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SCSL-04-16-T
(17046-17114)

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SPECIAL COURT FOR SIERRA LEONE

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TRIAL CHAMBER II

Before: Justice Teresa Doherty, Presiding Judge
Justice Richard Lussick
Justice Julia Sebutinde

Interim Registrar: Lovemore Munlo

Date: 13 November 2005

PROSECUTOR **Against** **Alex Tamba Brima**
Brima Bazzy Kamara
Santigie Borbor Kanu
(Case No.SCSL-04-16-T)

JOINT LEGAL PART
DEFENCE MOTION FOR JUDGMENT OF ACQUITTAL UNDER RULE 98

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I INTRODUCTION

1. On 7 March 2005, the AFRC trial started with the Prosecution case, and on 21 November 2005, the Prosecution case came to an end.[1] Following the Trial Chamber "Scheduling Order for Filing of a Motion for Judgement of Acquittal" of 30 September 2005,[2] the Defence has three weeks to prepare its Motion for Acquittal.

2. The Defence herewith presents its "Joint Legal Part – Defence Motion for Judgment of Acquittal" ("**Motion for Acquittal**"). The first part of this Motion for Acquittal is a joint document of all three AFRC Accused, and relates to the legal and jurisdictional arguments. Each Accused files a separate and distinct second part, relating to the factual and evidentiary material as presented during the Prosecution case.

II INTERPRETATION OF RULE 98 ON THE BASIS OF EXISTING CASE LAW

3. Rule 98 provides that "[i]f, after the close of the case for the prosecution, there is no evidence capable of supporting a conviction on one or more counts of the indictment, the Trial Chamber shall enter a judgment of acquittal on those counts." The standard of proof at this stage of the proceedings for the Defence is therefore to prove that there is no evidence capable of supporting a conviction on one or more counts of the Further Amended Consolidated Indictment of 18 February 2005 against the three Accused ("Indictment").

4. In *Prosecutor v. Jelisic*, the ICTY Appeals Chamber set a standard for the interpretation of the equivalent rule 98*bis* of the ICTY Rules and Procedures, when it decided as follows:

"The Appeals Chamber considers that the reference in Rule 98*bis* to a situation in which 'the evidence is insufficient to sustain a conviction' means a case in which,

[1] Transcript (hereinafter referred to as "T") 21 November 2005, p. 16, lines 12 – 13.
[2] Case No. SCSL-2004-16-T-404.

in the opinion of the Trial Chamber, the prosecution evidence, if believed, is insufficient for any reasonable trier of fact to find that guilt has been proved beyond a reasonable doubt. (...) [T]hus the test is not whether the trier would in fact arrive at a conviction beyond reasonable doubt on the prosecution evidence (if accepted) but if it could."[3]

5. Though frequently cited by subsequent decisions of both *ad hoc* tribunals,[4] the *Jelisic* standard seems to be a flexible one. The *Jelisic* Appeals Chamber made it clear that the standard for Rule 98[5] must be determined by the circumstances indigenous to the legal forum in which it is to be applied, including both the text of the Rule and the broader context in which it functions.[6] Trial Chamber I of the Special Court held that the Jelisic standard is not applicable at this stage of the proceedings before the Special Court, where it stated that: "the proof beyond reasonable doubt standard can and should only be addressed at a later stage of the proceedings."[7] Yet, this finding is not without dispute in light of, inter alia, the ICTY decision in *Prosecution v. Milosevic*, where the ICTY Trial Chamber held that "[w]here there is some evidence, but it is such that, taken at its highest, a Trial Chamber could not convict on it, the Motion is to be allowed."[8]

6. Part B will show that the Prosecution has not adduced any evidence which at the minimum can meet the mentioned Rule 98 standard as set forth by the ICTY. It is the contention of the Defence in this case that the term "evidence" within this context should at the least extend to an assessment of proof of the elements of crime.

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[3] *Prosecutor v. Jelisic*, IT-95-10-A, Appeals Chamber, Judgment, 5 July 2001, para. 37. Often referred to as the 'objective standard' for acquittal motions, the *Jelisic* test has never been challenged by subsequent decisions, and is frequently cited by decisions of both the ICTY and ICTR. See, e.g., *Prosecutor v. Strugar*, IT-01-42-T, Trial Chamber, Decision on Defence Motion Requesting Judgment of Acquittal Pursuant to Rule 98*bis*, 21 June 2004; *Prosecutor v. Milosevic*, IT-02-54-T, Trial Chamber, Decision on Motion for Judgment of Acquittal, 16 June 2004; *Prosecutor v. Bagosora* et al., ICTR-98-41-T, Trial Chamber, Decision on Motions for Judgement of Acquittal, 2 February 2005.

[4] *See Id.*

[5] Rule 98*bis* in the ICTY Rules of Procedure and Evidence.

[6] *Prosecutor v. Jelisic*, Case No. IT-95-10-A, Appeals Chamber, Judgement, 5 July 2001, para. 33.

[7] *Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-T-473, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 21 October 2005, para. 36.

[8] *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal, 16 June 2004, para. 13 under (2), also quoted in *Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-T-473, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 21 October 2005, para. 49.

III THE 'GREATEST RESPONSIBILITY' REQUIREMENT

3.1 The "Greatest Responsibility" as a Determinative Factor for Rule 98

7. The Defence contends that the motions for judgment of acquittal before this Court fundamentally differ, this to the advantage of the accused, from equivalent motions before the ICTY and ICTR, because of the specific requirement laid down in Article 1(1) of the Special Court Statute; saying that the Special Court "shall (...) have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone." Article 15 of the Statute prescribes the role and function of the Prosecutor, where it states in para. 1: "The Prosecutor shall be responsible for the investigation and prosecution of persons who bear the greatest responsibility 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 of receive instructions from any Government or from any other source."

8. This requirement clearly limits the discretionary prosecutorial powers of the Prosecution, as the Statute limits the Prosecution's power to prosecute to those persons who bear the greatest responsibility for the conflict. This threshold also affects the evidentiary burden to be met by the Prosecutor.[9] In the instant case, based upon the Prosecutor's evidence, this threshold is not met and justifies dismissal of the cases against the three accused. Two arguments arise:

[9] See Luc Côté, Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law, 1 Journal of International Criminal Justice 184-185 (2005); see also Geert-Jan Alexander Knoops, Theory and Practice of International and Internationalized Criminal Proceedings 117-119 (2005)

(i) Said requirement replaced the UN's formulation "persons most responsible" in order to emphasize that it should not serve as a distinct jurisdictional threshold, "but as a guide to the Prosecution in the adoption of a prosecution strategy."[10]. The current criterion "those who bear the greatest responsibility" was explicitly meant to limit "the focus of the Special Court to those who played leadership role."[11] Hence, these *travaux preparatoires* of said criterion clearly cumulate in an evidentiary threshold.

(ii) This conclusion is reinforced by the Decision of SCSL Trial Chamber I of 3 March 2004, where it was held that said criterion does not exclusively articulate prosecutorial discretion, as it is a component of "personal jurisdiction."[12]

9. Thus, it is submitted that, in keeping with the guidance of the *Jelisic* Appeals Chamber as well as this Court's own commitment to expediency, fairness, and reconciliation, the Trial Chamber should adopt a Rule 98 standard construed on the basis of the Statute of the Special Court and the Rules interpreted in conformity with the ICTY case law, and finally narrowly tailored to the unique context of the Special Court.

10. Therefore, in dealing with the Motions for Acquittal, the Defence is of the opinion that the requirement of 'greatest responsibility' elevates to an evidentiary standard to be met by the Prosecution already in the stage of a Rule 98 Motion. The factual details thereto will follow in each Accused's Part B of the Motions for Acquittal.

[10] Report of the Secretary-General on the establishment of a SCSL, 4 October 2000, S/2000/915, para. 30.
[11] See Letter of 22 December 2000 from the President of the SC to the Secretary-General, S/2000/234, para. 1.
[12] See Decision of the Preliminbary Defence Motion on the Lack of Personal Jurisdiction file don behalf of Accused Forfana, 3 March 2004, SCSL-2004-14-PT

3.2 The Threshold of the "Greatest Responsibility" Requirement

3.2.1 ICTY Limited Jurisdiction: Application by Analogy

11. The greatest responsibility requirement as such is not embedded in the Statutes of the ICTY and ICTR. However, about a decade after the establishment of these Tribunals, the Security Council felt the need to limit their mandate by setting a time frame for the completion of the Tribunals' work, in adopting Resolution 1503 of 28 August 2003, providing for the 'completion strategy.'[13] This completion strategy concentrates the work of the ICTY to "the prosecution of the most senior leaders suspected of being most responsible for crimes within the ICTY's jurisdiction."[14] The Security Council, in Resolution 1315 of 2000, recommended that the personal jurisdiction of the Special Court extend only to those "who bear the greatest responsibility for the commission of crimes."[15]

12. The ICTY judges even went further by amending the Rules of Procedure and Evidence in April 2004, by introducing a new indictment review mechanism in Rule 28.[16] ICTY Rule 28 now reads, insofar relevant, "[t]he President shall refer the matter to the Bureau which shall determine whether the indictment, prima facie, concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal." This amendment apparently introduces "what can be seen as a new jurisdictional requirement"[17] requiring *prima facie* proof that the accused bears the greatest responsibility. Accordingly "[e]videntiary sufficient to establish a *prima facie*

[13] UN SC Resolution 1503 (2003) on the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.
[14] UN SC Resolution 1503 (2003) on the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda; see also new Rule 28 of the ICTY RPE *infra*.
[15] Report of the Secretary General on the establishment of a Special Court for Sierra Leone, S/2000/915, of 4 October 2000, para. 29.
[16] See Luc Cote, Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law, Journal of International Criminal Justice 3, 2005, p. 162 – 186, at 185 – 186.
[17] Luc Cote, Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law, Journal of International Criminal Justice 3, 2005, p. 162 – 186, at 186.

case"[18] became the decisive criterion for confirming an indictment, which development supports the view that also the SCSL-criterion of "Greatest responsibility" should be applied in this sense at least by analogy.

3.2.2 Greatest Responsibility Component of Personal Jurisdiction

13. This conclusion also follows from the Special Court mandate as set forth, in the aforementioned Resolution 1315 of the Security Council, where it is recommended that the personal jurisdiction of the Special Court extend only to those "who bear the greatest responsibility for the commission of crimes," understood as an indication of a limitation on the number of accused by reference to their command responsibility and the gravity and scale of the crime."[19]

14. In *Prosecutor v. Fofana*, Trial Chamber I rejected the Preliminary Defence Motion on the Lack of Personal Jurisdiction,[20] as being without merit.[21] However, in the same decision the Chamber unanimously held that the greatest responsibility requirement is a component of personal jurisdiction.[22] Thus it should be regarded as a "jurisdictional requirement, and while it does of course guide the prosecutorial strategy, it does note exclusively articulate prosecutorial discretion (...)."[23]

15. Unlike the (amended) Rules of Procedure and Evidence of the ICTY, the Special Court Statute or Rules do not provide for screening mechanisms as to indictments

[18] B.H. Jallow, Prosecutorial Discretion and International Criminal Justice, Journal of International Criminal Justice 3, 2005, p. 145 – 161, at 152.
[19] Report of the Secretary General on the establishment of the Special Court for Sierra Leone, S/2000/915, 4 October 2000, para. 29.
[20] *Prosecutor v. Fofana*, Case No. SCSL-2003-11 (filing number Court Management 62), Preliminary Defence Motion on the Lack of Personal Jurisdiction, 17 November 2003.
[21] *Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-PT (filing number Court Management 26), Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana, 3 March 2004.
[22] See *Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-PT (filing number Court Management 26), Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana, 3 March 2004, paras. 26 – 27.
[23] *Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-PT (filing number Court Management 26), Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana, 3 March 2004, para. 27.

for a *prima facie* in proof that the criteria of greatest responsibility has been fulfilled similar to the ICTY Rule 28 system. This reinforces the interpretation of the Rule 98's requirement of "no evidence capable of supporting a conviction on one or more counts of the indictment" such that it also extends to the personal jurisdictional requirement of greatest responsibility. For the Defence submits that the personal jurisdiction requirement needs to be fulfilled before an accused can be convicted, and no evidence has been brought forward by the Prosecution fulfilling the greatest responsibility requirement, as will be proved under Part B of this Motion below.

