation generally, and of the criminal law in particular, we now turn to general principles to consider the interpretation of the criminal provisions of the Tribunal's Statute and Rules.

1. Aids to Construction of Criminal Statute

408. To put the meaning of the principle of legality beyond doubt, two important corollaries must be accepted. The first of these is that penal statutes must be strictly construed, this being a general rule which has stood the test of time. Secondly, they must not be given retroactive effect. This is in addition to the well-recognised paramount duty of the judicial interpreter, or judge, to read into the language of the legislature, honestly and faithfully, its plain and rational meaning and to promote its object. This rule

would appear to have been founded on the firm principle that it is for the legislature and not the court or judge to define a crime and prescribe its punishment.

409. A criminal statute is one in which the legislature intends to have the final result of inflicting suffering upon, or encroaching upon the liberty of, the individual. It is undoubtedly expected that, in such a situation, the intention to do so shall be clearly expressed and without ambiguity. The legislature will not allow such intention to be gathered from doubtful inferences from the words used. It will also not leave its intention to be inferred from unexpressed words. The intention should be manifest.

410. The rule of strict construction requires that the language of a particular provision shall be construed such that no cases shall be held to fall within it which do not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment. In the construction of a criminal statute no violence must be done to its language to include people within it who do not ordinarily fall within its express language. The accepted view is that if the legislature has not used words sufficiently comprehensive to include within its prohibition all the cases which should naturally fall within the mischief intended to be prevented, the interpreter is not competent to extend them. The interpreter of a provision can only determine whether the case is within the intention of a criminal statute by construction of the express language of the provision.

411. A strict construction requires that no case shall fall within a penal statute which does not comprise all the elements which, whether morally material or not, are in fact made to constitute the offence as defined by the statute. In other words, a strict construction requires that an offence is made out in accordance with the statute creating it only when all the essential ingredients, as prescribed by the statute, have been established.

412. It has always been the practice of courts not to fill omissions in legislation when this can be said to have been deliberate. It would seem, however, that where the omission was accidental, it is usual to supply the missing words to give the legislation the meaning intended. The paramount object in the construction of a criminal provision, or any other statute, is to ascertain the legislative intent. The rule of strict construction is not violated by giving the expression its full meaning or the alternative meaning which is more consonant with the legislative intent and best effectuates such intent.

413. The effect of strict construction of the provisions of a criminal statute is that where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of construction fail to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself[430]. This is why ambiguous criminal statutes are to be construed *contra proferentem*.

2. Interpretation of the Statute and Rules

414. It is obvious that the subject matter jurisdiction of the Tribunal is constituted by provisions of international law[431]. It follows, therefore, that recourse would be had to the various sources of international law as listed in Article 38 of the Statute of the ICJ, namely international conventions, custom, and general principles of law, as well as other subsidiary sources such as judicial decisions and the writings of jurists. Conversely, it is clear that the Tribunal is not mandated to apply the provisions of the national law of any particular legal system.

415. With respect to the content of the international humanitarian law to be applied by the Tribunal, the Secretary-General, in his Report, stated the position with unequivocal clarity, in paragraph 29, as follows:

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> It should be pointed out that, in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to 'legislate' that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law.

416. Further, at paragraph 34, explaining the application of the principle of *nullum crimen sine lege*, the Secretary-General stated:

> In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.

417. It is clear, therefore, that the Secretary-General was in these paragraphs referring to the application of existing customary international humanitarian law. This position avoids any misunderstanding that the absence of corresponding national legislation may cause. The Secretary-General went on, in paragraph 35 of the Report, to specify the customary law applicable as being,

> the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945.

418. The implication of these explanations is that the Security Council, not being a legislative body, cannot create offences. It therefore vests in the Tribunal the exercise of jurisdiction in respect of offences already recognised in international humanitarian law. The Statute does not create substantive law, but provides a forum and framework for the enforcement of existing international humanitarian law.

It is with these considerations in mind that the Trial Chamber addresses the elements of the offences charged in the Indictment.

ANNEX 3

Prosecutor v. Stakic, Judgement, Case No. IT-97-24-T, Trial Chamber, 31 July 2003 [Extract].

UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No.	IT-97-24-T
		Date:	31 July 2003
		Original:	English

IN TRIAL CHAMBER II

Before: **Judge Wolfgang Schomburg, Presiding**
Judge Volodymyr Vassylenko
Judge Carmen Maria Argibay

Registrar: **Mr. Hans Holthuis**

Judgement of: **31 July 2003**

PROSECUTOR

v.

MILOMIR STAKIĆ

JUDGEMENT

The Office of the Prosecutor:

Ms. Joanna Korner
Mr. Nicholas Koumjian
Ms. Ann Sutherland

Counsel for the Accused:

Mr. Branko Lukić
Mr. John Ostojic

III. THE INDIVIDUAL CRIMINAL RESPONSIBILITY OF DR. MILOMIR STAKIĆ FOR THE CRIMES ALLEGED – APPLICABLE LAW AND FINDINGS

A. General Principles of Interpretation of the Applicable Law

409. In this section of the Judgement, the Trial Chamber will provide its interpretation of the relevant law. It will restrict itself to an interpretation of the law to the extent necessary to provide a basis for determining the factual questions presented to this Chamber. In interpreting and applying the relevant law, the Trial Chamber has taken the following principles, *inter alia*, as its basis:

410. First, the Trial Chamber has interpreted the law in accordance with the Tribunal's Statute and Rules of Procedure and Evidence. It has also borne in mind the context in which the Statute was adopted, in particular resolution 827 (1993) establishing the International Tribunal under Chapter VII of the Charter of the United Nations.

411. Second, the Trial Chamber has considered carefully the Report of the Secretary-General Pursuant to Paragraph 2 of Security Council resolution 808 (1993)[900] according to which "the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law".[901] Against this background the Trial Chamber observes that whereas the norms laid down in Articles 2 to 5 of the Statute reflect customary international law, some of them also find their primary basis in various conventions. The Chamber has consequently deemed it appropriate to interpret any relevant convention in conformity with the general rules of interpretation of treaties set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 23 May 1969.[902]

412. Third, the Trial Chamber is aware that both substantive international criminal law and humanitarian law have developed since 1992. It has therefore been very cautious in interpreting the relevant rules and has assessed carefully whether the law constituted applicable law at the time the alleged crimes were committed. To do otherwise might lead to a violation of the fundamental principle of non-retroactive application of substantive criminal law.

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[900] S/25704, 3 May 1993.
[901] *Ibid*, para. 34.
[902] UNTS vol. 1155, p. 339, in force for Yugoslavia from 27 January 1980, succeeded to by Bosnia and Herzegovina on 1 September 1993 and by Serbia and Montenegro on 12 March 2001. See also *Tadić Decision on Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995, paras 79-93, describing the interpretation of Articles 2 and 3 of the Statute in accordance with the relevant conventions.

413. Fourth, as already stated, the Trial Chamber is aware that some of the norms laid down in Articles 2 to 5 of the Statute find their source in conventions drafted at various times and in different contexts. The Trial Chamber stresses that the provisions of the Statute do not form a coherent closed system of norms and that, in contrast to what may normally be assumed in the context of national codification of substantive criminal law norms, the norms laid down in Articles 2 to 5 must be interpreted against their own specific historical and contextual background. It follows that the Trial Chamber needs to exercise great caution in applying any systematic interpretation or *a contrario* reasoning that might normally follow from the interpretation of national codification of law. Ordinarily, the same interpretation should be given to the same phrase in a national code of substantive criminal norms even if the context differs. However, such a systematic interpretation cannot be assumed, and indeed is not always called for, when interpreting phrases in the relevant provisions of the Statute.

414. Fifth, when interpreting the relevant substantive criminal norms of the Statute, the Trial Chamber has used previous decisions of international tribunals, the primary source being judgements and decisions of this Tribunal and the Rwanda Tribunal, and in particular those of the Appeals Chamber. As a secondary source, the Trial Chamber has been guided by the case-law of the Nuremberg[903] and Tokyo[904] Tribunals, the tribunals established under Allied Control Council Law No. 10,[905] and the Tribunal for East Timor.[906]

415. Sixth, the Trial Chamber is restricted by the Indictment and cannot make a legal assessment of the facts that do not conform to the Indictment as would be possible in other legal systems. In addition, the Trial Chamber notes that some of the crimes listed as constituting acts of persecution (Count 6) are also charged separately, namely murder (Count 3), deportation (Count 7) and other inhumane acts (Count 8). Torture and rape, however, are charged only under the chapeau of persecution and not as separate counts. Imprisonment is not charged at all and extermination is charged separately and not as an act constituting persecution. The Trial Chamber is bound by these charges and will attempt to find a more systematic approach when answering the question whether to convict cumulatively.

416. The Trial Chamber explicitly distances itself from the Defence submission that the principle *in dubio pro reo* should apply as a principle for the interpretation of the substantive criminal law of

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[903] Trial of Major War Criminals Before the International Military Tribunal, Nuremberg, 14 Nov 1945 – 1 Oct 1946.
[904] The International Military Tribunal for the Far East, Tokyo, 29 April 1946 – 12 November 1948.
[905] Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 (Department of State Bulletin, 15 (384), 10 November 1946, 862).
[906] East Timorese Transitional Administration, Dili District Court, Special Panel for Serious Crimes.

the Statute.[907] As this principle is applicable to findings of fact and not of law, the Trial Chamber has not taken it into account in its interpretation of the law.

B. Modes of Participation: Articles 7(1) and 7(3) of the Statute

417. The Accused, Dr. Milomir Stakić, is charged under Article 7(1) of the Statute in its entirety with all the Counts in the Indictment. Article 7(1) of the Statute states:

> A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

418. The Trial Chamber recalls its Decision on Rule 98 *bis* Motion for Judgement of Acquittal insofar as the Accused was acquitted of the charge of instigation as set out in Counts 3 to 8.[908]

419. In addition to criminal responsibility pursuant to Article 7(1) of the Statute, the Prosecution alleges that Dr. Milomir Stakić incurred criminal responsibility as a superior[909] pursuant to Article 7(3) of the Statute in respect of all Counts in the Indictment.

420. Article 7(3) of the Statute of the Tribunal states:

> The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

1. The Applicable Law

(a) Committing

421. In view of the fact that the Prosecution bases its charges primarily on the concept of joint criminal enterprise as one definition of "committing", the Trial Chamber will first consider joint criminal enterprise.

(i) Arguments of the Parties

a. Prosecution

[907] See Defence Final Brief, paras 33-42.
[908] Rule 98 *bis* Motion for Judgement of Acquittal, 31 October 2002, para. 108.
[909] While the Trial Chamber views the terms "superior responsibility" and "command responsibility" as synonymous, in this Judgement it will use the term "superior" rather than "commander" with regard to Dr. Stakić, as he was not a member of the military and the term "commander" is more commonly used when describing persons in a military or para-military structure vested with some form of authority.

ANNEX 4

Prosecutor v. Hadzihasanovic et al., Decision on Joint Challenge to Jurisdiction, Case No. IT-01-47-PT, Trial Chamber, 12 November 2002 [Extract].

UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No.	IT-01-47-PT
		Date:	12 November 2002
		Original:	English

IN THE TRIAL CHAMBER

Before: **Judge Wolfgang Schomburg, Presiding**
Judge Florence Ndpele Mwachande Mumba
Judge Carmel Agius

Registrar: **Mr. Hans Holthuis**

Decision of: **12 November 2002**

PROSECUTOR

v.

ENVER HADŽIHASANOVIĆ
MEHMED ALAGIĆ
AMIR KUBURA

DECISION ON JOINT CHALLENGE TO JURISDICTION

The Office of the Prosecutor:

Mr. Ekkehard Withopf

Counsel for the Accused:

Ms. Edina Rešidović and Mr. Stéphane Bourgon for Enver Hadžihasanović
Ms. Vasvija Vidović and Mr. John Jones for Mehmed Alagić
Mr. Fahrudin Ibrišimović and Mr. Rodney Dixon for Amir Kubura

B. General Principles

55 ### In deciding upon the present issue, namely whether international law at the relevant time did or did not provide for criminal responsibility of superiors for omissions as foreseen in Article 7(3), pursuant to the doctrine of command responsibility, in the context of non-international armed conflict, and therefore, whether charges to that effect fall within the jurisdiction 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 Trial Chamber is duty-bound to fully respect the principle of *nullum crimen sine lege* in this broader context. The Trial Chamber observes that the question before it is limited *de facto* to superiors serving in armed forces and who are held responsible in this capacity. The Defence in their submissions rely on this principle and argue that this principle stands in the way of holding the Accused in this case responsible under command responsibility for violations of humanitarian law as the conflict in this case is characterised as an "armed conflict", and not as an international armed conflict.

56 ### The principle of *nullum crimen sine lege* is a fundamental principle in criminal law and in international human rights law.[102] This principle is enshrined in numerous international conventions including *inter alia*:

- Article 11(2) of the Universal Declaration of Human Rights of 10 December 1948[103];
- Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") of 4 November 1950; [104]
- Article 15 of the International Covenant on Civil and Political Rights ("ICCPR") of 16 December 1966; [105]
- Article 9 of the American Convention on Human Rights of 22 November 1969;[106]
- Article 6(2)(c) of Additional Protocol II to the Geneva Conventions of 8 June 1977;[107]
- and Article 10 of the Draft Articles on the Draft Code of Crimes against the Peace and Security of Mankind of 1991.[108]

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[102] Notably, no derogation is permitted from the principle of *nullum crimen sine lege* in times of war or other public emergency in the ECHR, Art. 15.
[103] G.A. Res 217A (III), U.N. Doc. A/811 (1948).
[104] 213 U.N.T.S. 221; European Treaty Series ("ETS") 005.
[105] 993 U.N.T.S. 171.

No doubt the same principle is reflected in nearly all national jurisdictions on a global level. In some jurisdictions, the principle of *nullum crimen sine lege* is even enshrined in the constitution.[109]

57 ### While the Statute of the International Tribunal does not contain a specific article stating this general principle of law, the Trial Chamber observes that the Secretary-General's Report states that:

> Fit is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognized standards are, *in particular*, contained in article 14 of the International Covenant on Civil and Political Rights.[110]

Furthermore, the jurisdictional requirement contained in Article 1 indirectly reflects it:

> The International Tribunal shall have the power to prosecute persons responsible for *serious violations of international humanitarian law* F...g.

In commentaries on the draft Statute of this Tribunal, the principle of *nullum crimen sine lege* was discussed in reference to the substantive offences being considered for inclusion in the Statute, and the amount of specificity required in the Statute.[111] The Secretary-General's Report explicitly comments on this issue:

> in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to "legislate" that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law.[112]

Specifically on the principle of *nullum crimen sine lege*, the Secretary-General said in his report:

> the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to the specific conventions does not arise.[113]

58 ### Under the jurisprudence of the European Court of Human Rights ("ECtHR"), Article 7 of the ECHR[114] allows for the "gradual clarification" of the rules of criminal liability through judicial

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[106] 1114 U.N.T.S. 123.
[107] 1977 U.N.J.Y.B. 135.
[108] Draft Articles on the Draft Code of Crimes against the Peace and Security of Mankind (as revised by the International Law Commission through 1991). First Adopted by the U.N. ILC, 4 December 1954, U.N. Doc. A/46/405 (1991), 30 I.L.M. 1554 (1991).
[109] See, e.g., Basic Law (*Grundgesetz*) for the Federal Republic of Germany, which enshrines the principle of *nullum crimen sine lege* in Art. 103 Abs. II GG: "Eine Tat kann nur bestraft werden, wenn die Strafbarkeit gesetzlich bestimmt war, bevor die Tat begangen wurde" ("An act may be punished only if it was defined by a law as a criminal offense before the act was committed."). See also, Constitution of the United States of America, Art. 1, Sect. (9)(3): "No Bill of Attainder or *ex post facto* law shall be passed."
[110] Secretary-General's Report, para. 106. (emphasis added).
[111] See, e.g. S/25504, p.16.
[112] Secretary-General's Report, para. 29.
[113] Ibid, para. 34.
[114] Article 7(1) of the ECHR provides, in part: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was

interpretation.[115] It is not necessary that the elements of an offence are defined, but rather that general description of the prohibited conduct be provided.[116] In the case of *S.W. v. U.K.*, in relation to the principle of *nullum crimen sine lege*, the European Court of Human Rights held:

> However clearly drafted a legal provision may be, in any system of law, including criminal law, *there is an inevitable element of judicial interpretation.* There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances ... Ftğhe progressive development of the criminal law through judicial law-making is a *well entrenched and necessary part of legal tradition. Article 7 cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence if the offence and could be reasonably foreseen.*[117]

The European Court of Human Rights found that the term "law" in Article 7(1) of the ECHR includes both written and unwritten law, and "implies qualitative requirements, notably those of accessibility and foreseeability."[118]

59 ### Article 7(2) of the ECHR states that:

> This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.[119]

60 ### The Trial Chamber in the *Čelebići* case discussed the principle of *nullum crimen sine lege* in detail. From this analysis, the following observations are particularly relevant:

> 402. The principles *nullum crimen sine lege* and *nulla poena sine lege* are well recognised in the world's major criminal justice systems as being fundamental principles of criminality. Another such fundamental principle is the prohibition against *ex post facto* criminal laws with its derivative rule of non-retroactive application of criminal laws and criminal sanctions. Associated with these principles are the requirement of specificity and the prohibition of ambiguity in criminal legislation. These considerations are the solid pillars on which the principle of legality stands. Without the satisfaction of these principles no criminalisation process can be accomplished and recognised.

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committed." See also, the Statute for the ICC, Art. 22, which provides: 1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court. 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted. 3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

[115] ECtHR, *S.W. v. UK* (1995). The fundamental principles reflected in *S.W. v. UK* has been applied consistently by the European Court. See *Case of Streletz, Kessler and Krenz v. Germany* (2001), para. 49.

[116] ECtHR, *S.W. v. UK* (1995), para. 35, citing *Kokkinakis v. Greece* (1993), para. 52: "an offence must be clearly defined in law ... Fandğ this requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable." See also, *Handyside v. UK* (1974).

[117] ECtHR, *S.W. v. UK* (1995), para. 36. (emphasis added).

[118] Ibid, para. 35.

[119] According to Harris, O'Boyle and Warbrick, this provision implies that: "Fiğf there is no treaty binding upon the parties to a dispute and if no rule of customary international law based upon state practice applies, recourse may be had to 'general principles of law recognised by civilised nations', i.e. by the states members of the international community, to fill the gap." David J. Harris, Michael O'Boyle and Colin Warbrick, Law of the European Convention on Human Rights (London: Butterworths 1995) p. 282.

> 403. The above principles of legality exist and are recognised in all the world's major criminal justice systems. It is not certain to what extent they have been admitted as part of international legal practice, separate and apart from the existence of the national legal systems. This is essentially because of the different methods of criminalisation of conduct in national and international criminal justice systems.
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> 404. Whereas the criminalisation process in a national criminal justice system depends upon legislation which dictates the time when conduct is prohibited and the content of such prohibition, the international criminal justice system attains the same objective through treaties or conventions, or after a customary practice of the unilateral enforcement of a prohibition by States.
>
> 405. It could be postulated, therefore, that the principles of legality in international criminal law are different from their related national legal systems with respect to their application and standards. They appear to be distinctive, in the *obvious objective of maintaining a balance between the preservation of justice and fairness towards the accused and taking into account the preservation of world order.* To this end, the affected State or States must take into account the following factors, *inter alia*: the nature of international law; the absence of international legislative policies and standards; the *ad hoc* processes of technical drafting; and the basic assumption that international criminal law norms will be embodied into the national criminal law of the various States.
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> [...]
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> 412. It has always been the practice of courts not to fill omissions in legislation when this can be said to have been deliberate. It would seem, however, that where the omission was accidental, it is usual to supply the missing words to give the legislation the meaning intended. *The paramount object in the construction of a criminal provision, or any other statute, is to ascertain the legislative intent. The rule of strict construction is not violated by giving the expression its full meaning or the alternative meaning which is more consonant with the legislative intent and best effectuates such intent.*[120]

61 ### The Appeals Chamber, in the *Aleksovski* Appeal Judgement, found that the principle of legality requires "that a person may only be found guilty of a crime in respect of acts which constituted a violation of the law at the time of their commission."[121] It further stated that the "principle does not prevent a court, either at the national or international level, from determining an issue through a process of interpretation and clarification as to the elements of a particular crime; nor does it prevent a court from relying on previous decisions which reflect an interpretation as to the meaning to be ascribed to particular ingredients of a crime."[122]

62 ### This Trial Chamber understands the principle of *nullum crimen sine lege*, a constitutive element of the principle of legality, in relation to the factual criminality of a particular *conduct*. In interpreting the principle of *nullum crimen sine lege*, it is critical to determine whether the underlying conduct at the time of its commission was punishable. The emphasis on conduct, rather than on the specific description of the offence in substantive criminal law, is of primary relevance. This interpretation of the principle is supported by the subsequent declaratory formulation of the principle of *nullum crimen sine lege* in Article 22 of the ICC Statute:

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[120] *Čelebići* Trial Judgement, relevant parts from paras 402-412. (emphasis added).
[121] *Aleksovski* Appeal Judgement, para. 126.
[122] Ibid, para. 127.

