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SCSL-04-16-T
(22765 – 22901)

22765

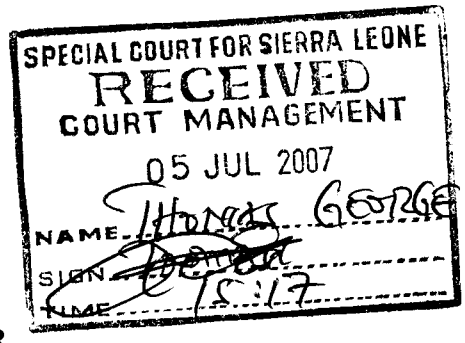
**SPECIAL COURT FOR SIERRA LEONE**

**Case No. SCSL-2004-16-T**

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

Acting Registrar: Herman von Hebel

Date filed: 5 July 2007




**THE PROSECUTOR**

against

Alex Tamba Brima
Brima Bazzy Kamara

and

**Santigie Borbor Kanu**

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**PUBLIC**

**PUBLIC VERSION OF KANU DEFENCE SENTENCING BRIEF PURSUANT TO RULE 100(A) AND REQUEST FOR NON-ADMISSION OF PROSECUTION EXHIBITS**

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# I Introduction

1. On 20 June 2007, the Trial Chamber rendered its "Judgement" against the three accused,[1] convicting the third accused, Mr. Santigie Borbor Kanu, of eleven counts.

2. On 28 June 2007, the Prosecution filed its "Public [with Confidential Annexed Filed Separately] Prosecution Submission Pursuant to Rule 100(A) of the Rules of Procedure and Evidence."[2]

3. The Defence herewith presents its "Public Version of Kanu Defence Sentencing Brief Pursuant to Rule 100(A) with Confidential Annex and Request for Non-Admission of Prosecution Exhibits,"[3] herewith providing the Chamber with "relevant information that may assist the Trial Chamber in determining an appropriate sentencing," as provided for by Rule 100(A) of the Rules.

4. The Defence respectfully submits that none of the arguments made in this sentencing brief prejudice Mr. Kanu's position that he is not guilty of the crimes as charged by the Prosecution. Thus, no admission of guilt can be deduced from this Defence Sentencing Brief.

# II General Observations

## 2.1 Evidentiary Rules

5. The sentencing procedure is not part of the trial procedure in the system of the Special Court, but forms a separate procedure. The normal evidentiary rules are

[1] *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-T-613, Judgement, 20 June 2007 (**Judgment**).
[2] *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-T-614, Public [with Confidential Annexed Filed Separately] Prosecution Submission Pursuant to Rule 100(A) of the Rules of Procedure and Evidence, 28 June 2007 (**Prosecution Sentencing Brief**).
[3] Hereinafter referred to as: **Defence Sentencing Brief**.

not applicable to the underlying sentencing procedure.[4] However, the Foca Trial Chamber of the ICTY held that the burden of proof regarding aggravating circumstances is on the Prosecution, and the standard of proof is that of beyond reasonable doubt.[5] Noticeably, as also indicated in the Prosecution Sentencing Brief, aggravating circumstances are limited to those circumstances directly related to the commission of the offence. The Trial Chamber held that it "would not allow such an uncharged crime being used as an aggravating circumstance. The reason, for this being an offender can only be sentenced for conduct for which he has been convicted."[6] It moreover held:

> Mitigating circumstances not directly related to the offence, such as co-operation with the Prosecutor, an honest showing of remorse and a guilty plea, may be considered. However, the position with respect to aggravating circumstances is quite different. Only those circumstances directly related to the commission of the offence charged and to the offender himself when he committed the offence, such as the manner in which the offence was committed, may be considered in aggravation. In other words, circumstances not directly related to an offence may not be used in aggravation of an offender's sentence for that offence.[7]

6. The Defence, on the other hand, only has to prove mitigating factors on a balance of probabilities.[8] This same consideration was articulated by the ICTR in the case against Elizaphan Ntakirumana, where the Trial Chamber held:

> The Chamber recalls at the outset the general principle that only matters proved beyond a reasonable doubt against the Accused are to be considered against them at the sentencing stage. This principle extends to the assessment of any aggravating factors. Another standard applies to the Chamber's assessment of mitigating factors. These shall be taken into consideration if established on a balance of probabilities. Also, the Chamber agrees with the *Vasiljevic* Trial Chamber of the ICTY that a particular circumstance shall not be retained as aggravating if it is included as an element of the crime in consideration.[9]

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[4] See also Jones & Powles, *International Criminal Practice* (2003), para. 9.95.
[5] *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgement, 15 March 2002, paras. 846-847.
[6] *Prosecutor v. Kunarac*, Case No. IT-96-23-T, Judgement, 22 February 2001, para. 850.
[7] *Prosecutor v. Kunarac*, Case No. IT-96-23-T, Judgement, 22 February 2001, para. 850.
[8] *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgement, 15 March 2002, paras. 847.
[9] *Prosecutor v. Elizaphan Ntakirumana*, Case No. ICTR-96-10&10A-T, Judgement and Sentence, 21 February 2003, para. 893 (footnotes omitted).

7. The ICTY Trial Chamber held that acts not charged in the indictment will not be taken into account as aggravating factors, even if they are proved beyond reasonable doubt, while holding: "an offender can only be sentenced for conduct for which he has been convicted."[10]

## 2.2 Sentences Should Be Individualised

8. There are three convicted persons in this case, and the Defence for Mr. Kanu submits that their sentences should be individualised. This, the particular and differing roles each of the convicted had during the conflict, as determined by the Judgement, should be recognised. In *Prosecutor v. Kambanda*, the ICTR Trial Chamber held that:

> It is true that 'among the joint perpetrators of an offence or among the persons guilty of the same type of offence, there is only one common element: the target offence which they committed with its inherent gravity. Apart from this common trait, there are, of necessity fundamental differences in their respective personalities and responsibilities: their age, their background, their education, their intelligence, their mental structure (...). It is not true that they are a priori subject to the same intensity of punishment.'[11]

9. Similarly in *Prosecutor v. Akayesu*, the ICTR Trial Chamber considered the fact that "as far as the individualisation of penalties is concerned, the Judges cannot limit themselves to the factors mentioned in the statutes and the Rules. Here again their unfettered discretion to evaluate the facts and attendance circumstances should enable them to take into account any other factor that they deem pertinent."[12] Moreover, the Appeals Chamber in Akayesu held that "[t]he right to take into account other pertinent factors goes hand in hand with the overriding obligation to individualize a penalty to fit the individual circumstances of the accused, the overall scope of his guilt and the gravity of the crime the overriding

[10] *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgement, 15 March 2002, para. 850.
[11] *Prosecutor v. Kambanda*, Case No. ICTR-97-23-S, Judgement and Sentence, 4 September 1998, para. 29.
[12] *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Sentence, 2 October 1998.

consideration being that the sentence to be imposed must reflect the totality of the accused's criminal conduct."[13]

10. The Defence submits that these considerations should also apply in the underlying case, where sentences will be pronounced against the three convicted persons of the AFRC.

## III Argument for Non-Admissibility of Prosecution Experts and Exhibits

### 3.1 Introduction

11. The Prosecution, in its Sentencing Brief, clearly intends to introduce new factual evidence. The sentencing phase does not have the character of a trial procedure where new evidence, i.e. a new expert report, new witness statements, and new exhibits, can be introduced by the Prosecution. Now that the Prosecution failed to introduce this factual evidence during the trial proceedings, the Prosecution should be denied the ability to use the sentencing proceedings for these purposes. This impacts and undermines Mr. Kanu's rights, in that the introduction of new factual evidence will deny the Defence any right to cross-examine the Prosecution's evidence. The Defence respectfully submits that this evidence is non-admissible for the following additional reasons.

### 3.2 Non-Admissibility of 'Expert Report'

#### *3.2.1 Introduction*

12. In para. 81 of the Prosecution Sentencing Brief, the Prosecution refers to an 'expert report' by psychologist Ms. An Michels (Annex G), "which may assist the Trial Chamber in assessing this sentencing factor." The Defence respectfully requests the honourable Trial Chamber to find this report inadmissible, or

[13] *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001, para. 416.

alternatively, to find that the content thereof is irrelevant for its determination of Mr. Kanu's sentence.

*3.2.2 Circumvention of Earlier TC Decisions*

13. In the first place, it is the Defence's submission that the Prosecution request for admissibility of such evidence is an attempt to circumvent the "Decision on Confidential Prosecution Motion to Reopen the Prosecution Case to Present an Additional Prosecution Witness"[14] and the "Decision on Confidential Motion to Call Evidence in Rebuttal, 14 November 2006."[15]

14. The witnesses, including Ms. An Michels, submitted by the Prosecution could have testified as (expert) witnesses during the trial. Victim impact is an aspect not solely related to the sentencing procedure and this type of evidence could have been presented at trial. In the Reopening Decision, the Trial Chamber decided on a Prosecution request to reopen its case in order to call an additional witness. The Trial Chamber denied such request, holding:

> Our finding – that the Prosecution has not discharged its burden of demonstrating that even with reasonable diligence the evidence of the proposed witness could not have been previously obtained and presented as part of its case – is a sufficient basis on which to dispose of the Motion and it is not necessary for the Trial Chamber to consider the probative value of the proposed evidence.[16]

15. As such, the Prosecution was prevented from introducing new evidence by way of reopening its case, and it was not permitted to call witnesses in rebuttal of the Defence case. A similar rationale preventing the Prosecution from admitting new witness statements should apply. The Defence respectfully submits that the

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[14] *Prosecutor v. Brima et al.*, Case No. SCSL-2004-16-T-560, Decision on Confidential Prosecution Motion to Reopen the Prosecution Case to Present an Additional Prosecution Witness, 28 September 2006 (**Reopening Decision**).
[15] *Prosecutor v. Brima et al.*, Case No. SCSL-2004-16-T-582, Decision on Confidential Motion to Call Evidence in Rebuttal, 14 November 2006 (**Rebuttal Decision**).
[16] Reopening Decision, para. 38.

current Prosecution request factually amounts to submitting new evidence in circumvention of the Trial Chamber's Reopening and Rebuttal Decisions.

*3.2.3 Report Has Not Been Filed According to Evidentiary Requirements*

16. In the second place, such evidence does not fulfil the evidentiary standard of Rule 94*bis* of the Rules. This expert report by Ms. Michels was drafted on 27 June 2007, and the Defence only received this report along with the Prosecution Sentencing Brief on 28 June. The Prosecution did not inform the Defence, nor the Trial Chamber, of its intent to have a psychological report drafted on this matter. The Defence is thus in no position to file its own report on this matter, and thus prejudiced by admission of such a report at this untimely stage of the proceedings.

*3.2.4 Expert Report Is Not Objective*

17. In the third place, Ms. An Michels previously worked for the Victims and Witness Section of the Special Court between September 2003 and May 2005.[17] As such, she has only been exposed to Prosecution victims and witnesses, and her assessment of the impact is thus not only limited in scope but also biased. This same argument goes for Ms. Susan Stepakoff, who has never had contact with the AFRC Defence witnesses. The Defence argues that an expert should have been exposed to more objective evidence; her sole contact with Prosecution witnesses similarly tends to lead towards an assessment both biased and limited in nature.

*3.2.5 Defence Is Not in a Position to Have Defence Expert Witness*

18. Moreover, since the Defence is not in a position to retain a psychological expert to testify on behalf of the Defence on short notice, the report of Ms. Michels should be found inadmissible.

[17] See footnote 8 of her report, p. 222460 of the Judgment.