16. Such interpretation of the assessment of this requirement is supported by the Security Council's consideration of Article 1 of the Statute, where it states that "the determination of the meaning of the term 'persons who bear the greatest responsibility' in any given case falls initially to the prosecutor and ultimately to the Special Court itself."[24]

3.2.3 The Legal Political Meaning of "Greatest Responsibility" Requirement

17. The Security Council interprets the wording "most responsible" as denoting the political or military leadership or authority of the accused.[25]

18. It is the Defence submission that the three AFRC accused, currently at trial, cannot be held to bear the greatest responsibility for the conflict, for the crimes committed during the relevant period of the Indictment. The evidence brought forward by the Prosecution, as will be shown in the second part of this Motion, cannot sustain such assertion beyond reasonable doubt seen from the perspective of a reasonable trier of fact. To the contrary, that evidence introduces the

[24] See letter of the Secretary General addressed to the President of the Security Council, S/2001/40, 12 January 2001, para. 2.
[25] Report of the Secretary General on the establishment of a Special Court for Sierra Leone, S/2000/915, 4 October 2000, para. 30.

existence of genuine prominent individuals bearing greatest responsibility, other than the Accused.[26]

19. The Prosecution case has even adduced evidence to the contrary, i.e. exculpatory for the three Accused when it concerns the threshold of 'greatest responsibility.' An example hereof forms the cross-examination of OTP expert witness TF1-296.[27] Confronted with para. 50 of the expert's report, this expert confirmed that the children at Brookfields Hotel (February – March 1999), were amongst the fighting forces, which happened under the auspices of the Government of Sierra Leone, and were even paid by that Government. On numerous occasions, the expert witness witnessed this fact.[28]

20. This should already lead to a dismissal of the case. Alternatively, the following arguments arise.

IV FORMS OF LIABILITY

21. The Prosecution charges all three Accused for all the crimes set out in the Indictment with individual criminal responsibility laid down in Article 6(1) of the Statute and superior responsibility as laid down in Article 6(3) of the Statute.

22. The indictment is framed on three liability concepts:
    (a) Individual criminal responsibility;
    (b) Joint criminal enterprise; and
    (c) Superior responsibility.
    This general part will deal with the legal prerequisites for each of these concepts.

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[26] See testimonies of OTP witnesses TF1-046 (Gibril Massaquoi) and TF1-296.
[27] T 4 October 2005, p. 114 (lines 11 – 29) – 115, (lines 1 – 13).
[28] The expert gave many examples that the Government of Sierra Leone itself did not comply with international standards on the prevention of child soldiers; see *inter alia* T 5 October 2005, p. 14 (lines 5 – 9).

4.1 Individual Criminal Responsibility

4.1.1 Individual Criminal Responsibility – Committing

23. Committing refers to physically participating in a crime, directly or indirectly, or failing to act when such a duty exists, coupled with the requisite knowledge.[29] As to the *mens rea element*, it is important to note that the ICTY Appeals Chamber in *Prosecutor v. Blaskic* reiterated that *mens rea* for crimes against humanity as requiring "knowledge on the part of the accused that there is an attack on the civilian population as well as knowledge that this act is part thereof."[30] Therefore, the standard is not whether the accused "knowingly took the risk of participating in the implementation of the (purported) ideology, policy or plan underlying the alleged crimes against humanity."[31]

24. It is to be concluded, based on Part B of this motion, that no reasonable trier of fact could find that the evidence of prosecution has shown that either three Accused had this knowledge, beyond this mere "taking of risk."

4.1.2 Individual Criminal Responsibility – Planning, Instigating, Ordering, Aiding and Abetting

25. As to the allegation of *aiding and abetting*, the same conclusion should be drawn. This concept includes all acts of assistance by words or acts that lend encouragement or support. Distinguished need to be the nature of the assistance and the effect thereof on the principal (main perpetrator).[32] The *actus reus* of aiding and abetting requires that the accused intend to contribute to the commission of the offence; it requires "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime."[33] Decisive, yet, is the *mens rea* requirement for this mode of participation, namely

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[29] *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, 15 July 1999, para. 188, where it is stated that; "This provision covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law. (...)."
[30] See *Prosecution v. Blaskic*, ICTY Appeals Chamber judgment 29 July 2004, IT-95-14-T-A, para. 126.
[31] *Ibid*, para. 257.
[32] *Prosecutor v. Furundzija*, Judgment, Case No. IT-95-17/1-T, 10 December 1998, paras. 190 – 249.
[33] *Prosecutor v. Furundzija*, Judgment, Case No. IT-95-17/1-T, 10 December 1998, paras. 235, 249. See also *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-T, 2 September 1998, para. 484.

that proof should be provided for "knowledge on the part of the aider and abettor that his acts assist in the commission of the principal perpetrators crime."[34]

26. The Prosecution case may indicate that the Accused were present at certain alleged crime scenes. Yet, the ICTY Trial Chamber in *Prosecutor v. Kunarac et al.*,[35] has held that "presence alone at the scene of the crime is not conclusive of aiding and abetting, unless it is shown to have a significant legitimizing effect on the principal." This view also extends to the other forms of individual criminal liability as set forth in the Indictment.

27. As to the liability of "*planning*" the ICTY has taken a conservative view thereto, stating that responsibility for planning a crime only incurs if it is demonstrated that the Accused "substantially (was) involved at the preparatory stage of that crime in the concrete form it took, which implies that he possessed sufficient knowledge thereof in advance."[36] Part B of this motion will show that the Prosecution has not submitted any evidence of planning in this sense.

28. The same conclusion counts for the liability mode of "*ordering*". The ICTY Appeals Chamber has stated that the correct legal standard for *mens rea* for ordering must be one in which the Accused had an "awareness of a higher likelihood of risk and a volitional element must incorporated in the legal standard".[37] Importantly, the ICTY Appeals Chamber reasoned that any lesser standard could actually amount to a form of strict liability, as there is always a possibility that violations could occur during the course of military operations.[38] These observations are relevant to the instant case now that it is the Prosecution's assertion, based upon the testimony of Colonel Iron, that the AFRC qualifies as a regular army.

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[34] See *Prosecutor v. Blaskic*, ICTY Appeals Chamber Judgment, o.c., paras. 52, 50, 287; see also *Prosecutor v. Vasiljevic*, ICTY Appeals Chamber Judgment, 25 February 2004, IT-98-32-A.
[35] *Prosecutor v. Kunarac et al.*, Case No. IT-96-23-T, Judgment, 22 February 2001, para. 393.
[36] *Prosecutor v. Brdanin*, Judgement ICTY, 1 September 2004, IT-99-36-T, para. 357.
[37] *Prosecutor v. Blaskic*, ICTY Appeals Chamber Judgement, 29 July 2004, IT-95-14-T-A, para. 42.
[38] Ibid., para 41.

4.2 Joint Criminal Enterprise

29. The second liability concept enshrined by the indictment relates to the concept of joint criminal enterprise (JCE). It should be noted that the Indictment is far from clear by not specifically setting out the exact form or category as required. Paragraphs 33 and 34 of the Indictment seem to aim at the third category thereof. Would this be the case, the Prosecution case has not provided evidence that could sustain the finding that a reasonable trier of fact could arrive at the conclusion that:

(i) a joint criminal enterprise (third category) existed; and/or

(ii) either of the three accused participated therein as required by the ICTY case law.

30. Neither of these two elements are fulfilled in this case when assessed on the basis of the Rule 98 standard.

31. As to the first category of JCE (although not implemented in the Indictment) it must be shown that the accused:

(a) voluntarily participated in one of the aspects of the common plan, and

(b) intended the criminal result, even if not physically perpetrating the crime.[39]

Yet, requisite is that all participants in the alleged JCE share the same intent.[40] This criterion is not established in this case by the prosecution.

32. As to the third category of JCE – presupposed the indictment should be read as enhancing this concept – the criteria here for are not met in the AFRC case against the three accused. In order to hold a person responsible under this third category "the prosecution must prove that the Accused entered into an agreement with a person to commit a particular crime (...) and that this same persons [emphasis added: GJK] physically committed another crime, which was a natural

[39] See *Prosecutor v. Brdanin*, Judgment ICTY, 1 September 2004, IT-99-36-T, para. 264.
[40] *Ibid.*

and foreseeable consequence of the execution of the crime agreed upon.[41] Thereto, the following conditions are set by the ICTY Appeals Chamber:

(a) The Accused should have been aware that such a crime was a possible consequence of the execution of that alleged enterprise and, with that awareness, participated in that enterprise.[42] In the instant case, this element is not established by the Prosecutor in its case; no single evidence is adduced to support this notion (see also part B).

(b) The Accused can only be held liable under this concept if the Prosecution establishes beyond reasonable doubt that the Accused had an understanding or entered into an agreement with the physical perpetrators to commit the particular crime or if the crime perpetrated by the physical perpetrators was a natural and foreseeable consequence of the crime agreed upon.[43] This is not established.

(c) The mere espousal of a strategic or political plan by the Accused on the one hand and many of the relevant physical perpetrators on the other is not equivalent to an arrangement between them to commit a concrete crime.[44]

33. It should be observed that the Prosecution's case has failed to proof (within the scope of Rule 98) the existence of a common plan as set forth in paras. 31 – 35 of the Indictment, let alone that the Accused were part in such a plan. Not witness of fact was introduced to this end and no evidence whatsoever adduced thereto.

In addition, as the ICTY Trial Chamber in *Prosecutor v. Brdanin* furthermore notes:

"Moreover, the fact that the acts and conduct of an accused facilitated or contributed to the commission of a crime by another person and/or assisted in the formation of that person's criminal intent is not sufficient to establish beyond reasonable doubt that there was an understanding or an agreement between the two to commit that particular crime. An agreement between two persons to

[41] See *Prosecution v. Brdanin, o.c.* para. 347; see ICTY Appeals Chamber in Prosecutor v. Brdanin, Decision on Interlocutory Appeal on Defence Motion for Acquittal, 19 March 2004, IT-99-36-A, para. 5.
[42] *Ibid.*
[43] *Brdanin* Judgment, para. 347.
[44] *Ibid,* paras. 351-352.

commit a crime requires a *mutual* understanding arrangement with each other to commit a crime.[45]

34. Based on the adjudicatory criteria of Rule 98, it can be concluded that the Prosecution's case also failed to establish this element on part of Mr. Kanu, Mr. Kamara and Mr. Brima. Therefore, also for these reasons, the case against the Accused should be dismissed.

4.3 Superior Responsibility

35. The last liability concept envisioned by the Prosecutor is that of superior responsibility. The following elements should be established.

4.3.1 General Remarks

(i) The existence of a superior-subordinate relationship;

(ii) Superior's knowledge or superior having reason to know that the crime was about to or had been committed; and

(iii) Superior's failure to take the necessary and reasonable measures to prevent the crime or punish the perpetrator(s) thereof.[46]

36. The Defence submits that the Prosecution failed to provide evidence within the meaning of Rule 98 that the Accused Kanu, or Kamara, Brima, can be held liable on the basis of superior responsibility by virtue of Article 6(3) of the Statute.

4.3.2 "Effective Control"

37. The doctrine of superior responsibility is "ultimately predicated upon the power of the superior to control the acts of his subordinates."[47]

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[45] *Ibid.*
[46] *See e.g., Prosecutor v. Delalic et al.* (Celibici), Judgment, Case No. IT-96-21-T, 16 November 1998, para. 346.
[47] See *Celibici* Appeals Judgment, para. 256; see also *Prosecutor v. Halilovic*, ICTY judgment 16 November 2005, IT-01-48-T, paras. 57-63.

38. The evidence presented by the Prosecution does not show that the alleged position or influence of Mr. Kanu (or Mr. Kamara or Brima) hereto meets the standard required to establish effective control. In particular, the expert evidence introduced by the Prosecution through the testimony of Colonel Iron falls short to establish "effective (command and) control" on part of Mr. Kanu or on the other two Accused.

39. It should be borne in mind that "substantial influence" over subordinates which does not meet the threshold of effective control is insufficient for liability to attach under the concept of superior responsibility.[48] The evidence as adduced by the Prosecution does not show at all that Mr. Kanu was ever in operational command such that he had effective control over "all"[49] the troops who committed the alleged crimes in all the districts as described in the indictment.

40. Accordingly, also for this reason the case should be dismissed now that none of the three liability modes merits any factual and/or legal basis in this case.

V ALTERNATIVE ARGUMENTS: ELEMENTS OF CRIMES

5.1 Introduction

41. Only after the Trial Chamber would reject the preceding arguments, is it necessary to go into the proof for the various alleged crimes and their elements.

5.1.1 Lack of Evidence on Elements of Crimes

42. The Defence submits in the first place, that if it would be established that the Prosecution has not adduced evidence for all the elements of crimes, the Rule 98 motion should be granted for this reason alone. The ICTR Trial Chamber decided in Prosecutor v. Nahimana et al., that "a Rule 98bis motion will succeed if an essential ingredient for a crime was not made out in the Prosecution's case; for, if

[48] See *Celebici* Appeal Judgment, para. 266; *Prosecution v. Halilovic*, o.c., para. 59.
[49] The Indictment in para. 31 explicitly extends exercising "authority, command, and control over all subordinate members of the AFRC, Junta and AFRC/RUF forces" (underlining added, GJK).

on the basis of evidence adduced by the Prosecution, an ingredient required as a matter of law to constitute the crime is missing, that evidence would also be insufficient to sustain a conviction."[50]

43. The ICTY Trial Chamber adopts the same position in *Prosecution v. Sikirica et al.*, where it states that: "if on the basis of evidence adduced by the Prosecution, an ingredient required as a matter of law to constitute the crime is missing, that evidence would also be insufficient to sustain a conviction, and the motion filed under Rule 98*bis* would succeed."[51]

5.1.2 Lack of Evidence on a Specific Element of the Indictment

44. Secondly, the Defence submits that also in the case of lack of evidence on a specific element pleaded in the Indictment, not part of the general elements of crime, the Rule 98 motion should be granted with respect to that specific part. This line of reasoning is supported by ICTY case law.[52]

45. Thus, even parts of counts as enshrined in the Indictment can be dismissed by way of judgment of acquittal.

5.1.3 Crimes against Humanity

46. As to these elements, it should be borne in mind that as for crimes against humanity, the requisite four are:

1. Attack against a civilian population;
2. The attack is widespread or systematic;
3. The act in question was committed as part of the attack; and
4. The accused or a subordinate knew of the broader context in which his or her act is committed.