> A person shall not be criminally responsible under this Statute unless *the conduct* in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.[123]

This interpretation is further supported by the relevant practice between States in the field of extradition. In order to determine whether the requirement of double criminality is fulfilled, the test to be applied is not so much whether a certain conduct is qualified in the respective national jurisdiction in the same way, but whether the conduct in itself is criminalised under those jurisdictions.[124] The Trial Chamber is fully aware of the different contexts in which these two principles are applied. However, the Trial Chamber observes the similarity of the underlying problem and legal guarantee. In order to meet the principle of *nullum crimen sine lege*, it must only be foreseeable and accessible to a possible perpetrator that his concrete conduct was punishable at the time of commission. Whether his conduct was punishable as an act or an omission, or whether the conduct may lead to criminal responsibility, disciplinary responsibility or other sanctions is not of material importance.[125]

63 ### Apart from the obligation to respect the principle of *nullum crimen sine lege*, the Trial Chamber is bound to interpret the Statute in accordance with Article 31 of the Vienna Convention on the Law of Treaties:

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[123] ICC Statute, Art. 22(1). (emphasis added).

[124] See, e.g., *Gesetz über die internationale Rechtshilfe in Strafsachen vom 23. Dezember 1982*, § 3 Abs. 2 (German Law on International Cooperation in Criminal Matters of 23 December 1982, Section 3, Para. 2): "Die Auslieferung zur Verfolgung ist nur zulässig, wenn die Tat nach deutschem Recht im Höchstmaß mit Freiheitsstrafe von mindestens einem Jahr bedroht ist oder wenn sie bei sinngemäßer Umstellung des Sachverhalts nach deutschem Recht mit einer solchen Strafe bedroht wäre." ("Extradition for the purpose of prosecution shall be granted only if the act is punishable under German law by a maximum of at least one year of imprisonment or if, *after analogous conversion of the facts*, the act would, under German law, be punishable by such a penalty.") Emphasis added. See Otto Lagodny in Wolfgang Schomburg and Otto Lagodny, *Internationale Rechtshilfe in Strafsachen/International Cooperation in Criminal Matters*, Third Edition (Munich: C. H. Beck, 1998), § 3 Abs. 2, Rdn. 25-29; "Einleitung", Rdn. 64.

[125] While the principle of *nullum crimen sine lege* "appears to have the force of an interpretative presumption in common-law systems", civil law systems generally accord it greater significance. Susan Lamb, "*Nullum crimen, nulla poena sine lege* in International Criminal Law," in Antonio Cassese, Paola Gaeta, John R.W.D. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), p. 740. See also M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (Dordrecht: Martinus Nijhoff Publishers, 1992), p. 91. In Germany, as already mentioned, the principle of *nullum crimen sine lege praevia* is elevated to constitutional rank (Article 103 Abs. II GG). For an authoritative discussion, see Eberhard Schmidt-Aßmann in Theodor Maunz et al., *Grundgesetz: Kommentar* (Munich: C. H. Beck, 1992), Art. 103 Abs. II GG, Rdn. 163-256. For a discussion of the principle of legality in international criminal law, see, for example, Bassiouni, *Crimes Against Humanity in International Criminal Law*, pp. 87-146; and Lamb, "*Nullum crimen, nulla poena sine lege* in International Criminal Law," pp. 733-766. On the principle of legality in American law, see, for example, Paul H. Robinson, *Fundamentals of Criminal Law*, Second Edition (Boston: Little, Brown, 1995), pp. 117-141. On the principle of legality in English law, frequently rendered in terms of "the rule of law," see, for example, Andrew Ashworth, *Principles of Criminal Law*, Third Edition (Oxford: Oxford University Press, 1999), esp. pp. 70-87. On the principle of *nullum crimen sine lege* in German criminal law, see also Claus Roxin, *Strafrecht: Allgemeiner Teil, Band I: Grundlagen, Der Aufbau der Verbrechenslehre*, Third Edition (Munich: C. H. Beck, 1997), § 5 I Rdn. 3; and Hans-Heinrich Jeschek and Thomas Weigend, *Lehrbuch des Strafrechts: Allgemeiner Teil*, Fifth Edition (Berlin: Duncker und Humblot, 1996), § 15 IV.

> in good faith, in accordance with the *ordinary meaning of the terms* in their context and in the light of its *object and purpose.* [126]

In order to do so, the Trial Chamber must take into account first the language of the Statute and second the object and purpose of this Statute, as becomes clear from *inter alia* the intention of the drafters of the Statute and of the Security Council. It is for this reason that the Trial Chamber will provide below a detailed overview of the different proposals that formed the basis for the Statute, the report of the Secretary-General, the relevant provisions of the Statute and the discussions in the Security Council at the moment of adoption of the Statute.

64 ### And as, according to Article 1 of the Statute, the International Tribunal has the power to prosecute persons responsible for serious violations of international humanitarian law, the Trial Chamber must consider as well the principles and purposes of this part of international law. International humanitarian law has, as its primary purpose, to regulate the means and methods of warfare and to protect persons not actively participating in armed conflict from harm. As the Trial Chamber held in *Furundžija* the general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law.[127] While international humanitarian law is largely derived from treaties and conventions, it also consists of a number of principles that have not been explicitly laid down in legal instruments, but are still considered fundamental to this body of law. Of fundamental importance in this respect is the so-called Martens clause, which can be found in numerous conventions in the field of international humanitarian law, ranging from the Hague Regulations to the Additional Protocols to the Geneva Conventions. According to this clause:

> Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result form the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.[128]

Although this formulation was first used in the context of a convention applicable to international armed conflicts, this clause has since been considered generally applicable to all types of armed conflicts. As such, it can also be found in the preamble to Additional Protocol II.

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[126] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331. (emphasis added).

[127] *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998, para. 183: "The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person."

[128] This is the text taken from the Hague Regulations, 7th preambular paragraph.

65 ### One of these fundamental principles underlying international humanitarian law is the principle of criminal responsibility for violations of such law. Although such responsibility is not always explicitly laid down in international humanitarian conventional instruments, it has been applied by national and international judicial organs in the course of the last century. Other fundamental principles, as will be discussed below, are the principle of responsible command and the principle of command responsibility. Both principles have sometimes been included in conventional instruments, but not always.

66 ### Finally, the purpose behind the principle of responsible command and the principle of command responsibility is to promote and ensure the compliance with the rules of international humanitarian law. The commander must act responsibly and provide some kind of organisational structure, has to ensure that subordinates observe the rules of armed conflict, and must prevent violations of such norms or, if they already have taken place, ensure that adequate measures are taken.

ANNEX 5

Prosecutor v. Rutaganda, Judgement and Sentence, Case No. ICTR-96-3-T, Trial Chamber I, 6 December 1999 [Extract].

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United Nations
Nations Unies

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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Applicability of Common Article 3 and Additional Protocol II

86. In applying Article 4 of the Statute, the Chamber must be satisfied that the principle of *nullum crimen sine lege* is not violated. Indeed, the creation of the Tribunal, in response to the alleged crimes perpetrated in Rwanda in 1994, raised the question all too familiar to the Nuremberg Tribunal and the ICTY, that of jurisdictions applying *ex post facto laws* in violation of this principle. In establishing the ICTY, the Secretary-General dealt with this issue by asserting that in the application of the principle of *nullum crimen sine lege* the International Tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law. However, in the case of this Tribunal, it was incumbent on the Chambers to decide whether or not the said principle had been adhered to(23), and whether individuals incurred individual criminal responsibility for violations of these international instruments.
87. In the *Akayesu Judgement*, the Chamber expressed its opinion that the "norms of Common Article 3 had acquired the status of customary law in that most States, by their domestic penal codes, have criminalized acts which, if committed during internal armed conflict, would constitute violations of Common Article 3". The finding of the Trial Chamber in this regard followed the precedents set by the ICTY(24), which established the customary nature of Common Article 3. Moreover, the Chamber in the *Akayesu Judgement* held that, although not all of Additional Protocol II could be said to be customary law, the guarantees contained in Article 4(2) (Fundamental Guarantees) thereof, which reaffirm and supplement Common Article 3, form part of existing international law. All of the norms reproduced in Article 4 of the Statute are covered by Article 4(2) of Additional Protocol II.
88. Furthermore, the Trial Chamber in the *Akayesu Judgement* concluded that violations of these norms would entail, as a matter of customary international law, individual responsibility for the perpetrator. It was also recalled that as Rwanda had become a party to the 1949 Geneva Conventions and their 1977 Additional Protocols, on 5 May 1964 and 19 November 1984, respectively, these instruments were in any case in force in the territory of Rwanda in 1994, and formed part of Rwandan law. Thus, Rwandan nationals who violated these international instruments incorporated into national law, including those offences as incorporated in Article 4 of the Statute, could be tried before the Rwandan national courts(25).
89. In the *Kayishema and Ruzindana Judgement*, Trial Chamber II deemed it unnecessary to delve into the question as to whether the instruments incorporated in Article 4 of the Statute should be considered as customary international law. Rather the Trial Chamber found that the instruments were in force in the territory of Rwanda in 1994 and that persons could be prosecuted for breaches thereof on the basis that Rwanda had become a party to the Geneva Conventions and their Additional Protocols. The offences enumerated in Article 4 of the Statute, said the Trial Chamber, also constituted offences under Rwandan law(26).
90. Thus it is clear that, at the time the crimes alleged in the Indictment were perpetrated, persons were bound to respect the guarantees provided for by the 1949 Geneva Conventions and their 1977 Additional Protocols, as incorporated in Article 4 of the Statute. Violations thereof, as a matter of custom and convention, incurred individual responsibility, and could result in the prosecution of the authors of the offences.

The Nature of the Conflict

91. The 1949 Geneva Conventions and Additional Protocol I generally apply to international armed conflicts, whereas Common Article 3 extends a minimum threshold of humanitarian protection to persons affected by non-international armed conflicts. This protection has been enhanced and developed in the 1977 Additional Protocol II. Offences alleged to be covered by Article 4 of the Statute must, as a preliminary matter, have been committed in the context of a conflict of a non-

international character satisfying the requirements of Common Article 3, which applies to "armed conflict not of an international character" and Additional Protocol II, applicable to conflicts which "take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".

92. First to be addressed is the question of what constitutes an armed conflict under Common Article 3. This issue was dealt with extensively during the 1949 Diplomatic Conference of Geneva leading to the adoption of the Conventions. Of concern to many participating States was the ambiguous and vague nature of the term "armed conflict". Although the Conference failed to provide a precise minimum threshold as to what constitutes an "armed conflict", it is clear that mere acts of banditry, internal disturbances and tensions, and unorganized and short-lived insurrections are to be ruled out. The International Committee of the Red Cross (the "ICRC"), specifies further that conflicts referred to in Common Article 3 are armed conflicts with armed forces on either side engaged in hostilities: conflicts, in short, which are in many respects similar to an international conflict, but take place within the confines of a single country(27). The ICTY Appeals Chamber offered guidance on the matter by holding "that an armed conflict exists whenever there is [...] protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until [...] in the case of internal conflicts, a peaceful settlement is reached"(28).

93. It can thence be seen that the definition of an armed conflict *per se* is termed in the abstract, and whether or not a situation can be described as an "armed conflict", meeting the criteria of Common Article 3, is to be decided upon on a case-by-case basis. Hence, in dealing with this issue, the *Akayesu Judgement* suggested an "evaluation test", whereby it is necessary to evaluate the intensity and the organization of the parties to the conflict to make a finding on the existence of an armed conflict. This approach also finds favour with the Trial Chamber in this instance.