### 3.2.6 *Sentencing Phase Not Designed for New OTP Evidence*

19. Moreover, the current sentencing phase is not designed to adduce new (expert) evidence. The Trial Chamber has been able to determine the impact on witnesses during the trial, if any, and the Prosecution should not be given any further opportunity to present evidence in addition to what they have already presented at trial in this respect. The ICTY Trial Chamber has allowed the hearing of psychiatric and psychological experts at the pre-sentencing hearing in some instances, but this was under different circumstances. Experts testified to the determination of diminished mental responsibility on the side of the accused,[18] the accused's impossibility to be present at the pre-sentencing hearing,[19] to call the forensic psychiatrist who had examined the accused previously,[20] and to describe the closer circumstances in which the crimes were committed, and the impact of the convicted person's crimes on surviving victims thereof and their relatives.[21] These circumstances are not applicable to the underlying basis of the Prosecution request. Rather, the Prosecution attempts to prove victim impact through a general report outlining the situation of war victims in Sierra Leone. This is clearly not in line with the procedures and objective of the sentencing phase.

### 3.2.7 *Report Is Too General to Be of Assistance*

20. In addition to the foregoing arguments, the Defence moreover submits that the report contains broad statements regarding victims during the entire conflict throughout the entire country, which information goes beyond the Indictment against Mr. Kanu. In no way is the report linked to the alleged behaviour of Mr. Kanu. The report does not more than describe, in general terms, the impact of the

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[18] See *Prosecutor v. Todorovic*, Case No. IT-95-9-1-S, Sentencing Judgement, 31 July 2001, paras. 93-95.
[19] See *Prosecutor v. Erdemovic*, Case No. IT-96-22-T, Sentencing Judgement, 29 November 1996, paras. 5-6, where a commission of experts wrote a report on Mr. Erdemovic's mental condition preventing him to be present at the sentencing hearing, given his post-traumatic stress syndrome.
[20] See *Prosecutor v. Tadic*, Case No. IT-94-1-T, Sentencing Judgment, 14 July 1997, para. 3, where it is stated that a psychiatrist was called at the Pre-Sentencing Hearing on behalf of the Defence, and who had examined the convicted Tadic previously in 1994.
[21] *Prosecutor v. Dragan Nikolic,* Case No. IT-94-2-S, Sentencing Judgement, 18 December 2003, para. 41.

conflict as a whole, and not just the indictment period. The report also covers the entire territory of Sierra Leone, and in no way relates the purported suffering undergone by the witnesses to the convicted person's behaviour.

*3.2.8 Objections to Proposed Expert Ms. Stepakoff*

21. For these reasons, the Defence also objects to Ms. Susan Stepakoff testifying as expert witness at the sentencing hearing or to have her prepare an expert report as suggested by the Prosecution.[22] Moreover, the Prosecution does not explain why it filed an expert report by psychologist Ms. An Michels and in addition requested another psychologist, Ms. Stepakoff, to testify as an expert witness.

22. Having Ms. Stepakoff draft an expert report, which would then be subject to cross-examination by the Defence, would be a time-consuming procedure, that would lead to significant delay in the proceedings against Mr. Kanu. Moreover, the Defence would need adequate time to prepare such a hearing. The Defence submits that the benefit of such a report, the impartiality of which the Defence would oppose to, does not outweigh the prejudice thus created for the convicted person.

23. The Defence strongly objects to having Ms. Stepakoff testify as "an independent and impartial witness by the Trial Chamber," as suggested by the Prosecution. The same reasons as indicated for Ms. Michels apply to Ms. Stepakoff who has not been working with Mr. Kanu's witnesses, but has solely been exposed to Prosecution witnesses and evidence in the AFRC case. This seriously affects her credibility and impartiality as an independent expert witness. The impartiality of an expert witness is part and parcel of Article 6(1) of the European Convention on Human Rights.[23]

[22] See Prosecution Sentencing Brief, para. 82.
[23] See *Bönisch v. Austria*, ECHR, 6 May 1985, paras. 28-35.

*3.2.9 Conclusion*

24. For the above reasons, the Defence submits that the report of Ms. An Michels should not be admitted into this sentencing procedure, or alternatively, that the Trial Chamber decide that the content thereof is not relevant for the determination of the sentence against Mr. Kanu. Moreover, the Defence submits that the Prosecution be not allowed to call Ms. Stepakoff as an expert witness at trial, nor be allowed to have her draft an expert report.

3.3 Abuse of Process

25. The Appeals Chamber held that "[a]t the root of the doctrine of abuse of process is fairness. The fairness that is involved is not fairness of adjudication itself but fairness in the use of the machinery of justice."[24] In the "Written Reasons for the Trial Chamber's Oral Decision on the Defence Motion on Abuse of Process Due to Infringement of Principles of *Nullum Crimen Sine Lege* and Non-Retroactivity as to Several Counts," the Trial Chamber provided an analysis of abuse of process.[25] In para. 21 thereof, the Trial Chamber indicated that:

> Under the abuse of process doctrine, proceedings that have been lawfully initiated may be terminated after an indictment has been issued if 'improper or illegal proceedings' are employed in pursuing an otherwise lawful process."

26. In that regard, Trial Chamber I in the underlying procedure, in consonance with the ICTR Barayagwiza Trial Chamber, held that "[i]f the rights of the Accused have been violated, that is sufficient for the Chamber to find that the integrity of the judicial process has been undermined."[26]

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[24] *Prosecutor v. Kallon*, Case no. SCSL-04-15-AR72(E) & *Prosecutor v. Kamara*, Case No. SCSL-04-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004 and 15 March 2004, para. 79.

[25] *Prosecutor v. Brima et al.*, Case No. SCSL-2004-16-PT-047, Written Reasons for the Trial Chamber's Oral Decision on the Defence Motion on Abuse of Process Due to Infringement of Principles of *Nullum Crimen Sine Lege* and Non-Retroactivity as to Several Counts, 31 March 2004, Section III under A.

[26] *Prosecutor v. Brima et al.*, Case No. SCSL-2004-16-PT-047, Written Reasons for the Trial Chamber's Oral Decision on the Defence Motion on Abuse of Process Due to Infringement of Principles of *Nullum Crimen Sine Lege* and Non-Retroactivity as to Several Counts, 31 March 2004, para. 26.

27. The Defence respectfully submits that the Prosecution's behaviour by submitting a new expert report without giving prior notice to the Defence and by submitting other new evidence, thus circumventing the Trial Chamber's Reopening and Rebuttal Decisions, amounts to an abuse of process.

## 3.4 Non-Admissibility of Witness Statements

### *3.4.1 Introduction*

28. The Defence also objects to the admissibility of the new witness statements, attached as Confidential Annex E to the Prosecution Sentencing Brief, on the basis of the following arguments.

### *3.4.2 Non-Admissibility: Witnesses Already Testified on Impact*

29. The Prosecution should be prohibited from submitting new evidence in this phase of the proceedings, especially without the Defence being able to cross-examine this evidence. Apart from the matter of cross-examination, however, the Defence is of the opinion that admission of such evidence is unnecessary for the current proceedings and the determination of the sentence.

30. The Prosecution witnesses whose statements have been submitted in Confidential Annex E have already testified regarding the impact of the crimes committed. Their newly filed statements only evolve around the alleged impact on their lives. Although these statements do contain new information concerning the specific instances on each of their lives, the Prosecution was able to lead evidence during trial regarding the impact of the crimes on all of the witnesses whose statements have been attached in Confidential Annex E. Having their new statements admitted, and calling these witnesses at trial, would not result in any new

information of assistance to the Trial Chamber, and would prevent the Defence from cross-examining those new issues.

*3.4.3 Request to Cross-Examine*

31. If the Chamber nevertheless decides to admit these statements, the Defence is of the opinion that it should be allowed to cross-examine those witnesses on the content of their new statements, as it factually amounts to aggravating circumstances of which the standard of proof is that of beyond reasonable doubt. Entering statements without the Defence being able to cross-examine the content thereof would cause unwarranted prejudice to Mr. Kanu's rights.

*3.4.4 Victim Impact Evidence Not Directly Related to Mr. Kanu's Behaviour*

32. In addition to the foregoing arguments, none of the witnesses presented by the Prosecution in Confidential Annex E to the Sentencing Brief mentions the name of Kanu. As such, these witnesses are not direct victims of Mr. Kanu, or any events for which he has been convicted. The Defence wishes to indicate that, although perhaps not a requirement for impact victims, such indirect evidence is of course not nearly as strong as victim evidence directly relating to the behaviour of the convicted person. Therefore, such statements should have very limited weight, if any at all. Furthermore, the Defence should be provided adequate time to prepare such a hearing, and should have the opportunity to introduce their own witnesses in the determination of the sentence.

*3.4.5 Submitted Statements in Confidential Annex E*

33. Witness TF1-084[27] testified in court on 6 April 2005. This witness does not refer to Mr. Kanu, but only to Sergeant Nyuma and Akim,[28] Tafaiko.[29] This evidence is

[27] See Prosecution Sentencing Brief, p. 22338 ff.
[28] See Transcript 6 April 2005, p. 39 (lines 5-7).

thus exculpatory for Mr. Kanu. The Trial Chamber has already seen this witness in court and also the impact the crimes had had on him.[30] For instance, this witness testified:

> Q. How do you provide for your family today?
> A. It's only with the help of good friends; they are assisting me. When I go on the streets, when I come across good friends, I talk with them nicely. They give me help. From them, I get something to assist my family.[31]

34. The Trial Chamber found the evidence of this witness unreliable insofar as it related to the identification of the perpetrators of the crimes. In cross-examination, this witness testified: "I spoke about RUF, but they were mixed, because some of them had military uniform, others had plain-clothes where it was written "RUF". All the clothes that they wore was written "RUF"."[32] The Trial Chamber considered in para. 945 of its Judgment:

> In cross-examination, it emerged that in a prior statement the witness [TF1-084] had referred to the rebels in Kissy as 'RUF'.[33] He explained that the forces he saw in Kissy were mixed, with some wearing military uniform and others civilian attire on which was written 'RUF'.[34] The Trial Chamber recalls that it was often difficult for members of the public to distinguish between AFRC and RUF fighters. In view of this, the Trial Chamber considers the witness's identification of his attackers to be unreliable.

35. As such, the witness cannot be deemed a direct victim of Mr. Kanu's behaviour, nor of the AFRC. Given that the Trial Chamber did not accept the liability mode of JCE between the RUF and the AFRC, and also given that this witness more likely than not was a victim of RUF violence, this victim impact witness cannot be characterized as a victim of crimes committed by the AFRC or Mr. Kanu. Moreover, as evidenced by the Prosecution Sentencing Brief, this witness has already testified on how the conflict impacted his life.[35]

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[29] See Transcript 6 April 2005, p. 41 (line 4).
[30] See Transcript of testimony of witness TF1-084, Confidential Annex F to the Prosecution Sentencing Brief, p. 22414-22417.
[31] Transcript 6 April 2005, p. 44 (lines 15-19).
[32] Transcript 6 April 2005, p. 45 (lines 15-17).
[33] TF1-084, Transcript 6 April 2005, p. 45.
[34] TF1-084, Transcript 6 April 2005, p. 45.
[35] See Confidential Annex F to the Prosecution Sentencing Brief, p. 22413-22416.

36. Witness TF1-278 testified in court on 5 and 6 April 2006, and the Trial Chamber has already seen the impact of the crimes on this victim. For instance, this witness testified in open court:

> Q. What is your occupation?
> A. At first I was a cook.
> Q. And now?
> A. Now I am a beggar in the street because my hands have already been chopped off.[36]

This was also indicated in the Prosecution Sentencing Brief. Thus, this witness has already testified on the impact of the conflict on his life,[37] and the Defence had the opportunity to cross-examine him on that.