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[50] *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T, 25 September 2002, para. 19.
[51] *Prosecutor v. Sikirica*, Case No. IT-95-8-T, Judgement on Defence Motions to Acquit, 3 September 2001, para. 9.
[52] See for instance *Prosecutor v. Kordic et al.*, Case No. IT-965-14/2-T, Decision on Defence Motions for Judgement of Acquittal, 6 April 2000, paras. 32, 35; *Prosecutor v. Sikirica et al.*, Case No. IT-95-8-T, Judgement on Defence Motions to Acquit, 3 September 2001, paras. 115, 150.

47. The Prosecution's case has not provided proof of the elements under 2-3 such that it can meet the Rule 98 test. The same counts for the following (sub) crimes with which the three Accused are charged:

5.2 Count 1 – Acts of Terrorism

48. Acts of terrorism, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.d. of the Statute.

49. The ICTY Trial Chamber in *Prosecutor v. Galic* gave the following definition of the crime of terror: "1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body and health within the civilian population. 2. The offender willfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence. 3. The above offence was committed with the primary purpose of spreading terror among the civilian population."[53] Trial Chamber I of the Special Court ruled that this definition might be of assistance in the interpretation of Article 3(d) of the Statute.[54]

50. Trial Chamber I in the aforementioned decision in *Prosecutor v. Norman et al.* also held, in the interpretation of the concept of terrorism, that "the proscriptive ambit of Protocol II in respect of 'acts of terrorism' does extend beyond acts of threats of violence committed against protected persons to 'acts directed against installations which would cause victims terror as a side-effect."[55]

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[53] *Prosecutor v. Galic*, Case No. IT-98-29-T, Judgement and Opinion, 5 December 2003, para.133.
[54] *Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-T-473, Decision on Motion for Judgment of Acquittal Pursuant to Rule 98, 21 October 2005, para. 110.
[55] *Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-T-473, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 21 October 2005, para. 111, referring to the ICRC Commentary on the Additional Protocols, at 1375.

51. The *Norman* decision then continues to enumerate the constitutive elements of this specific crime:

    1. Acts or threats of violence directed against protected persons or their property.
    2. The offender willfully made protected persons or their property the object of those acts and threats of violence.
    3. The acts or threats of violence were committed with the primary purpose of spreading terror among protected persons.

    In the instant case, the Prosecution at the least failed to submit proof of the elements under 2 and 3.

5.3 Count 2 – Collective Punishments

52. Collective punishments, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.b. of the Statute.

53. This provision of collective punishments should be interpreted "in its widest sense" according to the ICRC commentaries.[56] Yet, several requirements must be met for this charge:

    (i) The general elements of Article 3 common to the GC and Add. Prot. II;

    (ii) A punishment imposed upon protected persons for acts that they have not committed and

    (iii) The intent, on the part of the offender, to punish the protected persons or group of protected persons for acts which form the subject of the punishments.[57]

54. Apart from the lack of any precise time limits thereto, the Prosecution's case has failed to adduce any concrete evidence against Kanu as a person. In addition, it has failed to provide evidence substantiating the allegation that subordinate

[56] ICRC, Commentary on the Additional Protocols, at 1374.
[57] *Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-T-473, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 21 October 2005, para. 118.

members of the AFRC or RUF or members of those organizations acting in concert with him have committed the act of collective punishments.

55. Finally, the Prosecution's case has not set forth evidence capable of sustaining the allegation that the Accused would have done so while holding a position of superior responsibility and exercising effective control over them in relation to this crime (see above).

5.4 Count 3 – Extermination

56. Extermination, a crime against humanity, punishable under Article 2(b) of the Statute was defined in *Prosecutor v. Rutaganda*, where the ICTR Trial Chamber held that extermination by its very nature, is a crime which is directed against a group of individuals. Extermination differs from murder in that it requires an element of mass destruction which is not a pre-requisite for murder.[58] Any proof of this element is clearly not adduced by the Prosecution in the AFRC case.

57. The ICC elements of crime coincide with the elements as set out by the ICTY Appeals Chamber in *Prosecutor v. Krstic*.[59] These elements are as follows:
    1) The perpetrator killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population;
    2) The conduct constituted, or took place as part of, a mass killing of members of a civilian population;
    3) The conduct was committed as part of a widespread or systematic attack directed against a civilian population;
    4) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.[60]

[58] *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgement and Sentence, 6 December 1999, para. 82.
[59] *Prosecutor v. Krstic*, Case No. IT-98-33-A, Judgement, 19 April 2004, para. 225.
[60] John Jones & Steven Powles, International Criminal Practice (2003), section 4.2.587 p. 292.

58. The Defence holds that proof of these elements is not adduced in this case. Furthermore, it should be noted that the ICC elements for the count of murder as a crime against humanity (see para. 5.5 below in this Motion), are overlapped by the elements set out by the ICC and ICTY Appeals Chamber with regard to the crime of extermination (see the section below for an elaboration on this argument).

5.5 Count 4 - Murder

59. Murder, a crime against humanity, punishable under Article 2(a) of the Statute.

60. The elements of crimes are as follows:

1) The perpetrator killed one or more persons;
2) The conduct was committed as part of a widespread or systematic attack directed against a civilian population;
3) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.[61]

61. Again, no evidence is adduced for at least the elements under 2 and 3.

5.6 Count 5 – Violence to Life, Health and Physical or Mental Well-Being of Persons, in Particular Murder

62. Violence to life, health and physical or mental well-being of persons, in particular murder, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.a. of the Statute.

63. The requisite elements of this specific charge are:

[61] John Jones & Steven Powles, International Criminal Practice (2003), section 4.2.587 p. 292.

1) The accused or a subordinate committed an act or omission with respect to the victim that precipitated the following results: (i) the victim is dead and (ii) the death resulted from an unlawful act or omission of the accused or a subordinate, and
2) At the time of the killing, the accused or a subordinate had the intention to kill or inflict grievous bodily harm or inflicted grievous bodily harm on the victim having known that such bodily harm is likely to cause the victim's death or is reckless as to whether or not death ensues.

64. Part B will show that the Prosecution has not introduced evidence as to these two elements relating to all the District which are enumerated in the Indictment.

5.7 Count 6 – Rape

65. Rape, a crime against humanity, punishable under Article 2.g. of the Statute, requires the following elements of crimes:
   (i) The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
   (ii) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.
   (iii) The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
   (iv) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.[62]

[62] John Jones & Steven Powles, International Criminal Practice (2003), section 4.2.587 p. 294.

66. The ICTR case law has refined these criteria as follows:

> "596. Considering the extent to which rape constitute crimes against humanity, pursuant to Article 3(g) of the Statute, the Chamber must define rape, as there is no commonly accepted definition of this term in international law. While rape has been defined in certain national jurisdictions as non-consensual intercourse, variations on the act of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual.
>
> 597. The Chamber considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual frame work of state sanctioned violence. This approach is more useful in international law. Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.
>
> 598. The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive. This act must be committed :
>
> (a) as part of a wide spread or systematic attack;
> (b) on a civilian population;
> (c) on certain catalogued discriminatory grounds, namely: national, ethnic, political, racial, or religious grounds."[63]

67. It is clear from the Prosecution's case that it failed to adduce any evidence to sustain a conviction for any of these elements, particularly under (a) – (c)

5.8 Count 7 – Sexual Slavery and Any Other Form of Sexual Violence

68. Sexual slavery and any other form of sexual violence, a crime against humanity, is punishable under Article 2.g. of the Statute.

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[63] *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998, paras. 596 – 598.

69. Sexual slavery is conditioned on the following elements:

(i) The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.

(ii) The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.

(iii) The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

(iv) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.[64]

70. The elements of any other form of sexual violence consist of:

(i) The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

(ii) Such conduct was of a gravity comparable to the other crimes against humanity of a sexual nature[65].

(iii) The perpetrator was aware of the factual circumstances that established the gravity of the conduct.

(iv) The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

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[64] John Jones & Steven Powles, International Criminal Practice (2003), section 4.2.587 p. 295.
[65] In the ICC Statute referral is made to other offences in Article 7(1)(g) of the ICC Statute, being crimes against humanity of a sexual nature.

(v) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.[66]

71. Here it can be concluded that the Prosecution's case lacks any evidence, particularly with respect to the elements under (iii) and (iv) regarding both crimes. The same counts for the amended charge of "forced marriage" which was implemented in the Indictment as a derivative of sexual violence. In this regard it should be noted that the Prosecution has not introduced evidence of the phenomenon of "forced marriages" other than the expert testimony of Ms. Bangura which testimony lacks empirical value.

5.9 Count 8 – Other Inhumane Act

72. Other inhumane act, a crime against humanity, punishable under Article 2.i. of the Statute entail the following elements:

(i) The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.

(ii) Such act was of a character similar to any other act referred to in Article 7(1) of the ICC Statute.

(iii) The perpetrator was aware of the factual circumstances that established the character of an act.

(iv) The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

(v) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.[67]

[66] John Jones & Steven Powles, International Criminal Practice (2003), section 4.2.587 p. 296.
[67] John Jones & Steven Powles, International Criminal Practice (2003), section 4.2.587 p. 298.

73. Clearly, even before going into Part B of this motion, it can be concluded that the elements under (iii) , (iv) and (v) have not been fulfilled based upon the Prosecution case.

5.10 Count 9 – Outrages on Personal Dignity

74. Outrages upon personal dignity, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.e. of the Statute comprise the following elements of crimes (as a war crime):

(iv) The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons.

(v) The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity.

(vi) The conduct took place in the context of and was associated with an international armed conflict.

(vii) The perpetrator was aware of factual circumstances that established the existence of an armed conflict.[68]

5.11 Count 10 – Violence to Life, Health and Physical or Mental Well-Being of Persons, in Particular Mutilation

75. Violence to life, health and physical or mental well-being of persons, in particular mutilation, a violation Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.a. of the Statute require proof of the following elements of crimes (as a war crime):

(i) The perpetrator subjected one or more persons to mutilation, in particular by permanently disfiguring the person or persons, or by permanently disabling or removing an organ or appendage.

(ii) The conduct was neither justified by the medical, dental or hospital treatment of the person or persons concerned nor carried out in such person's or persons' interest.

[68] John Jones & Steven Powles, International Criminal Practice (2003), section 4.2.587 p. 311.

(iii) Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.

(iv) The perpetrator was aware of the factual circumstances that established his status.

(v) The conduct took place in the context of and was associated with an armed conflict not of an international character.

(vi) The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

76. Part B of this motion indicates that the Prosecution has not introduced evidence as to all of these elements enhancing all the District enumerated in the several counts.

5.12 Count 11 – Other Inhumane Acts

77. Other inhumane acts, a crime against humanity, punishable under Article 2.i. of the Statute entail the following elements of crimes:

(i) The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.

(ii) Such act was of a character similar to any other act referred to in Article 7(1) of the ICC Statute.

(iii) The perpetrator was aware of the factual circumstances that established the character of an act.

(iv) The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

(v) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.[69]

[69] John Jones & Steven Powles, International Criminal Practice (2003), section 4.2.587 p. 298.

78. Similar to the previous conclusions, no evidence has been adduced specifically as to the elements under (iii), (iv) and (v) (see further Part B).

5.13 Count 12 – Conscripting or Enlisting Children under the Age of 15 Years into the Armed Forces or Groups, or Using Them to Participate Actively in the Hostilities

79. Conscripting or Enlisting Children under the Age of 15 Years into the Armed Forces or Groups, or Using Them to Participate Actively in the Hostilities, an other serious violation of international humanitarian law, punishable under Article 4.c. of the Statute requires proof of the following elements of crimes (as a war crime):

(i) The perpetrator conscripted or enlisted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities.

(ii) Such person or persons were under the age of 15 years.

(iii) The perpetrator knew or should have known that such person or persons were under the age of 15 years.

(iv) The conduct took place in the context of and was associated with an international armed conflict.

(v) The perpetrator was aware of factual circumstances that established the existence of an armed conflict.[70]

5.14 Count 13 – Enslavement

80. Enslavement, a crime against humanity, punishable under Article 2.c. of the Statute requires proof of the following elements of crimes (as a war crime):

(i) The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty;

[70] John Jones & Steven Powles, International Criminal Practice (2003), section 4.2.587 p. 314.

(ii) The conduct was committed as part of a widespread or systematic attack directed against a civilian population;

(iii) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.[71]

81. Also here it is evident that the Prosecution case falls short in proving all three elements. This conclusion finds support in ther ICTY *Kunarac* case in which the Appeals Chamber adopted the indicia of enslavement developed by the Trial Chamber. These factors include "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.[72] Now that these factors have not been established by the Prosecution, the motion for acquittal should be granted as to this charge.