94. In addition to armed conflicts of a non-international character, satisfying the requirements of Common Article 3, under Article 4 of the Statute, the Tribunal has the power to prosecute persons responsible for serious violations of the 1977 Additional Protocol II, a legal instrument whose overall purpose is to afford protection to persons affected by non-international armed conflicts. As aforesaid, this instrument develops and supplements the rules contained in Common Article 3, without modifying its existing conditions of applicability. Additional Protocol II reaffirms Common Article 3, which, although it objectively characterized internal armed conflicts, lacked clarity and enabled the States to have a wide area of discretion in its application. Thus the impetus behind the Conference of Government Experts and the Diplomatic Conference(29) in this regard was to improve the protection afforded to victims in non-international armed conflicts and to develop objective criteria which would not be dependent on the subjective judgements of the parties. The result is, on the one hand, that conflicts covered by Additional Protocol II have a higher intensity threshold than Common Article 3, and on the other, that Additional Protocol II is immediately applicable once the defined material conditions have been fulfilled. If an internal armed conflict meets the material conditions of Additional Protocol II, it then also automatically satisfies the threshold requirements of the broader Common Article 3.

95. Pursuant to Article 1(1) of Additional Protocol II the material requirements to be satisfied for the applicability of Additional Protocol II are as follows:

(i) an armed conflict takes place in the territory of a High Contracting Party, between its armed forces and dissident armed forces or other organized armed groups;

(ii) the dissident armed forces or other organized armed groups are under responsible command;

(iii) the dissident armed forces or other organized armed groups are able to exercise such control over a part of their territory as to enable them to carry out sustained and concerted military operations; and

(iv) the dissident armed forces or other organized armed groups are able to implement Additional Protocol II.

Ratione Personae

The Class of Perpetrator

96. Under Common Article 3 of the Geneva Conventions, the perpetrator must belong to a "Party" to the conflict, whereas under Additional Protocol II[(30)] the perpetrator must be a member of the "armed forces" of either the Government or of the dissidents. There has been much discussion on the exact definition of "armed forces" and "Party", discussion, which in the opinion of the Chamber detracts from the overall protective purpose of these instruments. A too restrictive definition of these terms would likewise dilute the protection afforded by these instruments to the victims and potential victims of armed conflicts. Hence, the category of persons covered by these terms should not be limited to commanders and combatants but should be interpreted in their broadest sense.
97. Moreover, it is well established from the jurisprudence of International Tribunals that civilians can be held as accountable as members of the armed forces or of a Party to the conflict. In this regard, reference should be made to the *Akayesu Judgement*, where it was held that:

"It is, in fact, well-established, at least since the Tokyo trials, that civilians may be held responsible for violations of international humanitarian law. Hirota, the former Foreign Minister of Japan, was convicted at Tokyo for crimes committed during the rape of Nanking. Other post-World War II trials unequivocally support the imposition of individual criminal liability for war crimes on civilians where they have a link or connection with a Party to the conflict. The principle of holding civilians liable for breaches of the laws of war is, moreover, favored by a consideration of the humanitarian object and purpose of the Geneva Conventions and the Additional Protocols, which is to protect war victims from atrocities."[(31)]

98. Consequently, the duties and responsibilities of the Geneva Conventions and the Additional Protocols will normally apply to individuals of all ranks belonging to the armed forces under the military command of either of the belligerent parties, or to individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts. It will be a matter of evidence to establish if the accused falls into the category of persons who can be held individually criminally responsible for serious violations of these international instruments, and in this case, of the provisions of Article 4 of the Statute.

ANNEX 6

Prosecutor v. Delalic et al. (Celebici case), Judgment, Case No. IT-96-21-A, App. Ch., 20 February 2001 [Extract].

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IN THE APPEALS CHAMBER

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

Registrar:
Mr Hans Holthuis

Judgement of: 20 February 2001

PROSECUTOR

V.

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

("*CELEBICI* Case")

JUDGEMENT

Counsel for the Accused:

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

The Office of the Prosecutor:

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

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

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152. C. Whether Common Article 3 Imposes Individual Criminal Responsibility

1. What is the Applicable Law?

153. The Appeals Chamber in the *Tadic* Jurisdiction Decision, in analysing whether common Article 3 attracts individual criminal responsibility first noted that "common Article 3 of the Geneva Conventions contains no explicit reference to criminal liability for violation of its provisions".[198] Referring however to the findings of the International Military Tribunal at Nuremberg [199] that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches, provided certain conditions are fulfilled, it found:

> Applying the foregoing criteria to the violations at issue here, we have no doubt that they entail individual criminal responsibility, regardless of whether they are committed in internal or international conflicts. Principles and rules of humanitarian law reflect "elementary considerations of humanity" widely recognised as the mandatory minimum for conduct in armed conflict of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition .[200]

154. In the Appeals Chamber's opinion, this conclusion was also supported by "many elements of international practice (which) show that States intend to criminalise serious breaches of customary rules and principles on internal conflicts".[201] Specific reference was made to prosecutions before Nigerian courts,[202] national military manuals,[203] national legislation (including the law of the former Yugoslavia adopted by Bosnia and Herzegovina after its independence),[204] and resolutions adopted unanimously by the Security Council.[205]

155. The Appeals Chamber found further support for its conclusion in the law of the former Yugoslavia as it stood at the time of the offences alleged in the Indictment :

> Nationals of the former Yugoslavia as well as, at present, those of Bosnia-Herzegovina were therefore aware, or should have been aware, that they were amenable to the jurisdiction of their national criminal courts in cases of violation of international humanitarian law.[206]

156. Reliance was also placed by the Appeals Chamber on the agreement reached under the auspices of the ICRC on 22 May 1992, in order to conclude that the breaches of international law occurring within the context of the conflict, regarded as internal by the agreement, could be criminally sanctioned.[207]

157. The appellants contend that the evidence presented in the *Tadic* Jurisdiction Decision does not establish that common Article 3 is customary international law that creates individual criminal responsibility because there is no showing of State practice and *opinio juris*.[208] Additionally, the appellants submit that at the time of the adoption of the Geneva Conventions in 1949, common Article 3 was excluded from the grave breaches system and thus did not fall within the scheme providing for individual criminal responsibility .[209] In their view, the position had not changed at the time of the adoption of Additional Protocol II in 1977. It is further argued that common Article 3 imposes duties on States only and is meant to be enforced by domestic legal systems.[210]

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158. In addition, the appellants argue that solid evidence exists which demonstrates that common Article 3 is *not* a rule of customary law which imposes liability on natural persons.[211] Particular emphasis is placed on the ICTR Statute and the Secretary-General's Report which states that common Article 3 was criminalised for the first time in the ICTR Statute .[212]

159. The Prosecution argues that the *Tadic* Jurisdiction Decision previously disposed of the issue and should be followed. The Prosecution submits that, if violations of the international laws of war have traditionally been regarded as criminal under international law, there is no reason of principle why once those laws came to be extended to the context of internal armed conflicts, their violation in that context should not have been criminal, at least in the absence of clear indications to the contrary.[213] It is further submitted that since 1949, customary law and international humanitarian law have developed to such an extent that today universal jurisdiction does not only exist in relation to the grave breaches of the Geneva Conventions but also in relation to other types of serious violations of international humanitarian law .[214] The Prosecution contends that this conclusion is not contrary to the principle of legality, which does not preclude development of criminal law, so long as those developments do not criminalise conduct which at the time it was committed could reasonably have been regarded as legitimate .[215]

160. Whereas, as a matter of strict treaty law, provision is made only for the prosecution of grave breaches committed within the context of an international conflict, the Appeals Chamber in *Tadic* found that as a matter of customary law, breaches of international humanitarian law committed in internal conflicts, including violations of common Article 3, could also attract individual criminal responsibility.

161. Following the appellants' argument, two different regimes of criminal responsibility would exist based on the different legal characterisation of an armed conflict. As a consequence, the same horrendous conduct committed in an internal conflict could not be punished. The Appeals Chamber finds that the arguments put forward by the appellants do not withstand scrutiny.

162. As concluded by the Appeals Chamber in *Tadic*, the fact that common Article 3 does not contain an explicit reference to individual criminal liability does not necessarily bear the consequence that there is no possibility to sanction criminally a violation of this rule. The IMT indeed followed a similar approach, as recalled in the *Tadic* Jurisdiction Decision when the Appeals Chamber found that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches.[216] The Nuremberg Tribunal clearly established that individual acts prohibited by international law constitute criminal offences even though there was no provision regarding the jurisdiction to try violations: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".[217]

163. The appellants argue that the exclusion of common Article 3 from the Geneva Conventions grave breaches system, which provides for universal jurisdiction, has the necessary consequence that common Article 3 attracts no individual criminal responsibility. This is misconceived. In the Appeals Chamber's view, the appellants' argument fails to make a distinction between two separate issues, the issue of criminalisation on the one hand, and the issue of jurisdiction on the other. Criminalisation may be defined as the act of outlawing or making illegal certain behaviour.[218] Jurisdiction relates more to the judicial authority to prosecute those criminal acts. These two concepts do not necessarily always correspond. The Appeals Chamber is in no doubt that the acts enumerated in common Article 3 were intended to be criminalised in 1949, as they

were clearly intended to be illegal within the international legal order. The language of common Article 3 clearly prohibits fundamental offences such as murder and torture. However, no jurisdictional or enforcement mechanism was provided for in the Geneva Conventions at the time.

164. This interpretation is supported by the provisions of the Geneva Conventions themselves, which impose on State parties the duty "to respect and ensure respect for the present Conventions in all circumstances".[219] Common Article 1 thus imposes upon State parties, upon ratification, an obligation to implement the provisions of the Geneva Conventions in their domestic legislation . This obligation clearly covers the Conventions in their entirety and this obligation thus includes common Article 3. The ICJ in the *Nicaragua* case found that common Article 1 also applies to internal conflicts.[220]

165. In addition, the third paragraph of Article 146 of Geneva Convention IV, after setting out the universal jurisdiction mechanism applicable to grave breaches, provides :

> Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

166. The ICRC Commentary (GC IV) stated in relation to this provision that "there is no doubt that what is primarily meant is the repression of breaches other than the grave breaches listed and only in the second place administrative measures to ensure respect for the provisions of the Convention".[221] It then concluded:

> This shows that all breaches of the Convention should be repressed by national legislation . The Contracting Parties who have taken measures to repress the various grave breaches of the Convention and have fixed an appropriate penalty in each case should at least insert in their legislation a general clause providing for the punishment of other breaches. Furthermore, under the terms of this paragraph, the authorities of the Contracting Parties should give all those subordinate to them instructions in conformity with the Convention and should institute judicial or disciplinary punishment for breaches of the Convention.[222]

167. This, in the Appeals Chamber's view, clearly demonstrates that, as these provisions do not provide for exceptions, the Geneva Conventions envisaged that violations of common Article 3 could entail individual criminal responsibility under domestic law, which is accepted by the appellants. The absence of such legislation providing for the repression of such violations would, arguably, be inconsistent with the general obligation contained in common Article 1 of the Conventions.