37. The Trial Chamber also heard victim impact testimony of witness TF1-098, when he stated, for instance, in court:

> After they chopped off my hand I tried to come up along Ginger Hall part. There I came, I say Kasim lying down. At that time the way I saw Kasim, I was broken-hearted. I met him lying there covering his face. I tried to pick him up but he was not able to turn, so I left him. I moved back. I went and met my small brother.[38]

And:

> Q. Witness, did you get any help for your injuries?
> A. During that time there was nobody, because everybody was on the run. Everybody was running away. When they said they've cut our hands, everybody was running away.[39]

Although the Prosecution did not refer to this transcript in Confidential Annex F to the Prosecution Sentencing Brief, the Defence respectfully submits that this witness did testify on how the conflict and the crimes impacted him. The Defence was in a position to cross-examine him then. As such, any new evidence of this witness, which cannot be cross-examined by the Defence, is prejudicial to Mr. Kanu.

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[36] TF1-278, Transcript 5 April 2005, p. 49 (lines 1-5).
[37] See Confidential Annex F to the Prosecution Sentencing Brief, p. 22420-22421.
[38] Transcript 5 April 2005, p. 42 (lines 7-11).
[39] Transcript 5 April 2005, p. 42 (lines 19-22).

38. Witness TF1-058 also testified in court, and part of his transcripts have been enclosed in the Prosecution Sentencing Brief to show the impact the crimes had had on this witness.[40] The impact on this witness has been presented, and admission of a new statement by this witness leads to unnecessary prejudice to Mr. Kanu and unnecessary repetition.

39. Witness TF1-267[41] testified in court on 26 and 27 July 2005. As can be derived from the Prosecution Sentencing Brief, this witness already testified on the impact the crimes had on her. Part of the transcript relating to her testimony has been added to Confidential Annex F to the Prosecution Brief.[42] The impact on this witness has been presented, and admission of the new evidence of this witness would lead to prejudicial detriment to Mr. Kanu.

40. The second witness from Bombali of which the Prosecution added new evidence, concerns witness TF1-269, who testified in court on 14 July 2005. This witness showed her scars on her head to the court,[43] and on her foot.[44] She also testified:

> Q. After these attacks on you that you have described, what was your physical condition?
> A. I am not well. Sometimes I will have a serious problem with my neck. I can't walk any longer. I can't carry any load any longer. If you venture then you will experience serious problem. The veins are aching.[45]

Therefore, this witness already testified in court on the impact of the crimes on her, and the Defence was in a position to cross-examine her on that.

41. Regarding the remaining witness statements added to Confidential Annex F to the Prosecution Sentencing Brief, the Defence submits that these are irrelevant to Mr.

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[40] Confidential Annex F to the Prosecution Sentencing Brief, p. 22436-22438.
[41] Confidential Annex E to Prosecution Sentencing Brief, p. 22380 ff.
[42] See Confidential Annex F to the Prosecution Sentencing Brief, p. 22433-22435.
[43] Transcript 14 July 2005, p. 42-43.
[44] Transcript 14 July 2005, p. 45-46.
[45] Transcript 14 July 2005, p. 50 (lines 3-8).

Kanu. They relate to two areas, Port Loko and Kono, which are irrelevant to the crimes of which Mr. Kanu has been convicted.[46]

*3.4.6 Conclusion*

42. For the reasons set out above, the Defence respectfully submits that the witness statements added as Confidential Annex E to the Prosecution Sentencing Brief should not be admitted into evidence. The transcripts submitted by the Prosecution as Confidential Annex F to its Sentencing Brief already form part of the evidence and do not introduce any new evidence.

## 3.5 Objection to Admission of Annex H Documents

43. The Defence also objects to the information enclosed in Annex H to the Prosecution Sentencing Brief which consists of human rights reports and news reports. The Prosecution asserts that "where a victim has 'established bonds' with all members of his or her community, it is appropriate for the Trial Chamber to consider the impact on the community as a whole."[47] The Defence understands the Prosecution argument to be thus that it should be allowed to submit information relating to the suffering of a whole country, since all victims were part of the Sierra Leonean community. This is not a realistic point of view.

44. The first objection relates to the fact that said reports cannot be adduced at this late stage. These exhibits should have been submitted during the (pre-)trial proceedings, and cannot be adduced in this stage of the proceedings, especially since no prior notice has been given to the Defence and since these reports were not part of the Prosecution exhibit list at trial.

[46] See Judgement, paras. 2000, 2005, 2084 and 2088.
[47] Prosecution Sentencing Brief, para. 47 (emphasis added).

45. The Defence moreover objects to admission of said documents on the basis that there is no relation between the convicted persons, the time period of the indictment, the districts for which Mr. Kanu has been convicted, and the information contained in the documents. The reports merely provide a general overview of victims of the conflict and therefore lack any specificity.

46. The Prosecution argument, as understood by the Defence, is that everyone in the community of Sierra Leone is somehow related to a victim, and that as such, information relating to this wide category of victims, i.e. everyone in Sierra Leone, is useful in the determination of the sentencing. The Defence submits that this argument should be dismissed for the following reasons.

47. In *Prosecutor v. Krnojelac*, the ICTY Appeals Chamber considered that:

> [E]ven where no blood relationships have been established, a trier of fact would be right to presume that the accused knew that his victim did not live cut off from the world but had established bonds with others. In this instance, no consideration was given to the effect of the crimes on these people. However, the Appeals Chamber believes that the fact that the Trial Chamber did not take this into account had no major impact on the sentence and that there is, therefore, no reason for changing it.[48]

Additionally, the Blaskic Appeals Chamber referred to "the effects of the crime on relatives of the immediate victims may be considered as relevant to the culpability of the offender and in determining a sentence."[49]

48. This ICTY Appeals Chamber case law clearly indicates that victim impact information is restricted to the direct victims of the crimes, their relatives and persons close to them, even though the victims did not have a blood relationship with the latter. The information provided by the Prosecution in the underlying case, among which the report on abducted children in Uganda,[50] far exceeds such

[48] *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgement, 27 September 2003, para. 260.
[49] *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 683 (footnotes omitted).
[50] Annex H-D to the Prosecution Sentencing Brief, p. 22518-22529.

categories, and as such, should be dismissed as playing any relevant part in the determination of the sentence against Mr. Kanu.

### 3.6 Objection to Prosecution Request to Call Witnesses

49. As indicated in Lead Counsel's e-mail of 22 June 2006 to the Legal Officer of Trial Chamber II, the Defence objects to the Prosecution calling any witnesses at the sentencing hearing. The Defence is of the opinion that the Prosecution has had ample opportunity to submit all relevant evidence during the trial, and that adducing such information at this untimely stage is unnecessary and too late. Interestingly, the Prosecution refers to a transcript in the RUF case, which transcript is unfortunately not available to the Defence.[51] Regardless, reference to that case, which is still at trial stage, suggests that the Prosecution could also have raised such argument at the trial stage in the underlying case, affirming the notion that this is not an issue to be discussed at the sentencing stage.

50. The same argument goes for the Prosecution request to "submit documentation including Reports and give oral submissions on the impact of the crimes on the victims."[52]

### 3.7 Conclusion

51. For the reasons stated above, the Defence respectfully submits that the abovementioned information should not be admitted in this sentencing procedure.

[51] This transcript is not published on the SCSL Court Records website.
[52] Prosecution Sentencing Brief, para. 84.

## IV Factors to Be Taken into Account in Sentencing

### 4.1 Introduction

52. In determining the sentence after conviction, several factors need to be taken into account by the Trial Chamber. In the first place, Rule 101 of the Rules of Procedure and Article 19 of the Statute provide for guidance.

53. Rule 101 of the Rules of Procedure and Evidence reads that:

1. A person convicted by the Special Court (...) may be sentenced to imprisonment for a specific number of years.
2. In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 19(2) of the Statute, as well as such factors as:
   i. Any aggravating circumstances;
   ii. Any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;
   iii. (...).
3. The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.
4. Any period during which the convicted person was detained in custody pending his transfer to the Special Court or pending trial or appeal, shall be taken into consideration on sentencing.

54. Article 19 of the Statute provides, insofar relevant:

1. The Trial Chamber shall impose upon a convicted person, (...) imprisonment for a specified number of years. In determining the terms of imprisonment, the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone.
2. In imposing the sentences, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

55. Therefore, any aggravating and any mitigating circumstances should be taken into account in determining the terms of imprisonment. In *Prosecutor v. Krstic*, the ICTY Trial Chamber found that it had "discretion to consider any factors it

considers to be of a mitigating nature."[53] The Trial Chamber shall have recourse to the practice regarding prison sentences in the ICTR and the domestic courts of Sierra Leone. Furthermore, in imposing its sentences, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

56. In *Prosecutor v. Semanza*, the ICTR Trial Chamber in its Judgment supported this ICTY case law, by stating that "[t]he penalty must, first and foremost, be commensurate with the gravity of the offence. All of the crimes in the Statute are crimes of an extremely serious nature, rising to the level of international prohibition. Thus, in assessing the gravity of the offence, the Chamber ought to go beyond the abstract gravity of the crime to take into account the particular circumstances of the case, as well as the form and degree of the participation of the Accused in the crime."[54]

57. Apart from the factors indicated in the legal provisions, the Defence submits that the sentencing case law of the ICTY should be taken into account, because the ICTR case law is partly based on the ICTY case law, and also because it might provide additional insight in sentencing guidelines for international criminal procedures.

58. Below, an overview will be provided of the absence of aggravating circumstances claimed by the Prosecution, as well as the three elements for determination of a sentence: sentencing practice; gravity of the offences; and personal circumstances, all contributing to mitigating circumstances in the underlying case.

## 4.2 Alleged Aggravating Circumstances

[53] *Prosecutor v. Krstic*, Case No. IT-98-33-T, Judgment, 2 August 2001, para. 713; see also *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgement, 16 November 2001, para. 395.
[54] *Prosecutor v. Semanza,* Judgement and Sentence, Case No. ICTR-97-20-T, 15 May 2003, para. 555 (footnotes omitted).

59. In *Prosecutor v. Kambanda*, it was held: "The heinous nature of the crime of genocide and its absolute prohibition makes its commission inherently aggravating. The magnitude of the crimes involving the killing of an estimated 500,000 civilians in Rwanda, in a short span of 100 days constitutes an aggravating fact." And: "Abuse of positions of authority or trust is generally considered an aggravating factor."[55] The ICTR Serushago Trial Chamber held that aggravating circumstances consisted of, *inter alia*, the "extreme gravity" of the offences, given that genocide is the 'crime of crimes,'[56] and the fact that he "committed the crimes knowingly and with premeditation."[57] The Defence observes that the Prosecution Sentencing Brief does not indicate that this latter factor, premeditation, played a role in the case of Kanu.

60. The Defence wishes to emphasise that in determining the alleged existing aggravating circumstances, all relevant case law should be taken into account.

61. In response to the Prosecution's arguments made in the Prosecution Sentencing Brief, the Defence submits the following observations. In the first place, the 'aggravating circumstance' mentioned in para. 147 of the Prosecution Brief indicates that "Kanu's failure to take the necessary steps to discharge his duty to prevent or punish crimes by his subordinates (...) shows a total disregard for the sanctity of human life and dignity which must be regarded as a significant aggravating factor." Although not negating the seriousness of such an act, the Defence objects that the element of superior responsibility is an element of the level of responsibility. Thus, it should not be considered as a separate aggravating circumstance since it is already part and parcel of the determination of the facts at trial.