5.15 Count 14 – Pillage

82. Pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(f) of the Statute, enhances the following elements of crimes:

(i) The perpetrator appropriated certain property.

(ii) The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.

(iii) The appropriation was without the consent of the owner.

(iv) The conduct took place in the context of and was associated with an international armed conflict.

(v) The perpetrator was aware of factual circumstances that established the existence of an armed conflict.[73]

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[71] John Jones & Steven Powles, International Criminal Practice (2003), section 4.2.587 p. 293.
[72] See *Prosecutor v. Kunarac*, ICTY Appeals Chamber Judgment 12 June 2002, Case No. IT-96-23-A, para. 119.
[73] John Jones & Steven Powles, International Criminal Practice (2003), section 4.2.587 p. 309.

83. **Primarily**, the Defence submits that burning as such does not fulfill the elements of pillage. The Defence described the elements of this specific crime under the ICC Statute. The Prosecution in its Pre-Trial Brief made use of a different set of elements; it is not clear what the Prosecution's basis for this specific set of elements is, but they do not concur with the ICC elements of crime.

84. The Defence submits that of the ICC elements as set out above, the first, second and third elements have not been fulfilled as regards "count 14: looting and burning," indicted as "pillage" with regard to the burning aspect thereof. According to the humble submission of the Defence, burning does not fall under the definition of pillage.

85. In *Prosecutor v. Delalic et al.*, the ICTY Trial Chamber observed that "the offence of unlawful appropriation of public and private property in armed conflict has varyingly been termed 'pillage', 'plunder' and 'spoliation'."[74] Therefore, pillage requires appropriation, while the burning of property is something different: no property is appropriated, and there is certainly no intent of appropriation.

86. This argument becomes even stronger now that the Special Court Statute specifically provides in Article 5(b)(i), (ii) and (iii) for wanton destruction of property, more specifically "[s]etting fire to dwelling – houses, any person being therein (...)," "[s]etting fire to public buildings (...)," and "[s]etting fire to other buildings (...)." The Prosecution thus deliberately chose to categorize burning, as alleged in the Indictment, as pillage, which does not fulfill the required elements.

87. In the **alternative**, in case the Trial Chamber would not follow the primary argument set out above, and would find that burning in fact does fall under the

[74] *Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, Judgement, 16 November 1998, para. 591.

crime of pillage, the Defence teams will in their separate second, factual, parts of this Motion for Acquittal go into the evidence regarding burning.

88. Based on this section of this Motion for Acquittal, the conclusion is warranted that the Prosecution provided no evidence supporting this count of the Indictment. In any event, read in conjunction with Part B of this Motion for Acquittal, this conclusion is justified.

CONCLUSION PART A

89. Considering the legal assessment of the Prosecution's case as set forth in this Part A, the Defence seeks for a dismissal of the case pursuant to Rule 98 even before going into the factual Part B.

90. In the alternative, Part B of this motion justifies this conclusion.

Respectfully submitted,
On 13 December 2005,

Geert-Jan Alexander Knoops

Kojo Graham

Andrew Daniels

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ANNEX 1 – LIST OF AUTHORITIES

CASE LAW

1. *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-T, 2 September 1998 (URL: http://65.18.216.88/ENGLISH/cases/Akayesu/judgement/akay001.htm) – relevant parts: para. 484, 596 – 598.
2. *Prosecutor v. Bagosora* et al., ICTR-98-41-T, Trial Chamber, Decision on Motions for Judgement of Acquittal, 2 February 2005 (URL: http://65.18.21688/ENGLISH/cases/Bagosora/decisions/020205.htm).
3. *Prosecution v. Blaskic*, ICTY Appeals Chamber Judgment, 29 July 2004, IT-95-14-T-A (URL: http://www.un.org/icty/blaskic/appeal/judgement/bla-aj040729e.pdf) – relevant parts: para. 41-42, 126, 257, 52, 50, 287.
4. *Prosecutor v. Brdanin*, Judgment, 1 September 2004, Case No. IT-99-36-T (URL: http://www.un.org/icty/brdjanin/trialc/judgement/brd-tj040901e.pdf) – para. 264, 347, 351-352.
5. *Prosecutor v. Brdanin*, Decision on Interlocutory Appeal on Defence Motion for Acquittal, 19 March 2004, IT-99-36-A (URL: http://www.un.org/icty/brdjanin/appeal/decision-e/040319.htm) – relevant part: para. 5.
6. *Prosecutor v. Brima et al.*, Case No. SCSL-2004-16-T-404, Scheduling Order for Filing of a Motion for Judgement of Acquittal, 30 September 2005, p.2.
7. *Prosecutor v. Delalic et al.* (Celibici), Judgment, Case No. IT-96-21-T, 16 November 1998 (URL: http://www.un.org/icty/celebici/trialc2/judgement/cel-tj981116e.pdf) – relevant parts: para. 346, 591.
8. *Prosecutor v. Delalic et al. (Celibici)*, Case No. IT-96-21-T, Appeals Judgment, 20 February 2001 (URL: http://www.un.org/icty/celebici/appeal/judgement/cel-aj010220.pdf) – relevant parts: para. 256, 266.
9. *Prosecutor v. Halilovic*, ICTY judgment 16 November 2005, IT-01-48-T (URL: http://www.un.org/icty/halilovic/trialc/judgement/tcj051116e.pdf) – relevant parts: paras. 57-63.
10. *Prosecutor v. Jelisic*, IT-95-10-A, Appeals Chamber, Judgment, 5 July 2001 (URL: http://www.un.org/icty/jelisic/appeal/judgement/jel-aj010705.pdf) – relevant parts: para. 33, 37.
11. *Prosecutor v. Fofana*, Case No. SCSL-2003-11 (filing number Court Management 62), Preliminary Defence Motion on the Lack of Personal Jurisdiction, 17 November 2003.
12. *Prosecutor v. Furundzija*, Judgment, Case No. IT-95-17/1-T, 10 December 1998 (URL: http://www.un.org/icty/furundzija/trialc2/judgement/fur-tj981210e.pdf) – relevant parts: paras. 190 – 249.
13. *Prosecutor v. Galic*, Case No. IT-98-29-T, Judgement and Opinion, 5 December 2003 (URL http://www.un.org/icty/galic/trialc/judgement/gal-tj031205e.pdf) – relevant part: para. 133.
14. *Prosecutor v. Kordic et al.*, Case No. IT-965-14/2-T, Decision on Defence Motions for Judgement of Acquittal, 6 April 2000 (URL: http://www.un.org/icty/kordic/trialc/decision-e/00406DC512861.htm) – relevant parts: paras. 32, 35.
15. *Prosecutor v. Krstic*, Case No. IT-98-33-A, Judgement, 19 April 2004 (URL: http://www.un.org/icty/krstic/Appeal/judgement/krs-aj040419e.pdf) – relevant part: para. 225.
16. *Prosecutor v. Kunarac et al.*, Case No. IT-96-23-T, Judgment, 22 February 2001 (URL: http://www.un.org/icty/krstic/Appeal/judgement/krs-aj040419e.pdf) – relevant part: para. 393.
17. *Prosecutor v. Milosevic*, IT-02-54-T, Trial Chamber, Decision on Motion for Judgment of Acquittal, 16 June 2004 (URL: http://www.un.org/icty/milosevic/trialc/judgement/index.htm) – relevant part: para. 13.
18. See *Prosecutor v. Kunarac*, ICTY Appeals Chamber Judgment 12 June 2002, Case No. IT-96-23-A (URL: http://www.un.org/icty/kunarac/appeal/judgement/kun-aj020612e.pdf) – relevant part: para. 119.
19. *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T, Reasons for Oral Decision of 17 September 2002 on the Motions for Acquittal; Rule 98*bis* of the Rules of Procedure and Evidence,

25 September 2002 (URL: http://65.18.216.88/ENGLISH/cases/Nahimana/decisions/250902.htm) – relevant part: para. 19.
20. *Prosecutor v. Norman et al.*, SCSL-2004-14-PT-26, Decision of the Preliminary Defence Motion on the Lack of Personal Jurisdiction filed on behalf of Accused Fofana, 3 March 2004, para. 26-27.
21. *Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-T-473, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 21 October 2005, para. 36, 49, 110-111, 118.
22. *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgement and Sentence, 6 December 1999 (URL: http://65.18.216.88/ENGLISH/cases/Rutaganda/judgement/index.htm) – relevant part: para. 82.
23. *Prosecutor v. Sikirica*, Case No. IT-95-8-T, Judgement on Defence Motions to Acquit, 3 September 2001 (URL: http://www.worldlii.org/int/cases/ICTY/2001/9.html) – relevant parts: para. 9, 115, 150.
24. *Prosecutor v. Strugar*, IT-01-42-T, Trial Chamber, Decision on Defence Motion Requesting Judgment of Acquittal Pursuant to Rule 98*bis*, 21 June 2004 (URL: http://www.un.org/icty/strugar/trialc1/judgement/index.htm).
25. *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, 15 July 1999 (URL: http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf) – relevant part: para. 188.
26. *Prosecutor v. Vasiljevic*, ICTY Appeals Chamber Judgment, 25 February 2004, IT-98-32-A (URL: http://www.un.org/icty/vasiljevic/appeal/judgement/val-aj040225e.pdf).

LITERATURE

27. Luc Côté, Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law, 1 *Journal of International Criminal Justice* p.162 – 186 (2005), p.184-186
28. Geert-Jan Alexander Knoops, *Theory and Practice of International and Internationalized Criminal Proceedings*, p.117-119 (2005).
29. B.H. Jallow, Prosecutorial Discretion and International Criminal Justice, *Journal of International Criminal Justice* 3, 2005, p. 145 – 161, at p.152.
30. John Jones & Steven Powles, International Criminal Practice (2003), section 4.2.587 p. 292-296, 298, 309, 311, 314.

MISCELLANEOUS

31. Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, S/2000/915, para. 29-30.
32. See Letter of 22 December 2000 from the President of the SC to the Secretary-General, S/2000/1234, para. 1.
33. UN SC Resolution 1503 (2003) on the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.
34. See letter of the Secretary General addressed to the President of the Security Council, S/2001/40, 12 January 2001, para. 2.
35. ICRC, Commentary on the Additional Protocols, at 1374 and 1375.

Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law

Luc Côté*

Abstract

This paper sheds some light on the exercise of prosecutorial discretion in international criminal law, particularly within the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia. It argues that in international criminal law, the area where prosecutorial discretion becomes most politically sensitive concerns the power to select which individuals to prosecute, what rank of individual should be targeted for prosecution, and how many individuals to try before an international criminal tribunal. After briefly looking at the extent of the discretionary powers given to the international Prosecutor and, more importantly, at how they are exercised in practice, the author tries to identify the limits of these powers from three different angles: their legality in the light of the right to equality of treatment, the duty of impartiality of the Prosecutor and, finally, the legitimacy of the decisions to indict considering other efforts to negotiate peace. It concludes by identifying the new trends observed in international criminal law to limit prosecutorial discretion at the International Criminal Court, the Special Court for Sierra Leone and in the newly adopted completion strategy of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia.

1. Introduction

Only recently did the concept of prosecutorial discretion in international criminal justice become a subject of interest in the legal literature.[1] The

* Chief of Prosecutions, Special Court for Sierra Leone. The author was previously a member of the Office of the Prosecutor of the ICTR from 1995 to 1999. The views expressed here are solely those of the author and do not reflect those of the Special Court or the United Nations.

1 See D. D. Ntanda Nsereko, 'Prosecutorial Discretion Before National Courts and International Tribunals', 3 *JICJ* (2005) 124–144; M. R. Brubacher, 'Prosecutorial Discretion within the International Criminal Court', 2 *JICJ* (2004) 71–95; A. Marston Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court', 97 *American Journal of International Law (AJIL)* (2003) 510.

Journal of International Criminal Justice 3 (2005), 162–186 doi: 10.1093/jicj/mqi013

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4 Amnesty International, 'The Interna
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6 R. Dworkin, *Taking Rights Seriously*

general mandate 'to prosecute persons *responsible* for serious violations of international humanitarian law'. Criticism was voiced about the level and number of persons indicted — two factors that have had an impact on the lifespan of both ad hoc Tribunals and which represent a real financial burden for the United Nations. Since then, new approaches have been taken to try to limit the scope of prosecutorial discretion within new and existing international judicial institutions. In the cases of the ICC and the SCSL, provisions were introduced into their Statutes to try to limit and control the prosecutorial discretion in selecting the accused (SCSL) or initiating an investigation (ICC). In the case of the ICTR and ICTY, the Security Council imposed the adoption of a completion strategy that gives a clear directive to Prosecutors that limits their prosecutorial discretion for the remaining period of existence of both institutions.