168. As referred to by the Appeals Chamber in the *Tadic* Jurisdiction Decision , States have adopted domestic legislation providing for the prosecution of violations of common Article 3. Since 1995, several more States have adopted legislation criminalising violations of common Article 3,[223] thus further confirming the conclusion that States regard violations of common Article 3 as constituting crimes. Prosecutions based on common Article 3 under domestic legislation have also taken place.[224]

169. The Appeals Chamber is also not convinced by the appellants' submission that sanctions for violations of common Article 3 are intended to be enforced at the national level only. In this

regard, the Appeals Chambers refers to its previous conclusion on the customary nature of common Article 3 and its incorporation in Article 3 of the Statute.

170. The argument that the ICTR Statute, which is concerned with an internal conflict , made violations of common Article 3 subject to prosecution at the international level, in the Appeals Chamber's opinion, reinforces this interpretation. The Secretary -General's statement that violations of common Article 3 of the Geneva Conventions were criminalised for the first time, meant that provisions for international jurisdiction over such violations were *expressly* made for the first time. This is so because the Security Council when it established the ICTR was not creating new law but was *inter alia* codifying existing customary rules for the purposes of the jurisdiction of the ICTR. In the Appeals Chamber's view, in establishing this Tribunal, the Security Council simply created an international mechanism for the prosecution of crimes which were already the subject of individual criminal responsibility .

171. The Appeals Chamber is unable to find any reason of principle why, once the application of rules of international humanitarian law came to be extended (albeit in an attenuated form) to the context of internal armed conflicts, their violation in that context could not be criminally enforced at the international level. This is especially true in relation to prosecution conducted by an international tribunal created by the UN Security Council, in a situation where it specifically called for the prosecution of persons responsible for violations of humanitarian law in an armed conflict regarded as constituting a threat to international peace and security pursuant to Chapter VII of the UN Charter.

172. In light of the fact that the majority of the conflicts in the contemporary world are internal, to maintain a distinction between the two legal regimes and their criminal consequences in respect of similarly egregious acts because of the difference in nature of the conflicts would ignore the very purpose of the Geneva Conventions, which is to protect the dignity of the human person.[225]

173. The Appeals Chamber is similarly unconvinced by the appellants' argument that such an interpretation of common Article 3 violates the principle of legality. The scope of this principle was discussed in the *Aleksovski* Appeal Judgement , which held that the principle of *nullem crimen sine lege* does not prevent a court from interpreting and clarifying the elements of a particular crime.[226] It is universally acknowledged that the acts enumerated in common Article 3 are wrongful and shock the conscience of civilised people, and thus are, in the language of Article 15(2) of the ICCPR, "criminal according to the general principles of law recognised by civilised nations."

174. The Appeals Chamber is unable to find any cogent reasons in the interests of justice to depart from the conclusions on this issue in the *Tadic* Jurisdiction Decision.

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174. 2. Did the Trial Chamber Apply the Correct Legal Principles?

175. The Appeals Chamber notes that the appellants raised before the Trial Chamber the same arguments now raised in this appeal. The Trial Chamber held:

> Once again, this is a matter which has been addressed by the Appeals Chamber in the *Tadic Jurisdiction Decision* and the Trial Chamber sees no reason to depart from its findings. In its Decision, the Appeals Chamber examines various national laws as well as practice, to illustrate that there are many instances of penal provisions for violations of the laws applicable in internal armed conflicts. From these sources , the Appeals Chamber extrapolates that there is nothing inherently contrary to the concept of individual criminal responsibility for violations of common Article 3 of the Geneva Conventions and that, indeed, such responsibility does ensue.[227]

176. It then concluded:

> The fact that the Geneva Conventions themselves do not expressly mention that there shall be criminal liability for violations of common Article 3 clearly does not in itself preclude such liability. Furthermore, identification of the violation of certain provisions of the Conventions as constituting "grave breaches" and thus subject to mandatory universal jurisdiction, certainly cannot be interpreted as rendering all of the remaining provisions of the Conventions as without criminal sanction. While "grave breaches" *must* be prosecuted and punished by all States, "other" breaches of the Geneva Conventions *may* be so. Consequently , an international tribunal such as this must also be permitted to prosecute and punish such violations of the Conventions.[228]

177. In support of this conclusion, which fully accords with the position taken by the Appeals Chamber, the Trial Chamber went on to refer to the ILC Draft Code of Crimes against the Peace and Security of Mankind and the ICC Statute.[229] The Trial Chamber was careful to emphasise that although "these instruments were all drawn up after the acts alleged in the Indictment, they serve to illustrate the widespread conviction that the provisions of common Article 3 are not incompatible with the attribution of individual criminal responsibility".[230]

178. In relation to the ICTR Statute and the Secretary-General's statement in his ICTR report that common Article 3 was criminalised for the first time, the Trial Chamber held: "the United Nations cannot 'criminalise' any of the provisions of international humanitarian law by the simple act of granting subject-matter jurisdiction to an international tribunal. The International Tribunal merely identifies and applies existing customary international law and, as stated above, this is not dependent upon an express recognition in the Statute of the content of that custom, although express reference may be made, as in the Statute of the ICTR".[231] This statement is fully consistent with the Appeals Chamber's finding that the lack of explicit reference to common Article 3 in the Tribunal's Statute does not warrant a conclusion that violations of common Article 3 may not attract individual criminal responsibility.

179. The Trial Chamber's holding in respect of the principle of legality is also consonant with the Appeals Chamber's position. The Trial Chamber made reference to Article 15 of the ICCPR,[232] and to the Criminal Code of the SFRY, adopted by Bosnia and Herzegovina,[233] before concluding:

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> It is undeniable that acts such as murder, torture, rape and inhuman treatment are criminal according to "general principles of law" recognised by all legal systems . Hence the caveat contained in Article 15, paragraph 2, of the ICCPR should be taken into account when considering the application of the principle of *nullum crimen sine lege* in the present case. The purpose of this principle is to prevent the prosecution and punishment of an individual for acts which he reasonably believed to be lawful at the time of their commission. It strains credibility to contend that the accused would not recognise the criminal nature of the acts alleged in the Indictment. The fact that they could not foresee the creation of an International Tribunal which would be the forum for prosecution is of no consequence.[234]

180. The Appeals Chamber fully agrees with this statement and finds that the Trial Chamber applied the correct legal principles in disposing of the issues before it .

181. It follows that the appellants' grounds of appeal fail.

ANNEX 7

Statute of the ICTR [Extract].

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UNITED NATIONS NATIONS UNIES

STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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STATUTE OF THE INTERNATIONAL TRIBUNAL FOR RWANDA
(As amended)

As amended by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 (hereinafter referred to as "The International Tribunal for Rwanda") shall function in accordance with the provisions of the present Statute.

Article 1: Competence of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

Article 2: Genocide

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this Article or of committing any of the other acts enumerated in paragraph 3 of this Article.

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2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

(a) Genocide;

(b) Conspiracy to commit genocide;

(c) Direct and public incitement to commit genocide;

(d) Attempt to commit genocide;

(e) Complicity in genocide.

Article 3: Crimes against Humanity

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation;

(e) Imprisonment;

(f) Torture;

(g) Rape;

(h) Persecutions on political, racial and religious grounds;

(i) Other inhumane acts.

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Article 4: Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) Collective punishments;

(c) Taking of hostages;

(d) Acts of terrorism;

(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) Pillage;

(g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilised peoples;

(h) Threats to commit any of the foregoing acts.

Article 5: Personal Jurisdiction

The International Tribunal for Rwanda shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 6: Individual Criminal Responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a government or of a superior shall

ANNEX 8

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

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United Nations S/2000/915

Security Council

Distr.: General
4 October 2000

Original: English

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

I. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Nature and specificity of the Special Court

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

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

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

III. Competence of the Special Court

A. Subject-matter jurisdiction

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

1. Crimes under international law

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

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

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

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

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

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

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

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

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

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

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

2. Crimes under Sierra Leonean law

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

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

B. Temporal jurisdiction of the Special Court

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

1. The amnesty clause in the Lomé Peace Agreement

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

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

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

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

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

2. Beginning date of the temporal jurisdiction

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

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

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

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

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

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

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

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

C. Personal jurisdiction

1. Persons "most responsible"

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

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

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

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

2. Individual criminal responsibility at 15 years of age

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

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

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

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

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

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

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

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

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

IV. Organizational structure of the Special Court

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

A. The Chambers

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

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

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

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

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

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

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

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

B. The Prosecutor

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

C. The Registrar

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

V. Enforcement of sentences

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

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

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

VI. An alternative host country

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

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

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

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

VII. Practical arrangements for the operation of the Special Court

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

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

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

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

1. Personnel and equipment

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

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

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

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

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

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

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

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

2. Premises

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

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

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

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

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

B. Expertise and advice from the two International Tribunals

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

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

C. Support and technical assistance from UNAMSIL

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

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

VIII. Financial mechanism of the Special Court

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

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

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

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

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

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

IX. Conclusion

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

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

Notes

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

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

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

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

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

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

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

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

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

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

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

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

Annex

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

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

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

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

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

Article 1
Establishment of the Special Court

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

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

Article 2
Composition of the Special Court and appointment of judges

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

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

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

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

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

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

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

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

Article 3
Appointment of a Prosecutor and a Deputy Prosecutor

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

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

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

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

Article 4
Appointment of a Registrar

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

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

Article 5
Premises

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

Article 6
Expenses of the Special Court[a]

The expenses of the Special Court shall ...

Article 7
Inviolability of premises, archives and all other documents

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

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

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

Article 8
Funds, assets and other property

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

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

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

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

Article 9
Seat of the Special Court

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

[a] The formulation of this article is dependent on a decision on the financial mechanism of the Special Court.

Article 10
Juridical capacity

The Special Court shall possess the juridical capacity necessary to:

(a) Contract;

(b) Acquire and dispose of movable and immovable property;

(c) Institute legal proceedings;

(d) Enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Court.

Article 11
Privileges and immunities of the judges, the Prosecutor and the Registrar

1. The judges, the Prosecutor and the Registrar, together with their families forming part of their household, shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic agents in accordance with the 1961 Vienna Convention on Diplomatic Relations. They shall, in particular, enjoy:

(a) Personal inviolability, including immunity from arrest or detention;

(b) Immunity from criminal, civil and administrative jurisdiction in conformity with the Vienna Convention;

(c) Inviolability for all papers and documents;

(d) Exemption, as appropriate, from immigration restrictions and other alien registrations;

(e) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic agents by the Vienna Convention;

(f) Exemption from taxation in Sierra Leone on their salaries, emoluments and allowances.

2. Privileges and immunities are accorded to the judges, the Prosecutor and the Registrar in the interest of the Special Court and not for the personal benefit of the individuals themselves. The right and the duty to waive the immunity, in any case where it can be waived without prejudice to the purpose for which it is accorded, shall lie with the Secretary-General, in consultation with the President.