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[55] *Prosecutor v. Kambanda*, Case No. ICTR-97-23-S, Judgement and Sentence, 4 September 1998, paras. 42-44.
[56] See for the aggravating factor of 'crime of crimes' also *inter alia*: *Prosecutor v. Rutaganda,* Case No. ICTR-96-3-T, Judgement and Sentence, 6 December 1999, para. 468. See also *Prosecutor v. Musema,* Case No. ICTR-96-13-T, Judgement and Sentence, 27 January 2000, para. 1001, where the Trial Chamber found: "Amongst the aggravating circumstances, the Chamber finds, first of all, that the offences of which Musema is found guilty are extremely serious, as the Chamber already pointed out when it described genocide as the 'crime of crimes'."
[57] *Prosecutor v. Serushago*, ICTR-98-39-T, Sentence, 5 February 1999, paras. 27-30.

62. The Prosecution asserts that Kanu held a senior government position prior to the crimes committed and that this should constitute an aggravating factor.[58] In para. 510 of the Judgment, however, the Trial Chamber held that: "The Trial Chamber concludes that while this evidence corroborates documentary evidence that the Accused had a position in the AFRC government, it provides no indication of his seniority within that government." Thus, this cannot be deemed an aggravating circumstance due to a holding already determined by the Trial Chamber.

63. For these reasons, the Defence holds that no the aggravating factors are present is this case.

*4.2.1 Ingredient of the Crime Cannot Constitute an Aggravating Circumstance*

64. In *Prosecutor v. Todorovic*, the ICTY Trial Chamber considered that "since a discriminatory intent is one of the basic elements of the crime of persecution, this aspect of Todorovic's criminal conduct is already encompassed in a consideration of the offence. Therefore, it should not be treated separately as an aggravating factor."[59] Jones & Powles observe that it would be more correct to say that such element *cannot* be treated separately, rather than merely 'should not.'[60]

*4.2.2 No Possibility of Voluntary Surrender*

65. In *Prosecutor v. Babic*, the ICTY Trial Chamber held that: "[m]itigating factors identified in the case-law of the Tribunal include voluntary surrender and demonstrations of remorse, which are to be determined on the balance of probabilities. Potentially aggravating factors, such as the mode of criminal participation or the presence of premeditation, have also been identified. Only

[58] Prosecution Sentencing Brief, para. 149.
[59] *Prosecutor v. Todorovic*, Case No. IT-95-9-1-S, Sentencing Judgement, 31 July 2001, para. 57.
[60] Jones & Powles, *International Criminal Practice* (2003), para. 9.73.

those circumstances which are established beyond reasonable doubt will be taken into account as aggravating."[61]

66. At the time of his arrest, Mr. Kanu was unaware of the arrest warrant against him. Voluntary surrender was not possible, as the indictment was only filed by the Prosecution on 15 September 2003.[62] The following day, 16 September 2003, the Trial Chamber approved the Indictment[63] and on that same day, the arrest warrant against Mr. Kanu was issued.[64] On 17 September 2006, Mr. Kanu was arrested and detained in pre-trial detention. Given that on the day of his arrest he was not aware of any indictment against him. Thus, his absence of voluntarily surrender cannot be held against Kanu, and can thus not count as an aggravating circumstance.

67. This was also held by the Oric Trial Chamber, which stated:

> The Trial Chamber, in conformity with the jurisprudence of this Tribunal, reaches the conclusion that the fact that the Accused did not surrender to the Tribunal cannot been given any weight either as a mitigating or an aggravating factor, since the Indictment relating to the Accused remained confidential until the day of his arrest. Consequently, he did not have any opportunity to surrender, even if he had wanted to do so."[65]

68. Therefore, given that the indictment against Kanu was not made publicly available until the day of his arrest, the fact that Kanu did not surrender cannot form an aggravating circumstance and cannot be held against him.

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[61] *Prosecutor v. Milan Babic*, Case No IT-03-72-S, Sentencing Judgment, 29 June 2004, para. 48.
[62] *Prosecutor v. Kanu*, Case No. SCSL-03-13-PT-1, Indictment, 15 September 2003.
[63] See *Prosecutor v. Kanu*, Case No. SCSL-03-13-PT-2, Decision Approving the Indictment, the Warrant of Arrest and Order for Transfer and Detention and Order for Non-Public Disclosure, 16 September 2003.
[64] See *Prosecutor v. Kanu*, Case No. SCSL-03-13-PT-3, Warrant of Arrest and Order for Transfer of Detention, 16 September 2003.
[65] *Prosecutor v. Oric*, Case No. IT-03-68-T, Judgement, 30 June 2006, para. 753.

*4.2.3 Behaviour in Detention*

69. The Prosecution in Annex I to its Sentencing Brief submitted evidence relating to the behaviour of Mr. Kanu in detention.[66] However, this evidence cannot be deemed as aggravating in any sense. Thus, given that such behaviour is in no way related to the crimes of which Mr. Kanu has been convicted, behaviour in detention is only a possible mitigating factor.[67] By submitting such evidence in its Sentencing Brief, the Prosecution attempts to bring in evidence against Mr. Kanu in an impermissible way. The Defence is not relying on behaviour in detention as a mitigating factor, and as such, the information contained in Prosecution Annex I should be found inadmissible, or irrelevant for the current proceedings.

## 4.3 Sentencing Practice

70. Article 19(1) of the Statute provides, insofar relevant, that: "[i]n determining the terms of imprisonment, the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone."

71. It can be said that international criminal tribunals have a wider margin of discretion in determining sentences than national criminal courts have.[68]

72. Sierra Leone retains the death penalty for some forms of murder, for treason and piracy with violence. Life imprisonment is provided to all kinds of crimes, ranging from rape to burglary to gilding coinage. The ICTR, on the other hand, has only imposed life sentences on persons who committed genocide, the 'crime of crimes.' It therefore seems that the sentencing practices of Sierra Leone and the ICTR vary widely.

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[66] See Annex I to the Prosecution Sentencing Brief.
[67] See for instance, *Prosecutor v. Miodrag Jokic*, Case No. IT-01-42/1-S, Sentencing Judgement, 18 March 2004, para. 69.
[68] Jones & Powles, *International Criminal Practice* (2003), para. 9.116.

73. The ICTR, unlike Sierra Leonean domestic law, and like the Special Court, tries persons for international crimes. In that sense, the Defence submits that the Trial Chamber should take more notice of the ICTR sentencing practice than the Sierra Leonean case law. These two aspects will be assessed below.

### *4.3.1 Sentencing Practice of Sierra Leone*

74. First of all, the criterion of the *locus commissi delicti*, the sentencing practice of the place where the crimes took place, has been consistently interpreted as guiding but not binding.[69] The ICTR Trial Chamber stated that "the Chamber raises the question as to whether the scale of sentences applicable in Rwanda is mandatory or whether it is to be used only as a reference. The Chamber is of the opinion that such reference is but one of the factors that it has to take into account in determining the sentences. It also finds, as did Trial Chamber I of the ICTY in the Erdemovic case, that "the reference to this practice can be used for guidance, but is not binding". According to that Chamber, this opinion is supported by the interpretation of the United Nations Secretary-General, who in his report on the establishment of the ICTY stated that: "in determining the term of imprisonment, the Trial Chamber should have recourse to the general practice of prison sentences applicable in the courts of the former Yugoslavia."[70]

75. The Prosecution refers to several Sierra Leonean cases,[71] although it at the same time indicates that there "is no specific guidance from the courts of Sierra Leone on the sentencing practice for these [international] crimes."[72]

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[69] See A. Carcano, 'Sentencing and the Gravity of the Offence in International Criminal Law,' 51 International & Comparative Law Quarterly 583 (2002), at 589, referring to *Prosecutor v. Jelisic*, Case No. IT-95-10-T, Judgement, 14 December 1999, para. 114, and *Prosecutor v. Serushago*, Case No. ICTR-98-39-A, Reasons for Judgement, 6 April 2000, para. 30.
[70] *Prosecutor v. Kambanda*, Case No. ICTR-97-23-S, Judgement and Sentence, 4 September 1998, para. 23.
[71] See Annex C to the Prosecution Sentencing Brief.
[72] Prosecution Sentencing Brief, para. 34.

76. The Defence objects to the relevance of two of the cited cases. In the case of *State v. Julius Pratt*,[73] the latter was convicted on corruption charges. The Defence is of the opinion that citing a corruption case is not helpful for the determination of the sentence in the underlying case. The case of *State v. Momoni* concerns sexual assault of a 9-year-old girl by her uncle.[74] The Defence indicates that this case law is likewise not relevant in determining a sentence for Mr. Kanu, as it is not related to the facts in his case, and the case is thus irrelevant in determining the sentence of Mr. Kanu.

77. Accordingly, the case law provided for in the Prosecution Sentencing Brief cannot assist the Trial Chamber in the determination of its sentence for Mr. Kanu.

*4.3.2 Sentencing Practice at the International Criminal Tribunal for Rwanda*

78. In *Prosecutor v. Kambanda*, the ICTR Trial Chamber stated: "The crime of genocide is unique because of its element of dolus specialis (special intent) which requires that the crime be committed with the intent 'to destroy in whole or in part, a national, ethnic, racial or religious group as such', as stipulated in Article 2 of the Statute; hence the Chamber is of the opinion that genocide constitutes the crime of crimes, which must be taken into account when deciding the sentence."[75]

79. It should be taken into account that, unlike the areas covered by the ICTY and ICTR, genocide, "the crime of crimes," did not take place in Sierra Leone. The sentencing practice to be developed by the Special Court should reflect this difference in gravity of the crimes committed. Although the Prosecution is correct in submitting that the ICTY/ICTR Appeals Chamber held that there is no hierarchy in gravity of crimes between genocide and crimes against humanity, it

[73] See Annex C to Prosecution Sentencing Brief, p. 22238 ff. The judgement in first instance is attached, as well as the notice of application for leave to appeal, but no decision on the request for leave to appeal, or the possible ensuing appeal, were attached.
[74] See Annex C to Prosecution Sentencing Brief, p. 22275 ff.
[75] *Prosecutor v. Kambanda*, Case No. ICTR-97-23-S, Judgement and Sentence, 4 September 1998, para. 16.

cannot be denied that within the ICTR system genocide is generally more severely punished than crimes against humanity, Akayesu being one of the only four cases where life imprisonment was given for crimes against humanity.[76] It should be noted that in these four cases where the ICTR convicted persons for life imprisonment for crimes against humanity, all four of them were also convicted for the crime of crimes, genocide.

80. of all of those convicted of the ICTR, there are only three who have not been convicted of genocide, but they have been convicted of crimes against humanity. Interestingly, these three were convicted to 15, 7 and 6 years of imprisonment respectively.[77] All other persons convicted by the ICTR, as set out in Annex A to the Prosecution Sentencing Brief, were convicted of (incitement of) genocide, whether or not in combination with other international crimes. In addition, in several of the ICTR cases where genocide was proven, no life imprisonment was given.[78]

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[76] *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Sentence, 2 October 1998. There are three other cases where life imprisonment has been given for crimes against humanity, namely *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Judgement and Sentence, 1 December 2003; *Prosecutor v. Kamuhanda*, Case No. ICTR-99-54-T, Judgement and Sentence, 22 January 2004; and *Prosecutor v. Muhimana*, Case No. ICTR-95-1-T, Judgement and Sentence, 28 April 2005.