In January 2002, the United Nations signed the 'Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone' (SCSL). Although inspired by the ICTR Statute, the SCSL Statute nevertheless distinguished itself from its sibling by adopting a much narrower mandate to 'prosecute persons *who bear the greatest responsibility* for serious violations of international humanitarian law . . .'[105] If this choice of words did not suffice to clearly limit the prosecutorial discretion over the level and number of persons to be indicted, the UN Secretary General's accompanying budget and proposed lifespan of the new Court would erase any doubts in the mind of the Prosecutor. The new Court was established for an anticipated time frame of three years, with a global budget for the whole period equivalent to one-tenth of the annual budget of the ICTR and ICTY.[106]

Members of the UN Security Council ultimately replaced the Secretary General's formulation 'persons most responsible' — suggested 'not as a test criterion or a distinct jurisdictional threshold, but as a guide to the Prosecutor in the adoption of a prosecution strategy'[107] — with those who bear the greatest responsibility'. They did this with the aim of 'limiting the focus of the Special Court to those who played leadership role'.[108] In a recent

105 The first paragraph of Art. 1 SCSLSt. reads as follows: 'The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.'

106 'On the 14 June 2001, the UN Secretariat presented to the group of interested States revised budget estimates amounting approximately to $57 million for the first three years of operation of the Court'; see letter dated 12 July 2001 from Secretary-General addressed to President of the Security Council, S/2001/693.

107 Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, S/2000/915, §30.

108 Letter dated 22 December 2000 from the President of the Security Council to the Secretary-General, S/2000/1234, §1.

decision, dated 3 March 2(with a preliminary defence decide on the significance as being without merit, the words 'persons bearing personal jurisdiction. There while it does of course guic articulate prosecutorial disc a more limited expression introduced a limit to prosec

Recently, Security Counc 2004) used a similar choice and ICTY by 2010, calling any new indictments, to en most senior leaders suspect the jurisdiction of the relev Following these Resolutior in which Prosecutors acce this guideline, and stated p that end:

> In determining which indivi Criminal Tribunal for Rwand those who are alleged to have the Prosecutor, bear the grea most senior leaders suspecte the jurisdiction of the Interna Security Council resolution making this determination are
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> - the alleged status and exten
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> - the availability of evidence v
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> - the availability of investi prosecution.[111]

Surprisingly, the ICTY Judg felt the need to amend the

109 Decision on the Preliminary Behalf of Accused Fofana, SC

110 *Supra*, note 109, §27.

111 'Completion strategy of the dated 30 April 2004 from Security Council, 3 May 200

decision, dated 3 March 2004,[109] the Trial chamber of the SCSL, confronted with a preliminary defence motion on the lack of personal jurisdiction, had to decide on the significance of these words. While rejecting the defence motion as being without merit, the Court nevertheless stated unanimously that the words 'persons bearing the greatest responsibility' were a component of personal jurisdiction. Therefore, they were a 'jurisdictional requirement, and while it does of course guide the prosecutorial strategy, it does not exclusively articulate prosecutorial discretion, as the Prosecution has submitted'.[110] Hence, a more limited expression of the Court's personal jurisdiction requirements introduced a limit to prosecutorial discretion into the SCSL Statute.

Recently, Security Council Res. 1503 (28 August 2003) and 1534 (26 March 2004) used a similar choice of words in aiming to end to the work of the ICTR and ICTY by 2010, calling on 'each Tribunal, in reviewing and confirming any new indictments, to ensure that any such indictments concentrate on the most senior leaders suspected of being the most responsible for crimes within the jurisdiction of the relevant Tribunal as set out in resolution 1503 (2003)'. Following these Resolutions, each Tribunal adopted a completion strategy in which Prosecutors accepted to limit their discretion in accordance with this guideline, and stated publicly for the first time the criteria to be used to that end:

> In determining which individuals should be subject to trial before the International Criminal Tribunal for Rwanda, the Prosecutor will be guided by the need to focus on those who are alleged to have been in positions of leadership and those who, according to the Prosecutor, bear the greatest responsibility for genocide. This concentration on the most senior leaders suspected of being most responsible for crimes committed within the jurisdiction of the International Criminal Tribunal for Rwanda is in conformity with Security Council resolution 1534 (2004). The criteria taken into consideration when making this determination are as follows:
>
> - the alleged status and extent of participation of the individual during the genocide
> - the alleged connection an individual may have with other cases
> - the need to cover the major geographical areas of Rwanda in which the crimes were allegedly committed
> - the availability of evidence with regard to the individual concerned
> - the concrete possibility of arresting the individual concerned
> - the availability of investigative material for transmission to a State for national prosecution.[111]

Surprisingly, the ICTY Judges went further down this road and, in April 2004, felt the need to amend their Rules of Procedure and Evidence to introduce

109 Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana, SCSL Trial Chamber (SCSL-2004-14-PT), 3 March 2004.

110 *Supra*, note 109, §27.

111 'Completion strategy of the International Criminal Tribunal for Rwanda', Annex to Letter dated 30 April 2004 from the President of the ICTR addressed to the President of the Security Council, 3 May 2004, S/2004/341, §14.

a new indictment-review mechanism in Rule 28. This new mechanism empowers the Bureau[112] to 'determine whether the indictment, *prima facie*, concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal'. Following a positive determination of that question, the indictment would then proceed to be reviewed on its merit by a single Judge under Rule 47. Absent a positive determination, the indictment would be sent back to the Prosecutor without being submitted for review. This amendment is not without problems. First, it attributes to what was created as a judicial administrative body — the Bureau — a clear judicial function not provided for by the Statute. Secondly, it introduces what can be seen as a new jurisdictional requirement, which, again, is nowhere present in the Statute; this makes it susceptible to challenges as *ultra vires*.

One can see that adapting the notion of prosecutorial discretion from domestic jurisdictions, where it was born and well integrated within the intrinsic checks and balances present in most democracies, to the newly evolving field of international criminal law, where no such structures exist and where world politics play a major role, will not be done easily. Certainly, the area in which prosecutorial discretion raises the most political sensitivity concerns the power to select which individuals, their level and numbers will be subject to prosecution before an international criminal tribunal. On one hand, the discretionary nature of this power vested in a single person — the Prosecutor — constitutes the best guarantee of his independence and, by implication, the independence of the whole international judicial institution towards self-interested states. Yet, its far-reaching and important nature is also cause for concern and must be carefully designed and limited to avoid excesses that could undermine the whole exercise of international criminal justice in the future.

112 Under Rule 2 ICTY RPE: The Bureau is a body composed of the President, the Vice-President and the Presiding Judges of the Trial Chambers.

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1. Introduction

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* Associate Professor, Aoyama Gaku

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Theory and Practice of International and Internationalized Criminal Proceedings

Geert-Jan Alexander Knoops

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ically meant to try international crimes and certain crimes under Sierra Leonean law committed during the civil war which took place in 1991-2000. The final draft for the Statute for the Special Court was agreed in Freetown on January 6, 2002. Article 1 of the Statute directly raises the issue of prosecutorial discretion. It provides in section 1 that:

> The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear *the greatest responsibility* (emphasis added; GJK) for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.

The criterion of "the greatest responsibility" is neither defined in Article 1 nor elsewhere in the Statute. The same applies for the term "these leaders who threatened the peace process."

The Secretary-General of the UN initially proposed prosecuting those "most responsible" for the crimes committed in Sierra Leone. The term "most responsible" was meant to confine prosecution to individuals with "both a leadership or authority position of the accused, and a sense of gravity, seriousness or massive scale of the crime."[347] As such, the term was apparently not meant for jurisdictional purposes but, rather, as guidance for the prosecutor in developing a prosecutorial strategy and thus totally brought within the phenomenon of prosecutorial discretionary powers.[348] The Security Council, however, held that the choice of the phrase "most responsible" was too expansive and preferred to limit prosecution to those who had exercised a leadership role. Consequently, the Sierra Leone Statute was amended to provide jurisdiction over those who exercised the "greatest responsibility" for the alleged offenses.[349] Based on this amendment, the Sierra Leone Special Court was initially expected to prosecute between twenty and twenty-five persons, far fewer than would have been the case under the Secretary-General's formulation.[350]

It appears therefore that the ultimate decision about which person to indict as having "the greatest responsibility" is ultimately up to only the prosecutor of the Special Court. One could argue that this criterion, without any further definition of its

[347] Secretary-General's Sierra Leone Report, UN DOC. S/2000/915 para. 30.

[348] Daryl A. Mundis, *Current Development, New Mechanisms for the Enforcement of IHL*, in 4 AJIL 936 (2001).

[349] See letter of 22 December 2000 from the President of the Security Council to the Secretary General, UN Doc. S/2000/1234, para. 1.

[350] Mundis, *supra* note 348, at 936.

contents, is no improvement in the international legal system. One cannot assume, without argument, that no alternative was available to delineate the criterion of "the greatest responsibility." As a matter of fact, the Statute or at least its Rules of Procedure and Evidence could have set forth several sub-criteria in order to subject prosecutorial discretion more clearly to judicial scrutiny, for instance in view of the earlier mentioned principle of equal application of the law to all persons. After all, how is the Special Court for Sierra Leone to assess whether an indictment of sergeant-major A complies with the criterion of "the greatest responsibility" when the defence raises the argument that sergeant-major B, who is not indicted, bears – at a glance – equal responsibility so that therefore the prosecution of A is considered arbitrary and a clear violation of Article 1(1) of the Statute of the Special Court for Sierra Leone?

Yet, such an argument is possible given the fact that, at present, only thirteen persons have been indicted before this Special Court,[351] among whom which are several low-ranking non-commissioned officers. In view of the length and intensity of the civil war in Sierra Leone, it seems unrealistic that only these thirteen persons, assuming that they (as is alleged) bear legal and factual responsibility, can be attributed with "the greatest responsibility" for the alleged serious crimes committed during this civil war. The foregoing implies that the legitimacy of criminal prosecutions before internationalized courts such as the Sierra Leone Special Court may be seriously endangered by such vague prosecutorial criteria as "the greatest responsibility" if the international legal community is not provided with more concrete parameters as to its content.

The wording of Article 1(1) of the Statute for the SCSL produces novel prosecutorial discretion within international criminal law; its text may have serious impact on political independence and integrity of trials in that it allows the prosecution exclusively first to select and qualify cases and persons as being the "greatest responsible." In addition Article 1(1) provides that:

> The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, *including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.* (Emphasis: GJK)

In particular, the latter wording provides the prosecution with considerable legal political authority with respect to the selection of cases and persons. This observa-

[351] Two of which were withdrawn due to the deaths of Foday Sankoh and Sam Bockarie.

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Prosecutorial Discretion and International Criminal Justice

Hassan B. Jallow*

Abstract

Prosecutorial discretion is a key notion in all criminal justice systems. It also applies at international level; however, while at national level there is a well developed body of precedents or specific legislation that guides the Prosecutors in their activity, at the international level, the situation is radically different, since international criminal courts are of new creation and there are very few precedents to look at. Hence, the author identifies a variety of factors that influence international Prosecutors in the exercise of their discretionary powers to open investigations and/or bring charges. In particular, on the basis of the case law of the ad hoc Tribunals, he underscores that in international criminal justice, it is extremely important to take into account the relevant international instruments according to which the various courts have been established.

1. Introduction

The exercise of prosecutorial discretion with regard to the investigation of criminal conduct and the institution of judicial proceedings is a necessary and fundamental concept in the administration of criminal justice. Its necessity springs from the practical need for a selective, rather than automatic, approach to the institution of criminal proceedings, thus avoiding the overburdening and perhaps clogging of the machinery of justice. Somebody somewhere thus has to decide whether or not to institute proceedings and for what offence or offences.

Discretion is essential to the operation of any system of criminal justice for, without it, the system would grind to a halt — it would be paralysed and would lack any flexibility or ability to adapt to particular circumstances. Every participant in the process exercises discretion, e.g. the police, whether to investigate and what leads to follow, etc.; the defence, whether to plead guilty or go to trial, what tack to take with witnesses in cross-examination,

* Chief Prosecutor, International Criminal Tribunal for Rwanda (ICTR). The views here expressed do not reflect those of the ICTR or the UN.

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the Security Council can be exercised without prejudice to the independence of the Prosecutor provided for in Article 15, § 2 of the Statute.

All these considerations point to the conclusion that the Prosecutor has to make a choice of whom to indict and who should be let off or dealt with otherwise than by a prosecution at the ICTR. What are the criteria for making such a difficult choice? What factors influence this exercise of prosecutorial discretion?

A recent review of the ICTR caseload, with a view to preparing the 2004 revised Completion Strategy of the Tribunal, provided an occasion for the OTP to consciously discuss and determine these criteria and then utilize them as the yardstick for choice of cases.

Evidentiary sufficiency to establish a prima facie case is, as provided in Article 18, the threshold for the confirmation of an indictment and the issue of an arrest and transfer warrant. The OTP is now guided with respect to new indictments by a higher threshold, based on the chances of conviction rather than merely establishing a prima facie case. Hence, unlike in the past, the filing of any new indictment is, under current prosecutorial policy, undertaken only after selection and proofing of witnesses rather than being based merely on the written witness statements.

The overall strategy of the OTP in the choice of cases is to concentrate on those responsible for 'serious' violations of international humanitarian law. The Statute is silent as to how seriousness is to be determined.