Article 12
Privileges and immunities of international and Sierra Leonean personnel

1. Sierra Leonean and international personnel of the Special Court shall be accorded:

(a) Immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Such immunity shall continue to be accorded after termination of employment with the Special Court;

(b) Immunity from taxation on salaries, allowances and emoluments paid to them.

2. International personnel shall, in addition thereto, be accorded:

(a) Immunity from immigration restriction;

(b) The right to import free of duties and taxes, except for payment for services, their furniture and effects at the time of first taking up their official duties in Sierra Leone.

3. The privileges and immunities are granted to the officials of the Special Court in the interest of the Court and not for their personal benefit. The right and the duty to waive the immunity in any particular case where it can be waived without prejudice to the purpose for which it is accorded shall lie with the Registrar of the Court.

Article 13
Counsel

1. The Government shall ensure that the counsel of a suspect or an accused who has been admitted as such by the Special Court shall not be subjected to any measure which may affect the free and independent exercise of his or her functions.

2. In particular, the counsel shall be accorded:

(a) Immunity from personal arrest or detention and from seizure of personal baggage;

(b) Inviolability of all documents relating to the exercise of his or her functions as a counsel of a suspect or accused;

(c) Immunity from criminal or civil jurisdiction in respect of words spoken or written and acts performed in his or her capacity as counsel. Such immunity shall continue to be accorded after termination of his or her functions as a counsel of a suspect or accused.

Article 14
Witnesses and experts

Witnesses and experts appearing from outside Sierra Leone on a summons or a request of the judges or the Prosecutor shall not be prosecuted, detained or subjected to any restriction on their liberty by the Sierra Leonean authorities. They shall not be subjected to any measure which may affect the free and independent exercise of their functions.

Article 15
Security, safety and protection of persons referred to in this Agreement

Recognizing the responsibility of the Government under international law to ensure the security, safety and protection of persons referred to in this Agreement and its present incapacity to do so pending the restructuring and rebuilding of its security forces, it is agreed that the United Nations Mission in Sierra Leone shall provide the necessary security to premises and personnel of the Special Court, subject to an appropriate mandate by the Security Council and within its capabilities.

Article 16
Cooperation with the Special Court

1. The Government shall cooperate with all organs of the Special Court at all stages of the proceedings. It shall, in particular, facilitate access to the Prosecutor to sites, persons and relevant documents required for the investigation.

2. The Government shall comply without undue delay with any request for assistance by the Special Court or an order issued by the Chambers, including, but not limited to:

(a) Identification and location of persons;

(b) Service of documents;

(c) Arrest or detention of persons;

(d) Transfer of an indictee to the Court.

Article 17
Working language

The official working language of the Special Court shall be English.

Article 18
Practical arrangements

1. With a view to achieving efficiency and cost-effectiveness in the operation of the Special Court, a phased-in approach shall be adopted for its establishment in accordance with the chronological order of the legal process.

2. In the first phase of the operation of the Special Court, judges, the Prosecutor and the Registrar will be appointed along with investigative and prosecutorial staff. The process of investigations and prosecutions and the trial process of those already in custody shall then be initiated. While the judges of the Appeals Chamber shall serve whenever the Appeals Chamber is seized of a matter, they shall take office shortly before the trial process has been completed.

Article 19
Settlement of disputes

Any dispute between the Parties concerning the interpretation or application of this Agreement shall be settled by negotiation, or by any other mutually agreed-upon mode of settlement.

Article 20
Entry into force

The present Agreement shall enter into force on the day after both Parties have notified each other in writing that the legal instruments for entry into force have been complied with.

DONE at [place] on [day, month] 2000 in two copies in the English language.

For the United Nations

For the Government of Sierra Leone

Enclosure

Statute of the Special Court for Sierra Leone

Having been established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000, the Special Court for Sierra Leone (hereinafter "the Special Court") shall function in accordance with the provisions of the present Statute.

Article 1
Competence of the Special Court

The Special Court shall have the power to prosecute persons most responsible for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.

Article 2
Crimes against humanity

The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation;

(e) Imprisonment;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;

(h) Persecution on political, racial, ethnic or religious grounds;

(i) Other inhumane acts.

Article 3
Violations of article 3 common to the Geneva Conventions and of Additional Protocol II

The Special Court shall have the power to prosecute persons who committed or ordered the commission of serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include:

(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) Collective punishments;

(c) Taking of hostages;

(d) Acts of terrorism;

(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) Pillage;

(g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;

(h) Threats to commit any of the foregoing acts.

Article 4
Other serious violations of international humanitarian law

The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law:

(a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(b) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

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

Article 5
Crimes under Sierra Leonean law

The Special Court shall have the power to prosecute persons who have committed the following crimes under Sierra Leonean law:

(a) Offences relating to the abuse of girls under the Prevention of Cruelty to Children Act, 1926 (Cap. 31):

(i) Abusing a girl under 13 years of age, contrary to section 6;

(ii) Abusing a girl between 13 and 14 years of age, contrary to section 7;

(iii) Abduction of a girl for immoral purposes, contrary to section 12.

(b) Offences relating to the wanton destruction of property under the Malicious Damage Act, 1861:

(i) Setting fire to dwelling-houses, any person being therein to section 2;

(ii) Setting fire to public buildings, contrary to sections 5 and 6;

(iii) Setting fire to other buildings, contrary to section 6.

Article 6
Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime.

2. The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Court determines that justice so requires.

5. Individual criminal responsibility for the crimes referred to in article 5 shall be determined in accordance with the respective laws of Sierra Leone.

Article 7
Jurisdiction over persons of 15 years of age

1. The Special Court shall have jurisdiction over persons who were 15 years of age at the time of the alleged commission of the crime.

2. At all stages of the proceedings, including investigation, prosecution and adjudication, an accused below the age of 18 (hereinafter "a juvenile offender") shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society.

3. In a trial of a juvenile offender, the Special Court shall:

(a) Consider, as a priority, the release of the juvenile, unless his or her safety and security requires that the juvenile offender be placed under close supervision or in a remand home; detention pending trial shall be used as a measure of last resort;

(b) Constitute a "Juvenile Chamber" composed of at least one sitting judge and one alternate judge possessing the required qualifications and experience in juvenile justice;

(c) Order the separation of his or her trial, if jointly accused with adults;

(d) Provide the juvenile with the legal, social and any other assistance in the preparation and presentation of his or her defence, including the participation in legal proceedings of the juvenile offender's parent or legal guardian;

(e) Provide protective measures to ensure the privacy of the juvenile; such measures shall include, but not be limited to, the protection of the juvenile's identity, or the conduct of in camera proceedings;

(f) In the disposition of his or her case, order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.

Article 8
Concurrent jurisdiction

1. The Special Court and the national courts of Sierra Leone shall have concurrent jurisdiction.

2. The Special Court shall have primacy over the national courts of Sierra Leone. At any stage of the procedure, the Special Court may formally request a national court to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence.

Article 9
Non bis in idem

1. No person shall be tried before a national court of Sierra Leone for acts for which he or she has already been tried by the Special Court.

2. A person who has been tried by a national court for the acts referred to in articles 2 and 4 of the present Statute may be subsequently tried by the Special Court if:

(a) The act for which he or she was tried was characterized as an ordinary crime; or

(b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the Special Court shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 10
Amnesty

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

Article 11
Organization of the Special Court

The Special Court shall consist of the following organs:

(a) The Chambers, comprising two Trial Chambers and an Appeals Chamber;

(b) The Prosecutor; and

(c) The Registry.

Article 12
Composition of the Chambers

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

(a) Three judges shall serve in each of the Trial Chambers, of whom one shall be a judge appointed by the Government of Sierra Leone, and two judges appointed by the Secretary-General of the United Nations (hereinafter "the Secretary-General");

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

2. Each judge shall serve only in the Chamber to which he or she has been appointed.

3. The judges of the Appeals Chamber and the judges of the Trial Chambers, respectively, shall elect a presiding judge who shall conduct the proceedings in the Chamber to which he or she was elected. The presiding judge of the Appeals Chamber shall be the President of the Special Court.

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

Article 13
Qualification and appointment of judges

1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. They shall be independent in the performance of their functions, and shall not accept or seek instructions from any Government or any other source.

2. In the overall composition of the Chambers, due account shall be taken of the experience of the judges in international law, including international humanitarian law and human rights law, criminal law and juvenile justice.

3. The judges shall be appointed for a four-year period and shall be eligible for reappointment.

Article 14
Rules of Procedure and Evidence

1. The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable mutatis mutandis to the conduct of the legal proceedings before the Special Court.

2. The judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not, or do not

adequately, provide for a specific situation. In so doing, they may be guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone.

Article 15
The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons most responsible for serious violations of international humanitarian law and crimes under Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. The Prosecutor shall act independently as a separate organ of the Special Court. He or she shall not seek or receive instructions from any Government or from any other source.

2. The Office of the Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor shall, as appropriate, be assisted by the Sierra Leonean authorities concerned.

3. The Prosecutor shall be appointed by the Secretary-General for a four-year term and shall be eligible for reappointment. He or she shall be of high moral character and possess the highest level of professional competence and have extensive experience in the conduct of investigations and prosecution of criminal cases.

4. The Prosecutor shall be assisted by a Sierra Leonean Deputy Prosecutor, and by such other Sierra Leonean and international staff as may be required to perform the functions assigned to him or her effectively and efficiently. Given the nature of the crimes committed and the particular sensitivities of girls, young women and children victims of rape, sexual assault, abduction and slavery of all kinds, due consideration should be given in the appointment of staff to the employment of prosecutors and investigators experienced in gender-related crimes and juvenile justice.

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

Article 16
The Registry

1. The Registry shall be responsible for the administration and servicing of the Special Court.

2. The Registry shall consist of a Registrar and such other staff as may be required.

3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the Special Court and shall be a staff member of the United Nations. He or she shall serve for a four-year term and be eligible for reappointment.

4. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance

for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses. The Unit personnel shall include experts in trauma, including trauma related to crimes of sexual violence and violence against children.

Article 17
Rights of the accused

1. All accused shall be equal before the Special Court.

2. The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

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

(c) To be tried without undue delay;

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

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

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

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

Article 18
Judgement

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

Article 19
Penalties

1. The Trial Chamber shall impose upon a convicted person, other than a juvenile offender, imprisonment for a specified number of years. In determining the terms of imprisonment, the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone.

2. In imposing the sentences, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chamber may order the forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the State of Sierra Leone.

Article 20
Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by a Trial Chamber or from the Prosecutor on the following grounds:

(a) A procedural error;

(b) An error on a question of law invalidating the decision;

(c) An error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber.

3. The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the Former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone.

Article 21
Review proceedings

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

2. An application for review shall be submitted to the Appeals Chamber. The Appeals Chamber may reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

(a) Reconvene the Trial Chamber;

(b) Retain jurisdiction over the matter.