[77] See *Prosecutor v. Bisengimana*, Case No. ICTR-00-60, Judgement and Sentence, 13 April 2006, who was convicted of crime against humanity (extermination); *Prosecutor v. Nzabirinda*, Case No. ICTR-01-77-T, Judgement and Sentence, 23 February 2007, who was convicted of crime against humanity (murder); and *Prosecutor v. Rutaganira*, Case No. ICTR-95-1C-T, Judgement and Sentence, 14 March 2005, who was convicted of crime against humanity. See also Annex A (ICTR Sentencing Chart) to Prosecution Sentencing Brief.

[78] See *Prosecutor v. Imanishimwe*, Case No. ICTR-99-46-T, Judgement and Sentence, 25 February 2004, who was convicted of genocide, crimes against humanity (extermination), crime against humanity (murder), crime against humanity (imprisonment), crime against humanity (torture), violation of the laws and customs of war (cruel treatment), to a total of 27 years imprisonment; *Prosecutor v. Muvunyi*, Case No. ICTR-00-55-T, Judgement and Sentence, 12 September 2006, who was convicted of genocide, direct and public incitement to commit genocide, and crimes against humanity (other inhumane acts), to a total of 25 years imprisonment (this case is still under appeal); *Prosecutor v. Elizaphan Ntakirutimana*, Case No. ICTR-96-10-T, Judgement and Sentence, 21 February 2003, who was convicted of genocide, crime against humanity (extermination) to ten years imprisonment; *Prosecutor v. Gerard Ntakirutimana*, ICTR-96-10-T, Judgement and Sentencing, 21 February 2003, who was convicted of genocide, crime against humanity (murder), and crime against humanity (extermination), of a total of 25 years imprisonment; *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-T, 1 June 2000, who was convicted of direct and public incitement to commit genocide and crime against humanity (persecution) to a total of 12 years imprisonment; *Prosecutor v. Ruzindana*, Case No. ICTR-95-1-T, Judgement, 21 May 1999, who was convicted for genocide to 25 years imprisonment; *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgement and Sentence, 15 May 2003, who was convicted of genocide, crime against humanity (extermination), crime against humanity (rape), crime against humanity (torture), crime against humanity (murder), crime against humanity

81. This practice is indicative for the Special Court practice. Mr. Kanu has not been convicted of genocide, but has been found guilty on charges of crimes against humanity, and other international crimes. As such, the ICTR sentencing practice should be seen as a guideline, and the requested imprisonment of 50 years, factually amounting to life imprisonment for the acts for which Mr. Kanu has now been convicted, seems completely out of line with the ICTR sentencing practice.

82. Article 23(1) of the ICTR Statute provides: "The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda." The Kambanda Trial Chamber found that it "has recourse only to prison sentences applicable in Rwanda,"[79] and not the death penalty. It stated that "[r]eference to the Rwandan sentencing practice is intended as a guide to determining an appropriate sentence and does not fetter the discretion of the judges of the Trial Chamber to determine the sentence."[80] The ICTR Trial Chamber moreover held that "Rwandan law empowers its courts to impose the death penalty for persons convicted (...) of [g]enocide (...) and to impose a life sentence for persons convicted of (...) intentional homicide or (...) serious assault against the person causing death." The Chamber found that "the general practice regarding prison sentences in

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(murder), to a total of 25 years imprisonment; *Prosecutor v. Seromba*, Case No. ICTR-01-66-T, Judgement and Sentence, 13 December 2006, who was convicted of genocide and crime against humanity (extermination) for a total of 15 years (this case is still under appeal); *Prosecution v. Serugendo*, Case No. ICTR-05-84-T, Judgement and Sentence, 12 June 2006, who was convicted of direct and public incitement to commit genocide and crime against humanity (persecution) to a total of 6 years imprisonment; *Prosecutor v. Serushago*, Case No. ICTR-98-39-T, Sentence, 5 February 1999, who was convicted of genocide, crime against humanity (extermination), crime against humanity (murder), crime against humanity (torture) to a total of 6 years imprisonment; and *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Judgement and Sentence, 13 December 2005, who was convicted of genocide and crime against humanity (extermination) to a total of 25 years imprisonment. See also Annex A (ICTR Sentencing Chart) to Prosecution Sentencing Brief.

[79] *Prosecutor v. Kambanda*, Case No. ICTR-97-23-S, Judgement and Sentence, 4 September 1998, para. 22.

[80] *Prosecutor v. Kambanda*, Case No. ICTR-97-23-S, Judgement and Sentence, 4 September 1998, para. 41.

Rwanda represents one factor supporting this Chamber's imposition of the maximum and very severe sentences, respectively."[81]

4.4 Gravity of the Offences

83. In *Prosecutor v. Dragan Nikolic*, the ICTY Trial Chamber described the importance of this element of the gravity of the offence. In para. 144 it held: "The gravity of the offence is a factor of primary importance, and "may be regarded as the litmus test" in the imposition of an appropriate sentence. It is necessary to consider the nature of the crime and "the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime" in order to determine the gravity of the crime. "A sentence must reflect the predominant standard of proportionality between the gravity of the offence and the degree of responsibility of the offender."[82]

84. The gravity of the offence includes two elements: the magnitude of the harm caused (or risked) by the offender and the offender's culpability with respect to that harm.[83] The Defence will highlight the first of these aspects.

85. Although the AFRC was politically more involved than the RUF from May 1997 until February 1998, the RUF overall played a much more important role in the conflict. By excluding of a bulk of the conflict's period from the Indictment, i.e. the period 1991-end of 1996, the time frame of the Indictment and the evidence presented in support thereof, misrepresents the totality of the conflict in Sierra Leone. This aspect was of course not part of the trial procedure, but nonetheless relevant for the alleged responsibility of Mr. Kanu.

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[81] *Prosecutor v. Kayishema et al.*, Case No. ICTR-95-1-T, Judgement, 21 May 1999, para. 7.
[82] *Prosecutor v. Dragan Nikolic*, Case No. IT-94-2-S, Sentencing Judgment, 18 December 2003, para. 144.
[83] See A. Carcano, 'Sentencing and the Gravity of the Offence in International Criminal Law,' 51 International & Comparative Law Quarterly 583 (2002), at 589, referring to A. von Hirsch, 'Guidance by Numbers or Words Numerical versus Narrative Guidelines Sentencing,' Sentencing Reform: Guidance or Guidelines? (1987), 46-47.

86. The TRC report indicates that the RUF has been responsible for "the largest number of human rights violations" committed during the conflict (Chapter 2, para. 29). Although not relevant for the determination of individual guilt of the Third Accused as charged in the Indictment, the Defence deems it important to emphasise this historical broader picture, submitting that this should be reflected in the sentencing.

## 4.5 Individual Circumstances of the Accused: Subsequent Behaviour

### *4.5.1 Introduction*

87. In *Prosecutor v. Babic*, the ICTY Trial Chamber considered the mitigating factor of subsequent behaviour. The judgment reads:

> Conduct subsequent to the crime is a factor which has been accepted in other cases before the Tribunal where the convicted person acted immediately after the commission of the crime to alleviate the suffering of victims. For instance, in the *Plavsic* case, the Trial Chamber accepted Biljana Plavsic's post-conflict conduct as a mitigating factor because after the cessation of hostilities she had demonstrated considerable support for the 1995 General Framework Agreement for Peace in Bosnia-Herzegovina (Dayton Agreement) and had attempted to remove obstructive officials from office in order to promote peace. By contrast, in the *Jokic* case, the Trial Chamber did not accept as a separate mitigating circumstance Miodrag Jokic's conduct immediately after the crimes. Instead, the Trial Chamber used that information as well as his subsequent conduct as evidence of the sincerity of his remorse.[84]

88. As a result, the following three factors should be taken into account as mitigating factors in Mr. Kanu's case: (i) his role in the Commission for Peace; (ii) his role in the May 8th incident; and (iii) his role after the 1999 Ceasefire Agreement.

### *4.5.2 Kanu's Role after the 1999 Lomé Peace Agreement*

89. The evidence presented at trial confirms that Mr. Kanu was looking after the women and children in the jungle. One element thereof is his role in the release of

[84] *Prosecutor v. Milan Babic*, Case No IT-03-72-S, Sentencing Judgment, 29 June 2004, para. 94.

the children after the 1999 Lomé Peace Accord. Witness TF1-334 gave evidence in court that the Mr. Kanu came to the West Side to collect children, who would be released in Freetown.[85]

90. Also Defence witness C1 states that Kany played a vital role in the peace process, and that Kanu "told SAJ to come out, to lay down their arms and make peace with the government." This witness states: "I was present when Kanu said to SAJ that whilst Gullit and others were arrested in Kailahun, to lay down the arms and bring peace to the country."[86]

91. Kanu clearly played an instrumental role in the peace process after the July 1999 Lomé Peace Accord; he was the first soldier to come out of the bush to help build confidence between the government, the ex-SLAs and the RUF, as well as the UNAMSIL contingent present in Freetown and operating under commander General Jose and ECOMOG force commander Maxwell Khobe. Kanu worked together with them in bringing peace back to the country. When the West Side Boys proved intransigent and held UN peacekeepers and civilians captive, Kanu and four others helped out with disarming and assisting in cooling off the tension so as to safeguard the peace process. They were commended by UN Special Envoy Francis Okello, who noted the important role they played.

92. In this regard, the ICTY case law of *Prosecutor v. Oric* is indicative. In that case, the Trial Chamber considered that the accused's cooperation with the Stabilisation Force in BiH (SFOR), "providing information on a regular basis that enabled them to assess potential threats to the security of their forces as well as sections of the population in Bosnia." It held the accused's cooperation with SFOR in mitigation for the purpose of sentencing.[87]

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[85] Transcript 16 June 2005, p.91-92.
[86] Statement witness C1, attached to this Brief as Confidential Annex.
[87] *Prosecutor v. Oric*, Case No. IT-03-68, Judgment, 30 June 2006, para. 765.

93. The Defence thus holds that the role Mr. Kanu played in the peace process following the Lomé Peace Agreement should play a significant role in the mitigation of his sentence.

*4.5.3 Kanu's Role in the Commission for the Consolidation of Peace*

94. Additionally, Kanu was a member of the Commission for the Consolidation of Peace (**CCP**), the committee created for overseeing the implementation of the Lomé Peace Accord. As a member thereof, Kanu assisted Chairman Johnny Paul Koroma to bring all warring factions to the negotiation table. Especially the former honourables played an important role in the DDR process after the war, and IMATT training, including negotiations in Makeni to come back under government control. The Trial Chamber held in its Judgement that "it appears that the AFRC had the intention to bring lasting peace to Sierra Leone after six years of civil strife."[88]

95. The CCP was created to foster peace, and Kanu formed an important part thereof. He worked in close association with UNAMSIL, and the committee assisted the work of UNAMSIL. The CCP assisted with the reintegration of ex-combatants back to their communities, thus enabling and enhancing stability and peaceful existence. As a committee member, Mr. Kanu supervised the training of combatants into varying trades, and thus helped them out, as well as their families and society as a whole. The CCP program was assisting former combatants, offering training; thus helping their reintegration into society but also assisting them to heal their families and society as a whole.