In practice, however, a number of factors provide guidance. The genocide in Rwanda was the result of a well planned conspiracy by the members of the government in power and the ruling political party, Mouvement Révolutionnaire National pour le Développement (MRND).

The primary targets for prosecution inevitably are therefore the political, administrative and military leadership at the time, which planned and oversaw the execution of the genocide. Any level of participation by any such persons is thus sufficient to bring them within the category of those to be prosecuted. Hence, the former Prime Minister Kambanda, several cabinet ministers, military officers, MRND leaders and local government administrators who played a significant role in the genocide have stood trial or are awaiting trial at Arusha.

OTP prosecution policy has fortunately been quite consistent over many years in targeting the governmental, political and military *leadership* which planned the genocide. Thus, so far, there have been 21 convictions, including a former prime minister, three cabinet ministers, two prefects, four bougmestres, one military officer and a senior administrator. Those currently standing trial include eight former ministers, one parliamentarian, two prefects, two senior administrators, three bougmestres and three military officers. Among those in detention awaiting trial are two prefects, four bougmestres, two councillors and seven military officers. A similar range of people are included in the list of indictees at large, as well as in the list of targets for investigation.

While leadership status or the level of the perpetrator is one index, another is the *extent of participation* of the accused suspect. Low-level perpetrators who are notorious for ext
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INTERNATIONAL CRIMINAL PRACTICE

The International Criminal Tribunal for the Former Yugoslavia
The International Criminal Tribunal for Rwanda
The International Criminal Court
The Special Court for Sierra Leone
The East Timor Special Panel for Serious Crimes
War Crimes Prosecutions in Kosovo

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Article 7
Crimes against humanity

Introduction
1. Since article 7 pertains to international criminal law, its provisions, consistent with article 22, must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world.
2. The last two elements for each crime against humanity describe the context in which the conduct must take place. These elements clarify the requisite participation in and knowledge of a widespread or systematic attack against a civilian population. However, the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.
3. "Attack directed against a civilian population" in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, para. 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that "policy to commit such attack" requires that the State or organization actively promote or encourage such an attack against a civilian population.

Article 7 (1) (a)
Crime against humanity of murder

Elements
1. The perpetrator killed one or more persons.
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

Article 7 (1) (b)
Crime against humanity of extermination

Elements
1. The perpetrator killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population.
2. The conduct constituted, or took place as part of, a mass killing of members of a civilian population.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Crime a

Elements
1. The perpetrator exercised any c
or more persons, such as by purcha
by imposing on them a similar depri
2. The conduct was committed as
civilian population.
3. The perpetrator knew that the c
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Crime against humanit

Elements
1. The perpetrator deported or fo
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2. Such person or persons were l
transferred.
3. The perpetrator was aware of
such presence.
4. The conduct was committed a
civilian population.
5. The perpetrator knew that the
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Crime agai
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Elements
1. The perpetrator imprisoned o
persons of physical liberty.
2. The gravity of the conduct wa
tional law.
3. The perpetrator was aware o
conduct.
4. The conduct was committed
civilian population.
5. The perpetrator knew that th
widespread or systematic attack

Article 7 (1) (c)
Crime against humanity of enslavement

Elements
1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (1) (d)
Crime against humanity of deportation or forcible transfer of population

Elements
1. The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.
2. Such person or persons were lawfully present in the area from which they were so deported or transferred.
3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (1) (e)
Crime against humanity of imprisonment or other severe deprivation of physical liberty

Elements
1. The perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty.
2. The gravity of the conduct was such that it was in violation of fundamental rules of international law.
3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

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Article 7 (1) (f) Crime against humanity of torture
Elements 1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons. 2. Such person or persons were in the custody or under the control of the perpetrator. 3. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions. 4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. 5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Comment:

Two ingredients are absent from this definition of torture which are found in ICTY and ICTR jurisprudence: (1) the need for a State actor to be implicated in the torutre, and (2) the need to prove a specific purpose for this crime.

4.2.588

Article 7 (1) (g)-1 Crime against humanity of rape
Elements 1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. 2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent. 3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. 4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.
Article 7 (1) (g)-2 Crime against humanity of sexual slavery
Elements 1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.

2. The perpetrator caused such p nature. 3. The conduct was committed a civilian population. 4. The perpetrator knew that the widespread or systematic attack d

Comment:

The definition of rape corresp
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Similar to Slavery of 1956. It
ment includes trafficking in p

Crime ag
Elements 1. The perpetrator caused one by force, or by threat of force or co psychological oppression or abus by taking advantage of a coercivi uine consent. 2. The perpetrator or another p tage in exchange for or in conne 3. The conduct was committed civilian population. 4. The perpetrator knew that th widespread or systematic attack
Crime
Elements 1. The perpetrator confined or ing the ethnic composition of an law. 2. The conduct was committe civilian population. 3. The perpetrator knew that t widespread or systematic attacl

2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Comment:

The definition of rape corresponds to the ICTY/ICTR's "mechanical" definition (see 4.2.557 above). It is stated, in a footnote to these Elements, that "It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children."

Article 7 (1) (g)-3
Crime against humanity of enforced prostitution

Elements
1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (1) (g)-4
Crime against humanity of forced pregnancy

Elements
1. The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Comment:

It seems odd that "*ethnic* composition" alone should be a prohibited intent, and not the intent to affect a racial, religious or national composition, which might well also be aims of perpetrators of this offence.

Article 7 (1) (g)-5
Crime against humanity of enforced sterilization

Elements
1. The perpetrator deprived one or more persons of biological reproductive capacity.
2. The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (1) (g)-6
Crime against humanity of sexual violence

Elements
1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. Such conduct was of a gravity comparable to the other offences in article 7, para. 1 (g), of the Statute.
3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (1) (h)
Crime against humanity of persecution

Elements
1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.
2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, para. 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.

4. The conduct was committed in
Statute or any crime within the juris
5. The conduct was committed as
civilian population.
6. The perpetrator knew that the
widespread or systematic attack dir

Crime against hun

Elements
1. The perpetrator:
(a) Arrested, detained or abducted
(b) Refused to acknowledge the ar
or whereabouts of such person
2. (a) Such arrest, detention or ab
edge that deprivation of freedom or
or persons; or
(b) Such refusal was preceded or
3. The perpetrator was aware tha
(a) Such arrest, detention or abdu
refusal to acknowledge that de
abouts of such person or persc
(b) Such refusal was preceded or
4. Such arrest, detention or abdu
acquiescence of, a State or a politi
5. Such refusal to acknowledge t
whereabouts of such person or per
such State or political organization
6. The perpetrator intended to re
a prolonged period of time.
7. The conduct was committed as
civilian population.
8. The perpetrator knew that the
widespread or systematic attack di

Comment:

Two footnotes to the above art
complex nature of this crime, it
more than one perpetrator as
"This crime falls under the ju
elements 7 and 8 occurs after t
seems designed to keep "disap
which occurred in the 1970s,
counter to the idea of "continui

case before the Inter-American Court of Human Rights, whereby a State can incur responsibility for a "disappearance" long in the past if it fails to take appropriate action to locate the person or to punish the perpetrators in the present.

Article 7 (1) (j)
Crime against humanity of apartheid

Elements
1. The perpetrator committed an inhumane act against one or more persons.
2. Such act was an act referred to in article 7, para. 1, of the Statute, or was an act of a character similar to any of those acts.
3. The perpetrator was aware of the factual circumstances that established the character of the act.
4. The conduct was committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups.
5. The perpetrator intended to maintain such regime by that conduct.
6. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
7. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (1) (k)
Crime against humanity of other inhumane acts

Elements
1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
2. Such act was of a character similar to any other act referred to in article 7, para. 1, of the Statute.
3. The perpetrator was aware of the factual circumstances that established the character of the act.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

4.2.589

Article 8
War crimes

Introduction
The elements for war crimes under article 8, para. 2 (c) and (e), are subject to the limitations addressed in article 8, para. 2 (d) and (f), which are not elements of crimes.
The elements for war crimes under article 8, para. 2, of the Statute shall be interpreted within the established framework of the international law of armed conflict including, as appropriate, the

international law of arme
With respect to the last t
- There is no requirem armed conflict or its
- In that context there established the char
- There is only a requi the existence of an a was associated with

Elements
1. The perpetrator kille
2. Such person or pers 1949.
3. The perpetrator was
4. The conduct took pl conflict.
5. The perpetrator was armed conflict.

Elements
1. The perpetrator infli sons.
2. The perpetrator infli confession, punishment, kind.
3. Such person or pers 1949.
4. The perpetrator was
5. The conduct took pl conflict.
6. The perpetrator was armed conflict.

Comment:

Unlike torture as a crir perpetrator inflicted th was introduced is not

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with an international armed conflict.
stablished the existence of an

wounding

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ıal law applicable in armed conflict.

ing or injuring such person or

with an international armed conflict.
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urvivors.
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sity.
ith an international armed conflict.
ıblished the existence of an

Article 8 (2) (b) (xiv)
War crime of depriving the nationals of the hostile power of rights or actions

Elements
1. The perpetrator effected the abolition, suspension or termination of admissibility in a court of law of certain rights or actions.
2. The abolition, suspension or termination was directed at the nationals of a hostile party.
3. The perpetrator intended the abolition, suspension or termination to be directed at the nationals of a hostile party.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xv)
War crime of compelling participation in military operations

Elements
1. The perpetrator coerced one or more persons by act or threat to take part in military operations against that person's own country or forces.
2. Such person or persons were nationals of a hostile party.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xvi)
War crime of pillaging

Elements
1. The perpetrator appropriated certain property.
2. The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.
3. The appropriation was without the consent of the owner.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xvii)
War crime of employing poison or poisoned weapons

Elements
1. The perpetrator employed a substance or a weapon that releases a substance as a result of its employment.
2. The substance was such that it causes death or serious damage to health in the ordinary course of events, through its toxic properties.

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or serious damage to health in
operties.
with an international armed

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d use of chemical weapons."
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law of armed conflict because

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/ith an international armed

lished the existence of an

Article 8 (2) (b) (xx)
War crime of employing weapons, projectiles or materials or methods of warfare listed in the Annex to the Statute

Elements
[Elements will have to be drafted once weapons, projectiles or material or methods of warfare have been included in an annex to the Statute.]

Article 8 (2) (b) (xxi)
War crime of outrages upon personal dignity

Elements
1. The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons.
2. The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xxii)-1
War crime of rape

Elements
1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xxii)-2
War crime of sexual slavery

Elements
1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xxvi)
War crime of using, conscripting or enlisting children

Elements
1. The perpetrator conscripted or enlisted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities.
2. Such person or persons were under the age of 15 years.
3. The perpetrator knew or should have known that such person or persons were under the age of 15 years.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (c)
Article 8 (2) (c) (i)-1
War crime of murder

Elements
1. The perpetrator killed one or more persons.
2. Such person or persons were either *hors de combat*, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities.
3. The perpetrator was aware of the factual circumstances that established this status.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (c) (i)-2
War crime of mutilation

Elements
1. The perpetrator subjected one or more persons to mutilation, in particular by permanently disfiguring the person or persons, or by permanently disabling or removing an organ or appendage.
2. The conduct was neither justified by the medical, dental or hospital treatment of the person or persons concerned nor carried out in such person's or persons' interests.
3. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.
4. The perpetrator was aware of the factual circumstances that established this status.
5. The conduct took place in the context of and was associated with an armed conflict not of an international character.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Elements
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2. Such person or persons
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4. The conduct took place i
international character.
5. The perpetrator was awa
armed conflict.

Elements
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2. The perpetrator inflicted
confession, punishment, intin
kind.
3. Such person or persons
religious personnel taking no
4. The perpetrator was awa
5. The conduct took place i
international character.
6. The perpetrator was awa
armed conflict.

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Elements
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2. The severity of the humil
generally recognized as an o
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4. The perpetrator was awa
5. The conduct took place
international character.
6. The perpetrator was awa
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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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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

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United Nations S/2000/1234

Security Council

Distr.: General
22 December 2000

Original: English

Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General

The members of the Security Council have carefully reviewed your report of 4 October 2000 on the establishment of a Special Court for Sierra Leone (S/2000/915). The Council members wish to convey their deep appreciation for the observations and recommendations set forth in your report.

The members of the Security Council reaffirm their support for resolution 1315 (2000) and its reiteration that the situation in Sierra Leone constitutes a threat to international peace and security. With the objective of conforming to resolution 1315 (2000) and related concerns, and subject to the agreement of the Government of Sierra Leone as necessary and appropriate, the members of the Council suggest that the draft Agreement between the United Nations and the Government of Sierra Leone and the proposed Statute of the Court be amended to incorporate the views set forth below.