Article 22
Enforcement of sentences

1. Imprisonment shall be served in Sierra Leone. If circumstances so require, imprisonment may also be served in any of the States which have concluded with the International Criminal Tribunal for Rwanda or the International Tribunal for the Former Yugoslavia an agreement for the enforcement of sentences, and which have indicated to the Registrar of the Special Court their willingness to accept convicted persons. The Special Court may conclude similar agreements for the enforcement of sentences with other States.

2. Conditions of imprisonment, whether in Sierra Leone or in a third State, shall be governed by the law of the State of enforcement subject to the supervision of the Special Court. The State of enforcement shall be bound by the duration of the sentence, subject to article 23 of the present Statute.

Article 23
Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Special Court accordingly. There shall only be pardon or commutation of sentence if the President of the Special Court, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

Article 24
Working language

The working language of the Special Court shall be English.

Article 25
Annual report

The President of the Special Court shall submit an annual report on the operation and activities of the Court to the Secretary-General and to the Government of Sierra Leone.

ANNEX 9

Prosecution Response to the Defence Motion Challenging Jurisdiction of the Court, filed by the Prosecution on 30 October 2003.

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

IN THE TRIAL CHAMBER

Before: Judge Bankole Thompson
Judge Pierre Boutet
Judge Benjamin Mutanga Itoe

Registrar: Mr Robin Vincent

Date filed: 30 October 2003

THE PROSECUTOR

Against

SANTIGIE BORBOR KANU also known as 55 also known as FIFTY-FIVE also known as SANTIGIE KHANU also known as SANTIGIE KANU also known as S.B. KHANU also known as S.B. KANU also known as SANTIGIE BOBSON KANU also known as BORBOR SANTIGIE KANU

CASE NO. SCSL – 2003 – 13 – PT

PROSECUTION RESPONSE TO THE DEFENCE MOTION CHALLENGING JURISDICTION OF THE COURT

Office of the Prosecutor:
Mr Desmond de Silva, QC, Deputy Prosecutor
Mr Walter Marcus-Jones, Senior Appellate Counsel
Mr Christopher Staker, Senior Appellate Counsel
Mr Abdul Tejan-Cole, Appellate Counsel

Defence Counsel:
Mr Geert Jan Alexander Knoops

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

THE PROSECUTOR

Against

SANTIGIE BORBOR KANU also known as 55 also known as FIFTY-FIVE also known as SANTIGIE KHANU also known as SANTIGIE KANU also known as S.B. KHANU also known as S.B. KANU also known as SANTIGIE BOBSON KANU also known as BORBOR SANTIGIE KANU

CASE NO. SCSL – 2003 – 13 – PT

PROSECUTION RESPONSE TO THE DEFENCE MOTION CHALLENGING JURISDICTION OF THE COURT

I. INTRODUCTION

1. The Prosecution files this response to the Defence document entitled "Motion Challenging the Jurisdiction of the Special Court, Raising Serious Issues Relating to Jurisdiction on Various Grounds and Objections Based on Abuse of Process" (the "**Motion**"), filed on behalf of Santigie Borbor Kanu (the "**Accused**") on 20 October 2003.[1]

2. For the reasons given below, the Motion should be dismissed in its entirety.

II. ARGUMENT

A. ARGUMENT CONCERNING THE INTERNATIONAL LEGAL FOUNDATION OF THE SPECIAL COURT

3. Paragraphs 4-5 of the Motion argue that the Statute of the Special Court, which is based upon a "bilateral agreement", must be distinguished from the Statutes of the

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[1] Registry Page ("RP") 782-818.

International Criminal Tribunal for the Former Yugoslavia ("**ICTY**") and International Criminal Tribunal for Rwanda ("**ICTR**") which are based upon United Nations Security Council resolutions, and the Statute of the International Criminal Court ("**ICC**") which is based upon a multilateral treaty. The Motion argues that because the Special Court Agreement[2] is a bilateral agreement between the United Nations and a State, it "cannot judicially amount to an international legal instrument which can set aside certain constitutional rights and provisions". The Defence then argues that the Special Court Agreement is inconsistent with certain provisions of the Constitution of Sierra Leone.[3]

4. The Motion appears to accept that the Special Court Agreement is a treaty under international law (see Motion, para. 6). The Defence argument appears to be that a *bilateral* treaty, as opposed to a *multilateral* treaty such as the ICC Statute, cannot "set aside certain constitutional rights and provisions". However, the Motion advances no arguments or authorities in support of the proposition that under general principles of international law there is any relevant distinction in this respect between a multilateral and a bilateral treaty.

5. The Prosecution submits that even if there were an inconsistency between the Special Court Agreement and certain provisions of the Constitution of Sierra Leone, which is not admitted, this would not affect the validity or operation of the Special Court Agreement, or the existence of the Special Court, or the exercise of its jurisdiction. The Special Court Agreement is an international treaty concluded by the United Nations and the Government of Sierra Leone,[4] which is binding on both parties. As a creature of an international treaty, the Special Court exists and functions in the sphere of international law. The judicial power that it exercises is not the judicial power of the Republic of Sierra Leone. Thus, the arguments in paragraphs 8-9 of the Defence

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[2] Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002 (the "**Special Court Agreement**").

[3] The Motion states that the Special Court Agreement must be distinguished from the Statutes of the International Criminal Tribunal for the Former Yugoslavia (the "ICTY"), the International Criminal Tribunal for Rwanda (the "ICTR") and the International Criminal Court (the "ICC"), suggesting that the Statutes of the latter three courts *can* "set aside certain constitutional rights and provisions".

[4] See the Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, S/2000/915 (the "**Report of the Secretary-General**"), para. 9, indicating that the Special Court is "treaty-based".

Motion that international law is not a source of law under the Constitution of Sierra Leone is immaterial to the existence and operation of the Special Court, which exists and operates in the sphere of international law and not municipal law.

6. The creation of the Special Court can be likened to the creation of the ICC, which is also a treaty-based international criminal court. Insofar as violations of international criminal law are concerned, the subject-matter jurisdiction of both of these treaty-based international courts is similar. In the selfsame way that the ICC is not perceived to violate the constitutional or other municipal law of Sierra Leone, nor does the Special Court. As an institution created by international law, and operating within the sphere of international law, the Special Court is not subject to the municipal law or constitution of any State, any more than the ICC would be.

7. The validity of the Special Court Agreement as an international treaty cannot be affected by the Constitution of Sierra Leone.[5] Article 46 of the 1969 Vienna Convention on the Law of Treaties provides:

> 1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
>
> 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

Materially identical provision is made in Article 46(1) and (3) of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.[6]

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[5] See 1969 Vienna Convention on the Law of Treaties, Article 27: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46". Materially identical provision is made in Article 27(1) and (3) of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations.

[6] Although Sierra Leone is not a party to either of these two Vienna Conventions, it is submitted that the provisions of these treaties reflect customary international law: see Aust, *Modern Treaty Law and Practice* (2000), p. 10-11 Brownlie, *Principles of Public International Law* (5th edn, 1998), pp. 608, 618.

8. In the present case, even if it assumed for the sake of argument that the conclusion of the Special Court Agreement by the Government of Sierra Leone was in breach of the Constitution of Sierra Leone (which is not conceded), any such breach would not be "manifest" within the meaning of Article 46 of the two Vienna Conventions. The Special Court Agreement, 2002 (Ratification) Act 2002 (the "**Implementing Legislation**") states that the Special Court Agreement was, for the part of the Government of Sierra Leone, signed under the authority of the President pursuant to section 40(4) of the Constitution. The Implementing Legislation purports to ratification of the Special Court Agreement by the Parliament for the purposes of section 40(4) of the Constitution. Thus, *prima facie*, the constitutional requirements for the conclusion of the Special Court Agreement have been satisfied.

9. If the argument of the Defence were correct, it would mean that the Government of Sierra Leone also violated the Constitution when Sierra Leone became a party to the ICC Statute,[7] which similarly involved conferring on the ICC, its Prosecutor and its Judges the power to prosecute and try criminal offences committed in Sierra Leone by Sierra Leone citizens.[8] Moreover, the ICC is entitled to exercise its functions and powers on the territory of Sierra Leone.[9] A similar constitutional issue to the one raised by the Defence was considered by an Australian Parliamentary committee in connection with the ratification of the ICC Statute by Australia, a common law Commonwealth State like Sierra Leone. Australia ratified the ICC Statute, and enacted legislation to implement the ICC Statute into municipal law,[10] after the Parliamentary Committee had found that:

> "The most complete argument presented [for the view that ratification of the ICC Statute would be unconstitutional] is that ratification of the ICC Statute would be inconsistent with Chapter III of the [Australian] Constitution, which provides that [the] ... judicial power [of the Commonwealth of Australia] shall be vested in the High Court of Australia and such other federal courts as the Parliament creates. However, the Committee accepts as reasonable

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7 Sierra Leone ratified on 15 September 2000, becoming the 20th State Party: see the ICC website at http://www.icc-cpi.int/php/statesparties/country.php?id=17.

8 ICC Statute, Article 12.

9 ICC Statute, Article 4(2) ("The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State party ...").

10 Australia: International Criminal Court Act 2002 (Commonwealth).

> the Attorney-General's submission ... that the ICC will not exercise the judicial power of the Commonwealth [of Australia], even if it were to hear a case relating to acts committed on Australian territory by Australian citizens. The judicial power to be exercised by the ICC will be that of the international community, not of the Commonwealth of Australia."[11]

Similarly, South Africa enacted legislation implementing the ICC Statute,[12] even though section 165(1) of the Constitution of South Africa provides that the judicial authority of South Africa is vested in certain courts specifically identified in section 166 thereof, of which the ICC is not one.

10. For the purposes of disposing of this motion, it is unnecessary for the Trial Chamber to determine whether or not Australia or South Africa acted in accordance with their own constitutions when they ratified the ICC Statute and enacted national implementing legislation. In view of the fact that they did so, and in view of the opinion expressed by the Australian Parliamentary Committee, it cannot be said that there was any "*manifest*" violation of their constitutions. For the same reason, even if the Government and Parliament of Sierra Leone had acted unconstitutionally in entering into the Special Court Agreement and enacting the Implementing Legislation (as argued by the Defence and not conceded by the Prosecution), it cannot be said that any violation of constitutional norms was "*manifest*" within the meaning of Article 46 of the two Vienna Conventions, in view of the analogies with these other countries,[13] in view of the fact that *prima facie* the constitutional requirements for the conclusion of the Special Court Agreement have been satisfied, and in view of the fact that both

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[11] Parliament of the Commonwealth of Australia, Joint Standing Committee on Treaties, Report 45, *The Statute of the International Criminal Court* (May 2002) (the "**Australian Parliament Report**"), para. 3.46. The issue is considered in paras. 2.35, 2.41 to 2.55, and 3.40 to 3.49. See *ibid.*, para. 2.50, referring to Professor Louis Henkin, *Foreign Affairs and the United States Constitution* (2nd edn, 1996), p. 269, in relation to the position in the United States of America.