96. Whilst initially marginalized, "[t]he CCP scored a major success in April 2000 when a confidence- and trust-building conference for ground and battalion commanders held in the southern town of Bo ignited mass voluntary disarmament

[88] See Sierra Leone: Time for a New Political and Military Strategy, 11 April 2001, URL address: http://www.unhcr.org/home/RSDCOI/3c0cc89c4.pdf.

by pro-government militiamen. This provoked deep reflections by young combatants from all the factions on the catastrophic effects of the war on the country and their own future."[89]

97. The Sierra Leone News Archive website contains a statement of 24 May 2000, reflecting a statement made by Johnny Paul Koroma as Chairman of the CCP, where he stated that

> "[t]he rule of law is the cornerstone of democracy and must therefore be upheld." The CCP called on the government to restore the territorial integrity of Sierra Leone by bringing all areas "previously dominated by conflict parties" under the constitutional authority of the president (...)." The CCP statement urged RUF combatants to give up their guns, and promised the Commission would work with government and all agencies concerned to ensure the protection of former combatants. "The CCP reiterates its determination to pursue its mandate by encouraging combatants wherever they may be to stop fighting and join the peace process," the statement said. The CCP also called for the unconditional release of U.N. personnel and the return of their weapons as a pre-condition for the resumption of the peace process, voiced opposition to the recruitment of child soldiers "whether by pro or anti-government forces," and warned against "breeding hatred and division in our society through witch hunts against so-called collaborators, especially at this time when national unity should be our priority."[90]

98. The Kanu Defence filed two motions, which are relevant in this respect. The first is the "Kanu – Motion to Request an Order under Rule 54 with Respect to Exculpatory Evidence,"[91] and the second is the "Kanu – Defence Motion for Dismissal of Counts 12-18 of the Indictment Due to an Alibi Defense and Lack of *Prima Facie* Case" of 20 January 2005.[92] In the first motion, the Kanu Defence submitted that "during the period [Mr. Kanu] was serving under the army and designated to CCP to locate in Freetown. As of the year 2000, the Accused receives a salary from the military authorities, as being professionally attached o

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[89] See D. Bright, Implementing the Lomé Peace Agreement, Conciliation Resources (September 2000), URL address: http://www.c-r.org/our-work/accord/sierra-leone/implementing-lome.php.
[90] Sierra Leone News Archives, 24 May 2000, URL address: http://www.sierra-leone.org/slnews0500.html.
[91] *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-PT-038, Kanu – Motion to Request an Order under Rule 54 with Respect to Exculpatory Evidence, 19 March 2004 (**Rule 54 Motion**).
[92] *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-PT-119, Kanu – Defence Motion for Dismissal of Counts 12-18 of the Indictment Due to an Alibi Defense and Lack of *Prima Facie* Case, 20 January 2005 (**Alibi Motion**).

thee chairman of the CCP."[93] Although the Defence tried to obtain salary vouchers from the national authorities, they were no longer available.

99. The Defence submits that Mr. Kanu's participation in the CCP subsequent to the conflict which took place in Sierra Leone amounts to a significant mitigating factor, as it clearly indicates his willingness to transform war torn Sierra Leone to a country where peace and reconciliation could exist.

### *4.5.4 Kanu's Role in the May 8th Incident*

100. Furthermore, Kanu and others assisted the British troops in Freetown when they engaged in a fire fight with RUF rebels on 8 May 2000. Mr. Kanu and others were called by Johnny Paul Koroma to save the people from the RUF rebels. The demonstration was against Foday Sankoh and the RUF for their repeated violation of the Lomé Peace Accord, including the detention of some 500 UN Peacekeepers.[94] The lives of the elite Pathfinder troops equipped with SA 80 were at risk, but with the assistance of Kanu and others, they managed to save the troops. This operation was codenamed Operation Palliser. The fact that Mr. Kanu thus saved lives cannot be overlooked in the determination of his sentence.

### *4.5.5 Conclusion*

101. The aforementioned three elements should play a distinctive role in the assessment of the factors determining Mr. Kanu's sentence. Subsequent behaviour is an important aspect in mitigating someone's sentence, and as such, it is justified that these incidents be of high importance.

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[93] See Rule 54 Motion, para. 25.
[94] ReliefWeb, Sierra Leone: Calm Returns after Protests, URL address: http://www.reliefweb.int/rw/rwb.nsf/db900SID/OCHA-64D2ZZ?OpenDocument.

## 4.6 Mitigating Circumstances

### *4.6.1 Introduction*

102. In *Prosecutor v. Tadic*, the ICTY Appeals Chamber recognized the "need for sentences to reflect the relative significance of the role of the [accused] in the broader context of the conflict in the former Yugoslavia."[95] As such, the rather low position of Mr. Kanu, compared to the other convicted persons, should be a relevant factor in the determination of his sentence.

103. In Kanu's case, it was often his popular name "55" which unjustly brought him fame rather than his actual position as a leader. Indicative of this is Prosecution Exhibit P85 which provides an illustration of the fame of the nickname of Mr. Kanu. It concerns a commentary by Radio Netherlands of 21 January 2000, called "A Day in Rebel Territory." The reporter describes a trip he makes with, *inter alia*, the First and Third Accused. They travel after curfew time, and run into several roadblocks. However, it is Five-Five's name which saves them time and again: "Each time, 5 5 replies, 'A friend – 5 5.' The soldiers greet him enthusiastically and he promises to return within a few days," and "5 5 is the open sesame all the way to Freetown."

104. Five-Five's name was apparently famous, not so much because of his position or deeds, but because he was a popular man within the army. People knew 55's name, but not Brima's, whilst, according to the Judgment, Brima was in a higher position than Mr. Kanu. Five-Five was a popular man, and his name was easy to remember, unlike the Dutch name "Gullit."

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[95] *Prosecutor v. Tadic*, Judgment in Sentencing Appeals, para. 55, see also *Delalic et al.*, Appeals Judgment, para. 845 and 847.

*4.6.2 Relatively Low Position*

105. As already indicated by the Trial Chamber, the Accused's role in the 1997 coup and in the governing AFRC Council thereafter cannot be deemed to be senior. The Trial Chamber in its Judgment held that "[t]he Trial Chamber concludes that while this evidence that the Accused [Kanu] had a position in the AFRC government, it provides no indication of his seniority within that government" and "[t]he Prosecution adduced no evidence that the Accused Kanu held a ministerial or other high ranking government position."[96]

106. Especially when compared to the other two convicted persons, who according to the Judgement had PLO1 and PLO2 positions in the AFRC government, Mr. Kanu had a relatively low position during the governing Council and the ensuing conflict. Consequently, he bore less responsibility. This lower position should be reflected in the sentencing. Even in Freetown, where Kanu was found guilty of several of the indicted counts, he was supposedly the third in command as Chief of Staff.[97]

107. The Trial Chamber dismissed the Defence argument, and the jurisprudence created by Trial Chamber I that those bearing the greatest responsibility be a jurisdictional requirement. Nonetheless, the Defence respectfully holds that in spite of that, the consideration of Article 1(1) of the Statute should be taken into account in the sentencing phase of the proceedings.

108. In this respect, the following statement made by Prosecution witness TF1-045 should be taken into account. This witness was interviewed in January 2003, i.e. before the indictment against Mr. Kanu had been issued. He did not mention the name of Santigie Kanu. In cross-examination, he was confronted with this, and he testified: "Yes, sir. But during that time [January 2003], when I say I knew most

[96] Judgement, paras. 510-511, see also para. 437, where the Trial Chamber refers to witness TF1-045 stating that Kanu is not one of the top commanders, superiors.
[97] See Judgement, para. 2070.

of them, I was not concerned about. The major people who were commanders, during that time, on top, superior to these people, those were the only people I stated during that time.[98] This Prosecution witness therefore indicates that Five-Five, whom he had not mentioned in his interview in January, did not belong to this group of "major people who were commanders (...) on top, superior to these people."[99]

109. The Defence submits that the preceding argument, the lesser responsibility and position of Mr. Kanu should be considered as an important element in the sentencing procedure.

110. The ICTR Niyitegeka Trial Chamber considered "the principle of gradation in sentencing, according to which the highest penalties are to be imposed upon those at the upper end of the sentencing scale, such as those who planned or ordered atrocities, or those who committed crimes with especial zeal or sadism. Whether an accused is found guilty of genocide, of crimes against humanity or of violations of the Geneva Conventions or Additional Protocol II thereto, the principle of gradation enables the Chamber to punish, deter, and consequently stigmatize the crimes considered at a level that corresponds to their overall magnitude and reflects the extent of the suffering inflicted upon the victims."[100]

*4.6.3 Flexibility in Sentencing Superior Responsibility*

111. In *Prosecutor v. Oric*, it was held that responsibility for superior responsibility should not be based on the crime but rather should be limited to the failure to prevent or punish the commitment of the crime. As such, the sentencing should be limited to the aspect of the failure to prevent and punish the crimes and not the actual crimes themselves.

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[98] TF1-045, Transcript 21 July 2005, p. 24.
[99] See also Judgement, para. 437.
[100] *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-T, Judgement and Sentence, 16 May 2003, para. 486.

112. The Oric Trial Chamber considered:

> 724. The Trial Chamber agrees with what was recently stated in the *Hadzihasanovic* case, namely, that under Article 7(3) of the Statute, an individual is not convicted for the crimes committed by his subordinates, but for the failure to prevent or punish the said crimes. On that basis, the Trial Chamber held that the *sui generis* nature of superior responsibility pursuant to Article 7(3) of the Statute allowed for an even greater flexibility in the determination of sentence.
>
> (...)
>
> 728. Accordingly, in determining the gravity of the crime of which the Accused has been found guilty, the Trial Chamber has considered the following. First, it has taken into account that the crimes of murder and cruel treatment in a war-crime context are inherently grievous. Second, that failure to prevent the occurrence of such heinous crimes is necessarily also intrinsically grievous.
>
> Third, that the extent of the responsibility of the Accused for the purpose of the sentence to be imposed upon him, and hence, the gravity of his offence, depends on various factors. The principal factors include the gravity of the subordinates' crimes, the Accused's imputed knowledge, as distinct from actual knowledge, and the foreseeability of the imminence of the occurrence of the said crimes, given the circumstances of this case. Other factors, such as aggravating and mitigating circumstances, will also be considered.
>
> (...)
>
> 771. The Trial Chamber is finding the Accused guilty and will be sentencing him because he had reason to know that the reoccurrence of murder and cruel treatment of prisoners was possible and because he wilfully decided not to do anything about it, not even to at least try and enquire about the situation of the prisoners. The Trial Chamber has no doubt that the Accused was aware that maltreatment of prisoners would exacerbate their weakness and vulnerability, and even exposed them to murder, especially at a time when inhabitants of Srebrenica were acting erratically.[101]

113. Therefore, the responsibility of Mr. Kanu under Article 6(3) of the Statute is limited to the failure to prevent or punish rape and does not extend to the actual crimes committed by Kanu's subordinates.

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[101] *Prosecutor v. Oric*, Case No. IT-03-68, Judgment, 30 June 2006 (footnotes omitted).

114. The sentence to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime.[102] The level of participation is thus a relevant factor in the determination of the sentence.

*4.6.4 Family background*

115. The ICTY jurisprudence indicates that poor family background, in combination with youth and an immature and fragile personality are also elements that may constitute mitigating circumstances.[103] The ICTY Appeals Chamber held that mitigating circumstances included "youth of the accused, immature and fragile personality and the harsh environment of the armed conflict as a while.[104]

116. The Defence argues that the latter element, harsh environment of this specific armed conflict as a whole, is indeed a mitigating factor in the underlying case.