1. *Personal jurisdiction.* The members of the Security Council continue to hold the view, as expressed in resolution 1315 (2000), that the Special Court for Sierra Leone should have personal jurisdiction over persons who bear the greatest responsibility for the commission of crimes, including 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. The members of the Security Council believe that, by thus limiting the focus of the Special Court to those who played a leadership role, the simpler and more general formulations suggested in the appended draft will be appropriate. It is the view of the members of the Council that the Truth and Reconciliation Commission will have a major role to play in the case of juvenile offenders, and the members of the Security Council encourage the Government of Sierra Leone and the United Nations to develop suitable institutions, including specific provisions related to children, to this end. The members of the Security Council believe that it is the responsibility of Member States who have sent peacekeepers to Sierra Leone to investigate and prosecute any crimes they may have allegedly committed. Given the circumstances of the situation in Sierra Leone, the Special Court would have jurisdiction over those crimes only if the Security Council considers that the Member State is not discharging that responsibility. Therefore, Council members propose the inclusion of language in the Agreement to be concluded between the United Nations and the Government of Sierra Leone and in the Statute of the Special Court to that effect.

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2. *Funding.* Pursuant to resolution 1315 (2000), members of the Security Council support the creation of a Special Court for Sierra Leone funded through voluntary contributions. Such contributions shall take the form of funds, equipment and services, including the offer of expert personnel that may be needed from States, intergovernmental organizations and non-governmental organizations. It is understood that you cannot be expected to create any institution for which you do not have adequate funds in hand for at least 12 months and pledges to cover anticipated expenses for a second year of the Court's operation.

In order to assist the Court on questions of funding and administration, it is suggested that the arrangements between the Government of Sierra Leone and the United Nations provide for a management or oversight committee which could include representatives of Sierra Leone, the Secretary-General of the United Nations, the Court and interested voluntary contributors. The management committee would assist the court in obtaining adequate funding, provide advice on matters of Court administration and be available as appropriate to consult on other non-judicial matters.

3. *Court size.* The members of the Security Council do not believe the creation of two Trial Chambers and the use of alternate judges as proposed in your report is necessary, at least not from the very outset. The Special Court should begin its work with a single Trial Chamber, with the possibility of adding a second Chamber should the developing caseload warrant its creation. Council members also question the provision in the draft Agreement and Statute calling for alternate judges. It should be noted in this connection that neither the International Tribunal for the Former Yugoslavia nor the International Criminal Tribunal for Rwanda employs alternate judges.

The members suggest the following further adjustments of a technical or drafting nature to the Agreement: Add an express provision to article 13 as a new subparagraph (d) under paragraph 2, concerning immigration restrictions; to article 14 concerning witnesses and experts; and to article 4 (c) of the Statute of the Court, modifying it so as to conform it to the statement of the law existing in 1996 and as currently accepted by the international community.

The members of the Security Council express their hope that you will concur with the proposals outlined above and adjust the draft Agreement between the United Nations and the Government of Sierra Leone and the Statute of the Court as expeditiously as possible, along the above lines and as indicated in the attached annex.

(*Signed*) Sergey **Lavrov**
President of the Security Council

Annex

In consequence of the comments contained in the letter, it is suggested that consideration be given to adjustment of the "Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone" and the "Statute of the Special Court for Sierra Leone".

Agreement

Preamble

No change.

Article 1
Establishment of the Special Court

1. There is hereby established a Special Court for Sierra Leone to prosecute persons who bear the greatest responsibility 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 a Trial Chamber and an Appeals Chamber with a second Trial Chamber to be created if, after the passage of at least six (6) months from the commencement of the functioning of the Special Court the Secretary-General, the Prosecutor or the President of the Special Court so request. Up to two alternate judges shall similarly be appointed after six months if the President of the Special Court so determines.

2. The Chambers shall be composed of no fewer than eight (8) independent judges and no more than eleven (11) such judges who shall serve as follows:

(a) Three judges shall serve in the Trial Chamber where 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 ...

(b) In the event of the creation of a second Trial Chamber, that Chamber shall be likewise composed in the manner contained in subparagraph (a) above;

(c) Former paragraph 2 (b).

3. *No change.*

4. *No change.*

5. If an alternate judge or judges have been appointed, in addition ...

Article 3

No change.

Articles 4 and 5

No change.

Article 6
Expenses of the Special Court

The expenses of the Court shall be borne by voluntary contributions from the international community. It is understood that the Secretary-General will commence the process of establishing the Court when he has sufficient contributions in hand to finance the establishment of the Court and 12 months of its operations plus pledges equal to the anticipated expenses of the second 12 months of the Court's operation. It is further understood that the Secretary-General will continue to seek contributions equal to the anticipated expenses of the Court beyond its first 24 months of operation. Should voluntary contributions be insufficient for the Court to implement its mandate, the Secretary-General and the Security Council shall explore alternate means of financing the Court.

Articles 7 to 12

No change.

Article 13

New paragraph 2 (d)

Immunity from any immigration restrictions during his or her stay as well as during his/her journey to the Court and back.

Article 14

... The provisions of article 13, paragraph 2 (a) and (d), shall apply to them.

Articles 15 to 20

No change.

Statute

Preamble

No change.

Article 1
Competence of the Special Court

(a) The Special Court shall, except as provided in subparagraph (b), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who,

in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.

(b) Any transgressions by peacekeepers and related personnel present in Sierra Leone pursuant to the Status of Mission Agreement in force between the United Nations and the Government of Sierra Leone or agreements between Sierra Leone and other Governments or regional organizations, or, in the absence of such agreement, provided that the peacekeeping operations were undertaken with the consent of the Government of Sierra Leone, shall be within the primary jurisdiction of the sending State.

(c) In the event the sending State is unwilling or unable genuinely to carry out an investigation or prosecution, the Court may, if authorized by the Security Council on the proposal of any State, exercise jurisdiction over such persons.

Articles 2 and 3

No change.

Article 4

... (*as is*)

(c) Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.

Articles 5 and 6

No change.

Article 7

Should any person who was at the time of the alleged commission of the crime below 18 years of age come before the Court, he or she 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, and in accordance with international human rights standards, in particular the rights of the child.

Articles 8 to 10

No change.

Article 11

(a) The Chamber, comprising one or more Trial Chambers and an Appeals Chamber;

Article 12

1. The Chamber shall be composed of not less than eight (8) or more than eleven (11) independent judges, who shall serve as follows:

[*consequential changes in paras. 1 (a) and 4*]

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(33)

United Nations S/RES/1503 (2003)

Security Council

Distr.: General
28 August 2003

Resolution 1503 (2003)

Adopted by the Security Council at its 4817th meeting, on 28 August 2003

The Security Council,

Recalling its resolutions 827 (1993) of 25 May 1993, 955 (1994) of 8 November 1994, 978 (1995) of 27 February 1995, 1165 (1998) of 30 April 1998, 1166 (1998) of 13 May 1998, 1329 (2000) of 30 November 2000, 1411 (2002) of 17 May 2002, 1431 (2002) of 14 August 2002, and 1481 (2003) of 19 May 2003,

Noting the letter from the Secretary-General to the President of the Security Council dated 28 July 2003 (S/2003/766),

Commending the important work of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in contributing to lasting peace and security in the former Yugoslavia and Rwanda and the progress made since their inception,

Noting that an essential prerequisite to achieving the objectives of the ICTY and ICTR Completion Strategies is full cooperation by all States, especially in apprehending all remaining at-large persons indicted by the ICTY and the ICTR,

Welcoming steps taken by States in the Balkans and the Great Lakes region of Africa to improve cooperation and apprehend at-large persons indicted by the ICTY and ICTR, but noting with concern that certain States are still not offering full cooperation,

Urging Member States to consider imposing measures against individuals and groups or organizations assisting indictees at large to continue to evade justice, including measures designed to restrict the travel and freeze the assets of such individuals, groups, or organizations,

Recalling and reaffirming in the strongest terms the statement of 23 July 2002 made by the President of the Security Council (S/PRST/2002/21), which endorsed the ICTY's strategy for completing investigations by the end of 2004, all trial activities at first instance by the end of 2008, and all of its work in 2010 (ICTY Completion Strategy) (S/2002/678), by concentrating on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes within the ICTY's jurisdiction and transferring cases involving those who may not bear this

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level of responsibility to competent national jurisdictions, as appropriate, as well as the strengthening of the capacity of such jurisdictions,

Urging the ICTR to formalize a detailed strategy, modelled on the ICTY Completion Strategy, to transfer cases involving intermediate- and lower-rank accused to competent national jurisdictions, as appropriate, including Rwanda, in order to allow the ICTR to achieve its objective of completing investigations by the end of 2004, all trial activities at first instance by the end of 2008, and all of its work in 2010 (ICTR Completion Strategy),

Noting that the above-mentioned Completion Strategies in no way alter the obligation of Rwanda and the countries of the former Yugoslavia to investigate those accused whose cases would not be tried by the ICTR or ICTY and take appropriate action with respect to indictment and prosecution, while bearing in mind the primacy of the ICTY and ICTR over national courts,

Noting that the strengthening of national judicial systems is crucially important to the rule of law in general and to the implementation of the ICTY and ICTR Completion Strategies in particular,

Noting that an essential prerequisite to achieving the objectives of the ICTY Completion Strategy is the expeditious establishment under the auspices of the High Representative and early functioning of a special chamber within the State Court of Bosnia and Herzegovina (the "War Crimes Chamber") and the subsequent referral by the ICTY of cases of lower- or intermediate-rank accused to the Chamber,

Convinced that the ICTY and the ICTR can most efficiently and expeditiously meet their respective responsibilities if each has its own Prosecutor,

Acting under Chapter VII of the Charter of the United Nations,

1. *Calls* on the international community to assist national jurisdictions, as part of the completion strategy, in improving their capacity to prosecute cases transferred from the ICTY and the ICTR and encourages the ICTY and ICTR Presidents, Prosecutors, and Registrars to develop and improve their outreach programmes;

2. *Calls* on all States, especially Serbia and Montenegro, Croatia, and Bosnia and Herzegovina, and on the Republika Srpska within Bosnia and Herzegovina, to intensify cooperation with and render all necessary assistance to the ICTY, particularly to bring Radovan Karadzic and Ratko Mladic, as well as Ante Gotovina and all other indictees to the ICTY and calls on these and all other at-large indictees of the ICTY to surrender to the ICTY;

3. *Calls* on all States, especially Rwanda, Kenya, the Democratic Republic of the Congo, and the Republic of the Congo, to intensify cooperation with and render all necessary assistance to the ICTR, including on investigations of the Rwandan Patriotic Army and efforts to bring Felicien Kabuga and all other such indictees to the ICTR and calls on this and all other at-large indictees of the ICTR to surrender to the ICTR;

4. *Calls* on all States to cooperate with the International Criminal Police Organization (ICPO-Interpol) in apprehending and transferring persons indicted by the ICTY and the ICTR;

5. *Calls* on the donor community to support the work of the High Representative to Bosnia and Herzegovina in creating a special chamber, within the State Court of Bosnia and Herzegovina, to adjudicate allegations of serious violations of international humanitarian law;

6. *Requests* the Presidents of the ICTY and the ICTR and their Prosecutors, in their annual reports to the Council, to explain their plans to implement the ICTY and ICTR Completion Strategies;

7. *Calls* on the ICTY and the ICTR to take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010 (the Completion Strategies);

8. *Decides* to amend Article 15 of the Statute of the International Tribunal for Rwanda and to replace that Article with the provision set out in Annex I to this resolution, and requests the Secretary-General to nominate a person to be the Prosecutor of the ICTR;

9. *Welcomes* the intention expressed by the Secretary-General in his letter dated 28 July 2003, to submit to the Security Council the name of Mrs. Carla Del Ponte as nominee for Prosecutor for the ICTY;

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

Annex I

Article 15
The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of 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.

2. The Prosecutor shall act independently as a separate organ of the International Tribunal for Rwanda. He or she shall not seek or receive instructions from any government or from any other source.

3. The Office of the Prosecutor shall be composed of a Prosecutor and such other qualified staff as may be required.

4. The Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General. He or she shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations.

5. The staff of the Office of the Prosecutor shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

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United Nations S/2001/40

Security Council

Distr.: General
12 January 2001

Original: English

Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council

1. I have the honour to refer to the letter of 22 December 2000, addressed to me from the President of the Security Council (S/2000/1234), by which members of the Council conveyed their views on my report on the establishment of the Special Court for Sierra Leone (S/2000/915) and proposed amendments (see S/2000/1234, annex), to the draft Agreement between the United Nations and the Government of Sierra Leone and the proposed Statute annexed thereto (see S/2000/915, annex). In incorporating the proposed amendments to the two documents, I wish to put before the members of the Council my understanding of the meaning, scope and legal effect of some of the proposals made. My intention is then to present the amendments in that light to the Government of Sierra Leone. These understandings pertain to the personal jurisdiction of the Special Court, the funding and the reduced size of the Court.

I. Personal jurisdiction — article 1 (a) of the draft Statute

2. Members of the Council expressed preference for the language contained in Security Council resolution 1315 (2000), extending the personal jurisdiction of the Court to "persons who bear the greatest responsibility", thus limiting the focus of the Special Court to those who played a leadership role. However, the wording of subparagraph (a) of article 1 of the draft Statute, as proposed by the Security Council, does not mean that the personal jurisdiction is limited to the political and military leaders only. Therefore, the determination of the meaning of the term "persons who bear the greatest responsibility" in any given case falls initially to the prosecutor and ultimately to the Special Court itself. Any such determination will have to be reconciled with an eventual prosecution of juveniles and members of a peacekeeping operation, even if such prosecutions are unlikely.