[12] South Africa: Implementation of the Rome Statute of the International Criminal Court Act (No. 27 of 2002), available at: http://www.gov.za/acts/2002/a27-02/index.html. See the ICC's website, at http://www.icc-cpi.int/php/statesparties/country.php?id=18.

[13] Even if it could be shown that there are some States who considered that ratification of the ICC Statute and the enactment of implementing legislation may have required a constitutional amendment, this would not make it *manifest* that such an amendment was in fact required in those States, and it certainly would not make it *manifest* that a constitutional amendment was required in Sierra Leone for this purpose.

the Government and the Parliament of Sierra Leone apparently did not consider that they were acting unconstitutionally.

11. Because there has been no *manifest* violation of the Constitution of Sierra Leone, it is immaterial to the validity of the Special Court Agreement, and to Sierra Leone's obligations under that agreement, whether the conclusion of the Special Court Agreement by the Government of Sierra Leone was or was not in fact in conformity with the Constitution of Sierra Leone or whether implementing legislation has been validly enacted as a matter of Sierra Leonean national law.[14] Paragraphs 10-20 of the Motion, dealing with certain provisions of the Constitution of Sierra Leone that are allegedly violated by the Special Court Agreement, are thus simply irrelevant. It is therefore unnecessary for the Special Court to decide this question. Indeed, the Special Court has no *jurisdiction* to decide this question.

B. ARGUMENT ALLEGING LACK OF JURISDICTION BY VIRTUE OF THE LOMÉ AGREEMENT

12. Paragraphs 6 and 22-24 of the Motion argue that the Special Court has no jurisdiction to hear and determine crimes allegedly committed prior to 7 July 1999, as such crimes are covered by an effective amnesty provision in Article IX of the Lomé Agreement.

13. However, apart from any other consideration, the Special Court must comply with the provisions of its own Statute, which forms part of the treaty creating it, and which determines the parameters of its jurisdiction. Even if Article IX of the Lomé Agreement purported to be a legal bar to the prosecution of a person by the Special Court for crimes under Articles 2-4 of the Statute (which for the reasons given below, it does not and could not), the Special Court would be bound to apply the express provision in Article 10 of its Statute, which states that "An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes

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14 See, e.g., *Akehurst's Modern Introduction to International Law* (7th edn, Malanczuk (ed.), 1997), pp. 65: "If a treaty requires changes in English law, it is necessary to pass an Act of Parliament in order to bring English law into conformity with the treaty. If the Act is not passed, the treaty is still binding on the United Kingdom from the international point of view, and the United Kingdom will be responsible for not complying with the treaty." This author notes (at p. 66) that "Most other common law countries, except the United States, ... follow the English tradition and strictly deny any direct internal effect of international treaties without legislative enactment".

referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution." There is no merit to the Defence argument in para. 6 of the Motion that in the case of an inconsistency between two treaties, the latter treaty is invalid. Where State X enters into a treaty with State Y that is inconsistent with an earlier treaty between State X and State Z, this may engage the international responsibility of State X towards State Z, but will not invalidate the latter treaty between State X and State Z, except in specific circumstances which cannot apply in the present case.[15]

14. In any event, the Lomé Agreement[16] is not a treaty under international law,[17] but an agreement signed between two national bodies—the Government of Sierra Leone and the RUF. Others who signed the Agreement were not parties to it, but merely signed as "moral guarantors" or as international organizations and governments who were "facilitating and supporting" the conclusion of the Agreement.[18] The Lomé Agreement thus has no force under international law. It had no legal basis at all until the Lomé Peace Agreement (Ratification) Act 1999 (the "**Lomé Ratification Act**") was enacted by the Sierra Leone Parliament, and even then its basis was limited to domestic law. The Prosecution submits that even if there is a conflict between Sierra Leone's domestic law and the Special Court's Statute (and this is in no way conceded by the Prosecution), domestic law cannot be invoked to invalidate a properly concluded treaty such as the Special Court Agreement concluded between the United Nations and Sierra Leone.[19]

15. Furthermore, even assuming that an amnesty was extended by the Lomé Ratification Act, a national statute, this was repealed as a matter of national law on 7 March 2002 by the enactment of the Implementing Legislation. The Implementing Legislation is

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15 *Oppenheim's International Law* (6th edn. Jennings and Watts (eds.), 1992, vol. 1, pp. 1214-1215.

16 "Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL)" (the "**Lomé Agreement**").

17 Article 2 of the Vienna Convention of the Law of Treaties defines a "treaty" as "an international agreement concluded *between States* in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation" (emphasis added). The Lomé Agreement is patently not an international treaty, and the reference in the Lomé Ratification Act to section 40(4) of the Sierra Leone Constitution cannot transform it into an international treaty.

18 See Lomé Agreement, Articles XXXIV and XXXV. The text of the Lomé Agreement is contained in a schedule to the Lomé Ratification Act.

19 See the provisions of the two Vienna Conventions on the Law of Treaties, referred to in footnote 5 above.

an act subsequent to the Lomé Ratification Act which therefore supersedes and replaces the terms of the Lomé Ratification Act, to the extent that the two acts are inconsistent. Based on the doctrine of subsequent legislation,[20] if a later enactment is inconsistent with the provisions of an earlier enactment, those provisions of the earlier enactment are impliedly, even if not expressly, repealed.

16. Finally, even if Article IX of the Lomé Agreement somehow had some legal effect in the legal system of the Special Court (and for the reasons given above, it does not), that provision of the Lomé Agreement, properly construed, was not intended to cover crimes under Articles 2-4 of the Special Court Statute. At the time of signature of the Lomé Agreement, the Special Representative of the Secretary-General for Sierra Leone appended to his signature on behalf of the United Nations a disclaimer to the effect that the United Nations holds the understanding that the amnesty provision in Article IX of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.[21] Neither of the parties to the Lomé Agreement, nor any of the international organizations or States represented at the signing, voiced any objection or disagreement with this interpretation at the time, or at any subsequent time. Indeed, in the negotiations on the Statute of the Special Court, the Government of Sierra Leone concurred with the position of the United Nations.[22] The inclusion of Article 10 in the Special Court's Statute can itself be seen as additional confirmation of this interpretation. The Prosecution submits that this interpretation is further supported by a crystallising international norm that a government cannot grant amnesty for serious violations of crimes under international law.[23] The matters

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[20] Also known as the doctrine of implied repeal, it states that an earlier Act cannot be used to amend or repeal a later Act. Instead, where any conflict arises between Acts of Parliament that cannot be smoothed by judicial interpretation, the later one always takes precedence: *lex posteriores priores contrarias abrogant.*

[21] See Security Council Resolution 1315 (2000), 14 August 2000, preambular para. 5; Report of the Secretary-General Supra footnote 4 para. 23.

[22] ibid, para. 24.

[23] See, e.g., Brownlie, *Principles of Public International Law* (5th edn, 1998), pp. 514-515, indicating that *jus cogens* norms are "rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect. The least controversial examples of the class are the prohibition of the use of force, the law of genocide, the principle of racial non-discrimination, crimes against humanity, and the rules prohibiting trade in slaves and piracy" (footnotes omitted); Cassese, *International Criminal Law* (2003), p. 316 that "whenever general rules prohibiting

referred to in the previous paragraph are themselves a practical example of this norm. Further evidence of this norm can be found in the fact that certain international instruments that are closely related to the issue of crimes against humanity either expressly or impliedly prohibit amnesty. The Report of the Secretary-General on the establishment of a Special Court for Sierra Leone also expressed the view that to the extent that the Lomé Agreement purported to confer an amnesty for serious violations of international humanitarian law, it would be illegal under international law.[24]

17. There is no merit to the Defence argument (at paras. 25-28 of the Motion) that it would be an abuse of process for the Special Court to permit the prosecution of any accused for crimes pre-dating the Lomé Agreement, in alleged breach thereof. This argument cannot be sustained, for the same reasons given above. It cannot be an abuse of process for the Special Court not to apply Article IX of the Lomé Agreement in circumstances where the Special Court is bound by the express provisions of Article 10 of its own Statute, and in circumstances where Article IX of the Lomé Agreement (a) is of no effect in international law, (b) has even been repealed as a matter of *national* law to the extent that it could apply to crimes under Articles 2-4 of the Special Court's Statute, and (c) on its correct interpretation does not even apply to crimes under Articles 2-4 of the Special Court's Statute. The fact that these international crimes may be "equally" punishable under Sierra Leone municipal law (as argued in paragraph 27 of the Defence Motion) cannot affect this conclusion. Furthermore, the Defence advances no authorities on the existence or scope of the doctrine of abuse of process in international criminal law. The Prosecution should not be required to respond to a vague Defence allegation that is not supported by detailed argument.

C. ARGUMENT CONCERNING COMMAND RESPONSIBILITY

18. The Defence argues that the Special Court cannot assume jurisdiction for crimes which were allegedly committed by the Accused prior to his assuming command or

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specific international crimes come to acquire the nature of peremptory norms (*jus cogens*), they may be construed as imposing among other things the obligation not to cancel by legislative or executive fiat the crimes they proscribe."

[24] See Report of the Secretary-General, para. 24: "With the denial of legal effect to the amnesty granted at Lomé, to the extent of its illegality under international law …".

allegedly taking the position of a superior. They argue that based on the Indictment, it was alleged that the Accused was "a senior commander of AFRC/RUF force in Kono district" between Mid-February 1998 – April 30, 1998 and "one of the three commanders (...) on 6 January 1999." The Defence argues that the Indictment contains several charges relating to crimes committed before mid-February 1998 when it was alleged the Accused was "a Senior Commander of AFRC/RUF." The Defence concludes that the Special Court is not empowered to try the Accused for crimes related to the concept of superior responsibility for crimes committed before February 1998.

19. The Prosecution states that the Accused is not only charged in the indictment for crimes for which he bears command or superior responsibility but he is also charged with offences for which he is individually liable or was part of a joint criminal enterprise or common criminal purpose. In all cases in the indictment, the Accused is charged under Article 6.1 of the Statute and alternatively under Article 6.3. Counts 3 - 5 cited by the Defence are preceded by paragraph 31 which clearly states that the Accused by his acts or omissions in relation, but not limited to these events, pursuant to Article 6.1, and or alternatively, Article 6.3 of the Statute, is individually criminally liable for the crimes alleged. It is misconceived to suggest that the Accused is only charged with command responsibility for the crimes under Counts 3-5 when the indictment clearly says otherwise.

20. Further, the Prosecution states that the period for which the Accused actually had command, though material, does not signify that the Accused was not liable in any other way outside this period. The fact that he may not have been in command for this period does not preclude the fact that he bears superior responsibility or individual responsibility outside these periods.

21. The Prosecution submits that these are purely matters of evidence which have to be determined by a court of law having heard the evidence.

IV. CONCLUSION

The Court should therefore dismiss the Motion in its entirety.

Freetown, 30 October 2003.

For the Prosecution,

Desmond de Silva, QC
Deputy Prosecutor

Walter Marcus-Jones
Senior Appellate Counsel

Christopher Staker
Senior Appellate Counsel

Abdul Tejan-Cole
Appellate Counsel