117. Mr. Kanu has a girlfriend who wants to marry him and build up a life together with him in the future.

118. In *Prosecutor v. Oric*, and previous cases, the ICTY Trial Chamber found that family circumstances may amount to mitigating circumstances. It held: "The Accused is married with two children. His family status will be considered as a mitigating circumstance, but the Trial Chamber notes that this Tribunal has generally attached only limited importance to this factor.[105] However, in previous

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[102] *Prosecutor v. Predrag Banovic*, Case No. IT-02-65/1, Sentencing Judgment, 28 October 2003, para. 37.
[103] See *Prosecutor v. Erdemovic*, Case No. IT-96-22-T*bis*, Sentencing Judgement, 5 March 1998, para. 16(i); *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998, para. 284; *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgement, 3 March 2000, para. 778; *Prosecutor v. Jelisic*, Case No. IT-95-10-A, Judgement, 5 July 2001, para. 128; *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgement and Sentence, 6 December 1999, para. 471.
[104] *Prosecutor v. Delalic et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 827.
[105] *Prosecutor v. Oric*, Case No. IT-03-68, Judgment, 30 June 2006, para. 758.

cases, the ICTY Trial Chambers have also taken this aspect into account.[106] The Defence thus submits that this family situation for Mr. Kanu should be taken into account when assessing the mitigating circumstances. His family situation will also assist Mr. Kanu in his future rehabilitation in society.

*4.6.5 Superior Orders*

119. As indicated by Trial Chamber in the Judgement, in many cases, Kanu merely followed the orders of others.[107]

120. In *Prosecutor v. Kambanda*, the ICTR Trial Chamber concluded that superior orders may lead to mitigating circumstances. It held: "With regard to the mitigating circumstances, Article 6(4) of the Statute states that the fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."[108]

121. As such, Mr. Kanu was the lowest in rank and position of the three convicted. The fact that he followed orders of others should be a mitigating factor in the determination of his sentence.

*4.6.6 Collapse of Command Structure*

122. Moreover, the Oric Trial Chamber, whilst referring to previous ICTY case law, considered that difficult circumstances in which an convicted person had to operate can be a mitigating factor. "The Trial Chamber considers this to be the

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[106] *Prosecutor v. Kunarac*, Case No. IT-96-23&23/1-A, Judgement, 12 June 2002, paras. 362 and 408; *Prosecutor v. Tadic*, Case No. IT-94-1-S, Sentencing Judgement, 11 November 1999, para. 26; and *Prosecutor v. Erdemovic*, Case No. IT-96-22-T, Sentencing Judgement, 5 March 1998, para. 16(i).
[107] See Judgement, p.131-132 and p. 271: orders Brima Freetown; p.556: reissuing an order of Brima; p.165-166 and p. 178-180, 182, 189: Kanu chief of staff, reiterating orders Brima.
[108] *Prosecutor v. Kambanda*, Case No. ICTR-97-23-S, Judgement and Sentence, 4 September 1998, para. 35.

pivotal consideration for the purpose of establishing the sentence that should be meted out to the Accused."[109]

123. The Oric Trial Chamber described the situation in Srebrenica at the relevant time as follows:

> Throughout this Judgement, the Trial Chamber has endeavoured to describe the abysmal conditions prevailing in Srebrenica town and in the surrounding area where the Accused operated during the relevant time in 1992 and 1993. It was a situation which became worse by the day. It was the result of a combination of inter-related factors, chief amongst which were the escalating offensive by militarily superior Serb armed forces, the unpreparedness of the Bosnian Muslims, an unmanageable influx of refugees, an increasing isolation of the town and area resulting in critical shortages of food and other essentials, the general chaos and last, but certainly not least, the flight from Srebrenica of all the authorities, civilian and otherwise, soon after the outbreak of hostilities and the take-over of the town by the Serb forces. This resulted in a total breakdown of society in Srebrenica including a collapse of law and order.[110]

124. In the Judgement, the Trial Chamber set out that after the "command structure failed when the troops lost control of State House,"[111] and "the climate became increasingly chaotic once the troops lost State House."[112] Also the Judgement reads: "The Trial Chamber accepts that the dysfunctional state of the SLA at the time of the coup in 1997 had a detrimental impact on the future military organisation of the AFRC faction."[113] The chaos that ensued in Freetown after the control of the State House was lost should thus form a particular mitigating circumstance relating to the events which occurred after that event. This argument is not only relevant in the determination of Article 6(3), but also in the determination of Article 6(1). As such, this should play a strong mitigating role in the sentence of Mr. Kanu.

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[109] *Prosecutor v. Oric*, Case No. IT-03-68, Judgment, 30 June 2006, para. 767.
[110] *Prosecutor v. Oric*, Case No. IT-03-68, Judgment, 30 June 2006, para. 768.
[111] Judgement, para. 2067.
[112] Judgement, para. 420.
[113] Judgement, para. 555.

*4.6.7 Lack of Formal Military Training*

125. The Judgement holds: "The AFRC was less trained, resourced, organised and staffed than a regular army. However, it mimicked one."[114] It also found: "The Trial Chamber agrees that, on the evidence adduced, the AFRC commanders dispensing "jungle justice" were not trained in military law and no formal procedures were in place for trying offenders and determining appropriate penalties. Rather, the system appears to have been fairly arbitrary."[115] The Trial Chamber moreover held : "The Chamber notes that the AFRC faction suffered from lack of trained soldiers from which to fill senior positions and accepts that senior AFRC members were entrusted with multiple areas of responsibility."[116]

126. Mr. Kanu was 25 years old when he joined the army and had only very limited training[117] before he was sent off to defend the country against the RUF rebels who attacked the country. In *Prosecutor v. Serushago*, the ICTR Trial Chamber held that lack of a formal military training was considered as a mitigating circumstance. From the ICTY Trial Chamber judgment in *Prosecutor v. Oric* it can be derived that limited military experience can count as a mitigating factor.[118] All these factors should certainly weigh as considerable mitigating factors in the underlying sentencing procedure.

*4.6.8 Absence of Knowledge of Criminality*

127. In its Trial Brief, the Defence had made the argument of mistake of law regarding count 12, recruitment and use of child soldiers, and count 8, other inhumane acts.

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[114] Judgement, para. 539.
[115] Judgement, para. 597.
[116] Presiding Judge Julia Sebutinde, Transcript 20 June 2007, p. 9 (lines 16-20).
[117] Three months training after his conscription in 1990, and three months training by the Executive Outcomes in 1992.
[118] *Prosecutor v. Oric*, Case No. IT-03-68, Judgment, 30 June 2006, para. 757.

128. This argument was dismissed by the Trial Chamber, where it held that "[t]he rules of customary international law are not contingent on domestic practice in one given country."[119] However, in this stage the Defence argues that in spite of the legal argument being rejected, this argument should go to the sentencing aspect of the process against Mr. Kanu.

129. As evidenced during trial by the Defence expert witness on child soldiers as well as the Prosecution expert, Mr. Kanu could not have known about the criminality of his alleged acts. The evidence presented at trial with regard to count 12 of the Indictment was twofold.

130. Firstly, it suggested that even for the Sierra Leonean government it was normal to recruit children below the age of 15 within their armed forces. On the basis of the reports and testimony of both the Prosecution and Defence expert on child soldiers, evidence was adduced during trial as to the existence of a governmental practice, even within the regular SLA, on conscripting and enlisting children below the age of 16 within the army, up until 1997.

131. An example hereof forms the cross-examination of OTP expert [redacted].[120] Confronted with para. 50 of the expert's report, this expert confirmed [redacted]. On numerous occasions, the expert witness testified to this fact.[121]

132. In particular, the Defence expert Mr. Osman Gbla provided strong support for this conclusion in his report of 11 October 2006, which was not contested by the Prosecution. Reference can be made to the following passages in this report:

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[119] See Judgement, para. 732.
[120] Transcript 4 October 2005, p. 114 (lines 11-29) - 115, (lines 1-13).
[121] [redacted]; see *inter alia* Transcript 5 October 2005, p. 14 (lines 5 – 9).

Despite its track record of having ratified a number of international legal instruments bordering on the prevention of underage recruitment into the military, the Sierra Leone Government has not done much to prevent the recruitment of children into the Sierra Leon military. This is the case because the Sierra Leone military at various periods has a record of child recruitment. This is not necessarily out of a clearly thought out policy but one dictated by various circumstances at certain period of the country's history. One senior Sierra Leone military officers interviewed confirmed this point in noting that: the recruitment of children into the Sierra Leone military is not a deliberate government or military policy. The war circumstances created a fertile ground for the practice of involving children in the military. This latter view is not implying that the war started the practice of recruiting children into the Sierra Leone military.[122]

As far back as to the days of one party rule especially under the reign of the late President Siaka Stevens (1978-1985) voluntary enlistment into the military slowly gave way to enlistment through political connections. Politicians and well-connected persons were given a number of cards, which they gave out to young men of their choice to join the Army. This system produced a serious diminishing of military standards as characters of all shades were recruited into the force irrespective of prevailing military requirements.[123]

Recruitment of children into the military however assumed an unprecedented character during the war first under the reign of Joseph Saidu Momoh. President Momoh did not only inherit a military that was underpaid, indisciplined, demoralised and poorly trained but one that was also confronted with a rebel war. The Army at the time was about 3000 in strength and 364 of these were in Liberia as part of the ECOWAS Ceasefire Monitoring Group (ECOMOG). This precarious situation among other things compelled Momoh to embark on a crash military recruitment drive advocating for vigilantes to join the force thus sidelining military recruitment standards and procedures.[124]

The military regime of the National Provisional Ruling Council (NPRC) under the leadership of Captain V.E.M. Strasser inherited the legacy of sidestepping military recruitment procedures in his bid to swell up the military force to face the rebels. He continued the practice of enlisting vigilantes including the Sierra Leone Border Guards (SLBGS) into the military. Most of these members were under 15 years.(...).[125]

This background saw the infiltration of a number of children into the military through a variety of ways including backdoor enlistment. This was an

[122] Report Mr. Gbla, Exhibit D37, page 15, para. 33.
[123] Report Mr. Gbla, Exhibit D37, page 16, para. 34.
[124] Report Mr. Gbla, Exhibit D37, page 16, para. 35.
[125] Report Mr. Gbla, Exhibit D37, page 16, para. 36.

> enlistment practice that encouraged the replacement of deceased soldiers with child recruits that were given official status in the payroll. What was even more disturbing was the fact that these recruits were given crash training for three months instead of the nine months minimum period for such normal trainings. In most cases, they were trained only in the four rules of war-planning, advance, attach and retreat.[126]
>
> The practice of recruiting children into the military continued even during the period of the democratically elected government of Alhaji Ahmad Tejan Kabbah of the sierra Leone People's Party that came to power in 1996.[127]

133. It is therefore fair to conclude that this established practice of recruiting children into the military up to 1997 clearly impacts on the awareness within the military and specifically within the minds of individual military servicemen as to the alleged unlawfulness of recruiting children under the age of 18 or 16 within the military. Additionally, the absence of a proper training as to the (international) laws prohibiting the conscription and enlistment of children under 15 years into the army as an alleged war crime also affects this awareness.