3. Among those who bear the greatest responsibility for the crimes falling within the jurisdiction of the Special Court, particular mention is made of "those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone". It is my understanding that, following from paragraph 2 above, the words "those leaders who ... threaten the establishment of and implementation of the peace process" do not describe an element of the crime but rather provide guidance to the prosecutor in determining his or her prosecutorial strategy. Consequently, the commission of any of the statutory crimes without necessarily threatening the establishment and

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implementation of the peace process would not detract from the international criminal responsibility otherwise entailed for the accused.

4. In subparagraphs (b) and (c) of article 1 of the draft Statute as revised, the Council proposes to deal in a comprehensive manner with all perpetrators of crimes falling within the jurisdiction of the Special Court, including peacekeeping personnel present in Sierra Leone during the relevant period. While recognizing the primary jurisdiction of the sending State over its peacekeeping personnel, the Council recognizes the need to authorize the Special Court to exercise its jurisdiction in the event that the sending State is unwilling or unable to carry out an investigation or prosecution. The amended article, however, falls short of inducing the unwilling State to surrender an accused person situated in its territory, with the result that a State which is unwilling to prosecute a person in its own courts would in all likelihood be unwilling to surrender that person to the jurisdiction of the Special Court.

5. In order to give full effect to the amended provision and to avoid politicization of a legal process by allowing third States to intervene and determine whether the sending State is unable or unwilling to investigate and prosecute, I suggest that a procedure similar to the one adopted in the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda be adopted in the case of the Special Court for Sierra Leone. Accordingly, the President of the Special Court, if convinced that the sending State is unable or unwilling to prosecute, may notify the Security Council and seek its intervention with the State in question to induce it to investigate and prosecute or to surrender the accused to the jurisdiction of the Court. I suggest that the following formulation replace the one presently contained in subparagraph (c) of article 1:

> "In the event that the President of the Special Court is convinced that the sending State is unwilling or unable genuinely to carry out an investigation or prosecution, he or she shall notify the Security Council and seek its intervention with the sending State in order to induce it to conduct the investigation and prosecution in its own courts, or to surrender the accused to the jurisdiction of the Special Court."

6. The Rules of Procedure and Evidence of the Special Court will have to give effect to the new statutory provision by setting out the procedure for investigation by the prosecutor, the submission of a request for information on an investigation or prosecution carried out in the sending State or its intention in that regard, the transmittal of the evidence compiled in case of an investigation or prosecution in the sending State, or the submission of an indictment to the Trial Chamber in a manner similar to the one prescribed in rule 61 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda.

7. Article 7 of the draft Statute, as amended, retains the principle of juvenile prosecution but omits any reference to a minimum age or to the guarantees of juvenile justice. On the understanding the members of the Security Council did not intend to allow prosecution below the age of 15, I suggest that article 7 should be amended to read:

> **"The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime.** Should any person who was, at the time of the alleged commission of the crime, **between 15 and 18 years of age** come before the Court ...".

It is also my understanding that persons in this age group, if brought before the Court, will be entitled to all the guarantees stipulated in the draft Statute annexed to my report.

8. In proposing amendments to article 7, the members of the Security Council have also omitted any reference to the consequences of sentencing a juvenile, which were regulated in article 7, paragraph 3 (f) of the draft Statute attached to my report (cf. also article 19, paragraph 1). Even if it is unlikely that the Court would sentence a juvenile, the law must nevertheless clearly state that the Court is prohibited from applying imprisonment. I therefore propose that paragraph 3 (f) of the draft Statute be retained as article 7, paragraph 2. Consequently, the text proposed in the previous paragraph would become article 7, paragraph 1.

9. As pointed out by the Security Council, the Truth and Reconciliation Commission will have an important role to play in the case of juvenile offenders and I will endeavour, in cooperation with the Government of Sierra Leone and other relevant actors, to develop suitable institutions including specific provisions related to children to that end. I am also of the view that care must be taken to ensure that the Special Court for Sierra Leone and the Truth and Reconciliation Commission will operate in a complementary and mutually supportive manner, fully respectful of their distinct but related functions.

II. Funding — article 6 of the Agreement

10. In my report to the Security Council, I underscored the need for a viable and sustainable financial mechanism and noted that a financial mechanism based on voluntary contributions will not provide the assured and continuous source of funding required for the operation of the Special Court (S/2000/915, para. 70). I concluded that a Special Court based on voluntary contributions would be neither viable nor sustainable. In recognizing the risks involved in commencing the operation of the Special Court on the sole basis of prospects of voluntary contributions, members of the Council proposed that the process of establishing the Court shall not commence until the United Nations Secretariat has obtained sufficient contributions in hand to finance the establishment of the Court and 12 months of its operations, as well as pledges equal to the anticipated expenses of the second 12 months.

11. I have examined the proposal made by members of the Security Council to defer the commencement of the implementation stage until contributions for the establishment and the first year of operations are in hand and pledges for the second year are obtained. While the necessary funds for the establishment and first year of operations (US$ 25 million, according to the rough estimates provided in my report) may be obtained, I would still caution against the establishment of the Court on the basis of availability of funds for one year and pledges for the following year. Such a financial mechanism is not likely to ensure a regular flow of funds in the subsequent years, let alone the viability of the Court throughout its life span. I am therefore obliged to reiterate what I said in my report about the risks associated with the

establishment of an operation of this kind with insufficient funds, or without assurances of continuous availability of funds (S/2000/915, para. 70).

12. However, in view of the position expressed in the President's letter of 22 December 2000, I am ready to negotiate the conclusion of an Agreement for the establishment of a Special Court on the basis of voluntary contributions as suggested by members of the Security Council. I am nevertheless reluctant to engage the responsibility of the United Nations at this stage by concluding an Agreement with the Government of Sierra Leone in the absence of an indication as to whether funds are likely to be made available for the start-up of the Court and its sustained operation thereafter. I would, therefore, propose that the process of establishing the Court shall not commence until the United Nations Secretariat has obtained sufficient contributions in hand to finance the establishment of the Court and 12 months of its operations, as well as pledges equal to the anticipated expenses of the following 24 months. This extension of the Council's proposal by a further 12 months would provide a basis for a functioning Court over three years, which in my view is the minimum time required for the investigation, prosecution and trial of a very limited number of accused. I suggest, therefore, that as soon as an agreement is reached in principle between members of the Security Council, the Secretary-General and the Government of Sierra Leone, I will launch an appeal to all States to indicate, within a reasonable period of time, their willingness to contribute funds, personnel and services to the Special Court for Sierra Leone and to specify the scope and extent of their contributions. Upon receipt of concrete information, I will be able to assess whether the process of establishing the Special Court may commence or whether the matter should revert to the Council to explore alternate means of financing the Court.

13. In this connection, I welcome the idea of creating a committee to support the Special Court, and in particular the budgetary process. At the time of its establishment, however, it will be necessary to lay down clearly the criteria for the composition of the committee and its powers and responsibilities in order to ensure the efficient and cost-effective functioning of the Special Court in full independence. Pending the establishment of such a committee, and until it is otherwise decided, it is my intention to apply the United Nations Financial Regulations and Rules and Staff Regulations and Rules to the financial and administrative activities of the Special Court.

III. Size of the Special Court

14. In reducing the size of the Special Court to a single Trial Chamber and an Appeals Chamber, members of the Security Council proposed that the appointment of alternate judges be deferred until such time as the need arises, and not before six months of the commencement of the functioning of the Special Court. While, as rightly indicated in the President's letter, alternate judges were not foreseen in the statutes of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, the solution adopted by both Tribunals to the problem of absentee judges was to alternate judges between the Trial Chambers, and between the Trial and the Appeals Chamber. In the reduced structure of the Special Court, this option would neither be possible nor appropriate.

http://www.icrc.org/ihl.nsf/COM/475-760008?OpenDocument

[p.1373] 4531 The argument for this view was based on both the spirit and the letter of common Article 3:

"The acts referred to under items (a) to (d) are prohibited absolutely and permanently, no exception or excuse being tolerated. Consequently, any reprisal which entails one of these acts is prohibited, and so, speaking generally, is any reprisal incompatible with the "humane treatment" demanded unconditionally in the first clause of sub-paragraph (1)." (19)

The strengthening of fundamental guarantees of humane treatment in Protocol II and, in particular, the inclusion of a prohibition on collective punishments (20) confirms this interpretation without calling into question the refusal of the negotiators to introduce the legal concept of reprisals in the context of non-international armed conflict.

' Sub-paragraph ' (a) -- ' Violence to the life, health and physical or mental well-being of persons '

4532 This sub-paragraph reiterates paragraph 1, sub-paragraph (1)(a) of common Article 3. The scope of the prohibition was considerably strengthened; "violence to the life, health, and physical or mental well-being" is further-reaching in protection than the sole mention of violence to life and person, as contained in Article 3. The list is of course non-exhaustive, as shown by the words "in particular". Murder covers not only cases of homicide, but also intentional omissions which may lead to death; the prohibition of torture covers all forms of physical and mental torture.

4533 The practice of torture is prohibited by international law, (21) and is universally condemned. It is one of the evils which the international community seeks to eradicate. Therefore, for many years torture has been one of the United Nations'concerns. The General Assembly of the Organization has adopted a number of resolutions which, although they do not create mandatory obligations, do have an important moral force; the Declaration on the Protection of All Persons from being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of 9 December 1975 (Resolution 3452 (XXX)) deserves particular mention. Finally, the Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by the General Assembly on 10 December 1984 (Resolution 39/46). The most widespread form of torture is practised by public officials for the purpose of obtaining confessions, but torture in not only condemned as a judicial institution; the act of torture is reprehensible [p.1374] in itself, regardless of its perpetrator, and cannot be justified in any circumstances. (22)

4534 The mention of corporal punishment is new, as it did not appear in common Article 3; (23) it met the wish of a number of delegations that corporal punishment be explicitly mentioned in the text. (24)

' Sub-paragraph ' (b) -- ' Collective punishments '

4535 The ICRC draft prohibited collective penalties in Article 9 relating to the '

15. I would appreciate the concurrence of members of the Security Council to the changes proposed in my letter to articles 1 and 7 of the draft Statute as revised, and to my proposal to seek concrete information from States with respect to their preparedness to contribute funds, services and personnel before the conclusion of the Agreement with the Government of Sierra Leone.

(*Signed*) Kofi A. **Annan**

principles of penal law ' as a corollary of individual penal responsibility. (25) On this point it was inspired by Article 33 of the fourth Convention. The ICRC intended to give this prohibition the same significance as the above-mentioned Article 33, i.e., to prohibit "penalties of any kind inflicted on persons or entire groups of persons in defiance of the most elementary principles of humanity, for acts that these persons have not committed". (26)

4536 In the Working Group of the Committee some delegates considered that this prohibition should not be included amongst penal provisions since, in that context, it would appear to relate only to penalties imposed by the courts. The concept of collective punishment was discussed at great length. It should be understood in its widest sense, and concerns not only penalties imposed in the normal judicial process, but also any other kind of sanction (such as confiscation of property) as the ICRC had originally intended. (27) The prohibition of collective punishments was included in the article relating to fundamental guarantees by consensus. That decision was important because it is based on the intention to give the rule the widest possible scope, and to avoid any risk of a restrictive interpretation. (28) In fact, to include the prohibition on collective punishments amongst the acts unconditionally prohibited by Article 4 is virtually equivalent to prohibiting "reprisals" against protected persons.

[p.1375] ' Sub-paragraph ' (c) -- ' The taking of hostages '

4537 This sub-paragraph reaffirms a prohibition which is already contained in common Article 3, paragraph 1, sub-paragraph (1)(b). (29) It should be noted that hostages are persons who are in the power of a party to the conflict or its agent, willingly or unwillingly, and who answer with their freedom, their physical integrity or their life for the execution of orders given by those in whose hands they have fallen, or for any hostile acts committed against them. (30)

' Sub-paragraph ' (d) -- ' Acts of terrorism '

4538 The prohibition of acts of terrorism is based on Article 33 of the fourth Convention. The ICRC draft prohibited "acts of terrorism in the form of acts of violence committed against those persons" (i.e., against protected persons). (31) The formula which was finally adopted is simpler and more general and therefore extends the scope of the prohibition. In fact, the prohibition of acts of terrorism, with no further detail, covers not only acts directed against people, but also acts directed against installations which would cause victims as a side-effect. It should be mentioned that acts or threats of violence which are aimed at terrorizing the civilian population, constitute a special type of terrorism and are the object of a specific prohibition in Article 13 (Protection of the civilian population), ' paragraph 2.

' Sub-paragraph ' (e) -- ' Outrages upon personal dignity '

4539 This sub-paragraph reaffirms and supplements common Article 3, paragraph 1, sub-paragraph (1)(c). The ICRC draft contained a separate paragraph relating to the protection of women. (32) During the discussions it became clear that is was necessary to strengthen not only the protection of women, but in addition that of children and adolescents who may also be the victims of rape, enforced prostitution

or indecent assault. Therefore a reference to such acts was added to sub-paragraph (e). Furthermore, a separate article specifically devoted to protection of women and children was adopted in the Working Group. (33)