134. The report of Mr. Gbla lends support for the latter observation. Noticeably, this expert (unlike Prosecution expert TF1-296) relied upon primary sources, namely military and civilian official currently serving within the Administration of Sierra Leonean. Footnotes 17, 18, and 23-27 of his report reveal that this expert conducted interviews with, *inter alia*, the senior military officer attached in the Ministry of Defence, lieutenant-colonel working for the Sierra Leonean Ministry of Defence and other senior officials of the Government of Sierra Leone. Therefore the foundation of the report of Mr. Osman Gbla is highly relevant. Therefore, his conclusions on this issue have a considerable probative value, including his observation on p. 18 in para. 39:

> It is however noteworthy that the Government of Sierra Leone during the pre-conflict period did not seriously monitor the practice of recruiting children below the minimum age of seventeen and the half years into the military and that laws pertaining to this issue were hardly enforced. Furthermore, the laws pertaining to the definition of a child are confusing and contradictory with no

[126] Report Mr. Gbla, Exhibit D37, page 16, para. 37.
[127] Report Mr. Gbla, Exhibit D37, page 16, para. 38.

uniform age and most are outdated and not in tune with modern international legal standards.[128]

135. Moreover, one of his major conclusions and findings in his report, which is as noticed not contested by the Prosecution, can be read in paragraphs 54 and 55:

> The study also confirms that the role of the Sierra Leone government in recruiting child soldiers especially during the war in an attempt to bolster government forces to face the rebels sidestepped recruitment procedures and undermined efficient training and this in a way influenced the composition of the SLA faction that withdrew into the jungle. The study also reveals that prior to the on-going British-led military training programme, there was very little serious and consistent efforts to infuse child rights issues in the training of the security forces in the country especially the military.[129]

136. The inclusion of children that followed the AFRC members after being ousted from power in February 1998 was mainly caused by the fact that they were family members and other associates "that were afraid of reprisal" (see also para. 51 of Mr. Gbla's report). Besides that, many of the children actually volunteered to join the armed factions for various reasons.

137. Although the Trial Chamber did not accept the defence of mistake of law with regard to this count, the Defence does submit that the circumstances surrounding the recruitment of child soldiers, as described above, does form a serious mitigating factor relating to the conviction on count 12. Here, a similarity can be drawn with the defence of duress before the ICTY which may lead to mitigation.

*4.6.9 Kanu's Role in Protecting Women*

138. Although the Trial Chamber held that Kanu was in command and control of the abducted persons, including women and children, in the jungle,[130] this role also involved Mr. Kanu being in charge with taking care of the women their children, a task which he fulfilled to his best ability. One Prosecution witness testified:

> Q. Did you ever meet with this person called Santigie Kanu, alias Five-Five?

[128] Report Mr. Gbla, Exhibit D37, page 18, para. 39.
[129] Report Mr. Gbla, Exhibit D37, page 23, paras. 54-55.
[130] See for instance Judgement, para. 526.

A. During the AFRC I met with him.
Q. And can you tell this Court where you met with him?
A. Well, during the AFRC, when things were going on normal, he summoned a meeting in the community centre which was for youths. He spoke about progress, cleaning and other caretaking of the town, and that was the time I knew that this was the man. That was the time I met with him.[131]

139. During a certain part of his stay in the jungle (since his arrival in Koinadugu District in the beginning of 1998),[132] the evidence suggests that the Third Accused was in charge with protecting and taking care of the civilians, more specifically the women, who joined the soldiers for many reasons which included being a family member or looking for a safe haven in the jungle. These women were well protected[133] and could consult the Third Accused on certain problems and welfare issues.[134]

140. The evidence given by TF1-334 on the warning made by the Third Accused to the soldiers that they should take good care of the women,[135] may serve as a characterisation of the limited role of the Third Accused.

141. Notwithstanding that it did not exonerate Mr. Kanu in view of the Trial Chamber, this evidence should play a mitigating role in the determination of his sentence.

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[131] DAB-042 Transcript 15 September 2006, p. 89.
[132] TF1-334 gives a good indication when describing the time frame of the protective role of the Third Accused (Transcript 16 June 2005, p.62-63):
Q. Mr Witness, do you know when Santigie Borbor Kanu was appointed to look after the women?
A. Yes, sir, My Lord.
Q. When was it?
A. Well, it was during the time when we were at Mansofinia up to the time that we came to Freetown and he was still in charge of them.
Q. Was he still in charge of the women whilst you were retreating from Freetown?
A. Yes, My Lord.
[133] See for example TF1-334, Transcript 14 June 2005, p.116 ("These civilians were well protected").
[134] Witness TF1-334, Transcript 15 June 2005, p. 15-17.
[135] Transcript 23 May 2005, p. 76:
A. In fact, the soldiers came, they signed and Five-Five warned them that if there is any problem they should immediately report to him or he himself will monitor. If these soldiers disturb these women, he was going to retrieve them, to take them back from them. So he released these women to the various soldiers who had asked for them.

*4.6.10 Lengthy Proceedings*

142. The Defence contends that the lengthy proceedings, caused by the following factors, cannot be attributed to Mr. Kanu. A delay in the proceedings was caused by, *inter alia*, (i) the fact that Trial Chamber I approved the Indictment against Mr. Kanu,[136] and dismissed the Defence motion on defects in the form thereof, relating to JCE (see below) and (ii) the fact that Trial Chamber II dismissed the Defence argument relating to JCE in its Rule 98 Motion (see below). Both Trial Chambers could have disposed of the JCE argument at an earlier stage of the proceedings. By not doing so, the Defence had to prepare and present evidence on behalf of Mr. Kanu, which could have been avoided had the Chambers decided on the matter of JCE at an earlier stage.

143. On 13 October 2003, the Kanu Defence team filed its "Motion on Defects in the Form of the Indictment and for Particularization of the Indictment," in which the Defence complained of, *inter alia,* lack of specificity in the Indictment relating to the charged joint criminal enterprise (JCE),[137] which argument Trial Chamber I dismissed "as ill-conceived."[138] Also at the Rule 98 stage, the Defence submitted the argument concerning the alleged JCE.[139] Now, at the very end of this phase, the Trial Chamber found that "the Trial Chamber rejects the Prosecution argument that it has sufficiently pleaded a joint criminal enterprise between the three Accused in paragraph 35."[140] An earlier adjudication of this argument could here prevented the hearing of witnesses on this issue.

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[136] The Kanu Defence filed an objection against the Indictment, and on 19 November 2003, Trial Chamber I dismissed most of the objections by the Kanu Defence with regard to the initial indictment. The Kanu Defence objected to the specificity of the initial indictment regarding different forms of individual criminal responsibility and regarding various counts. See *Prosecutor v. Brima et al.,* Case No. SCSL-2004-16-PT-046, Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment, 1 April 2004, para. 7.

[137] *Prosecutor v. Brima et al.*, Case No. SCSL-03-13-PT-018, Motion on Defects in the Form of the Indictment and for Particularization of the Indictment, 13 October 2003, paras. 5-9.

[138] *Prosecutor v. Brima et al.*, Case No. SCSL-03-13-PT-46, Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment, 1 April 2004, para. 53.

[139] *Prosecutor v. Brima et al.*, Case No. SCSL-03-13-T-445, Joint Legal Part Defence Motion for Judgment of Acquittal Under Rule 98, 13 December 2005, paras. 29-34.

[140] Judgement, para. 81.

144. The Judgement reads:

> 66. (...) Trial Chamber I dismissed that application, finding that, upon a review of the Indictment as a whole and particularly paragraphs 33 and 34,[141] "the Indictment, in its entirety, is predicated upon the notion of a joint criminal enterprise", which is reinforced by paragraph 34, and that the nature of the alleged joint criminal enterprise was pleaded "with the degree of particularity as the factual parameters of the case admits," as alleged in paragraph 33.[142]
>
> 67. With the greatest respect, the Trial Chamber does not agree with the decision of our learned colleagues that the Indictment has been properly pleaded with respect to liability for JCE, since the common purpose alleged in paragraph 33, that is,
>
> > to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas
>
> is not a criminal purpose recognised by the Statute. The common purpose pleaded in the Indictment does not contain a crime under the Special Court's jurisdiction. A common purpose "to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone" is not an international crime and, as the Appeals Chamber has noted
>
> > Whether to prosecute the perpetrators of rebellion for their act of rebellion and challenge to the constituted authority of the State as a matter of internal law is for the state authority to decide. There is no rule against rebellion in international law.[143]

145. In the "Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98", Trial Chamber II held that:

> The evidence referred to, if believed, is capable of establishing all three categories of joint criminal enterprise. However, the Trial Chamber will not at this stage make a final determination as to the precise basis of liability of each Accused for participation in a joint criminal enterprise, or whether an Accused ought to be acquitted of an alternative basis of liability. A determination as to the liability of each Accused depends to a certain extent on issues of fact and the weight to be attached to certain evidence, which calls for an assessment of

[141] These paragraphs were referred to in the Kamara Form of the Indictment Decision, para. 52, as "paragraphs 23-24", which was their numbering in the previous Consolidated Indictment.
[142] See Kamara Form of the Indictment Decision, para. 52.
[143] *Prosecutor v. Kallon and Kamara*, Case No. SCSL-2004-15-AR72(E)/ SCSL-2004-16-AR72(E), Decisions on Challenge to Jurisdiction: Lomé Accord Amnesty ("Lomé Amnesty Decision"), para. 20, referring to M. N. Shaw, *International Law* (5th ed., 2003) p. 1040.

the credibility and reliability of that evidence. These are issues which do not arise for determination until the judgement phase.[144]

146. The Defence submits that had the Chambers decided on this defect in the indictment at earlier stages of the trial, the Defence would have saved a substantial amount of time in the preparation and presentation of its case. The delay thus caused should count as a mitigating factor in the determination of the sentence.

147. The ICTY has held in this regard that "The problem arising from lengthy court proceedings and the long period of time between the criminal conduct and its subsequent trial, has been discussed by the European Court of Human Rights, as well as in decisions of several national courts. Common to all leading decisions is that any disproportionate length of procedures may be considered as a mitigating factor in sentencing."[145]

148. The Nikolic case stated: "However, in most of the cases it was held that, in light of Article 6 (1), sentence 1 of the [European] Convention for Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter "ECHR"), the "reasonable time" requirement generally comprises solely the time frame starting from the indictment and/or arrest of the accused, and ending with a legally binding, final decision of the court. Moreover, it has been held that the violation of the accused's basic right to a fair and speedy trial should only be remedied and compensated if the perpetrator is not himself responsible for the delay of the proceedings."[146]

149. As such, the lengthy proceedings against Kanu should be considered as a mitigating factor in the sentencing procedure.

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[144] *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-T-469, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, para. 326.
[145] *Prosecutor v. Dragan Nikolic*, Case No. IT-94-2-S, Sentencing Judgment, 18 December 2003, para. 269 (footnotes omitted).
[146] *Prosecutor v. Dragan Nikolic*, Case No. IT-94-2-S, Sentencing Judgment, 18 December 2003, para. 270 (footnotes omitted).

*4.6.11 Good Behaviour in the Army*

150. Defence Exhibit D-11, Mr. Kanu's discharge booklet from the army which was signed on 18 June 2002 and admitted into the evidence, indicates the following:[147]

> Corporal Kanu offered a loyal, faithful service to the RSLMF. His approach and respect for authority have always been outstanding. I can strongly recommend that if given the opportunity by any employer he will measure up to the task.

151. The Defence submits that the recognition of Mr. Kanu's "loyal, faithful service" in the army, should count as a mitigating factor in the determination of his sentence. Notably, Prosecution witness John Petrie did not dispute the contents thereof.

*4.6.12 No Previous Convictions*

152. Mr. Kanu has no previous convictions and this was considered "a factor to be taken into account for mitigation" in *Prosecutor v. Nikolic*.[148] Also the ICTR Trial Chamber, in *Prosecutor v. Ruggiu*, considered: "The accused has no previous criminal record. (...) The above facts constitute mitigating circumstances to be considered by the Chamber."[149]

153. Especially when considered together with the aforementioned factor, his good behaviour in the army, this should amount to a serious mitigating factor.

*4.6.13 Breach of the Conakry Accord by ECOMOG*

154. On 23 October 1997, Johnny Paul Koroma, on behalf of the AFRC, and ECOWAS signed the so-called Conakry Peace Accord.[150] In this Accord, a peace

[147] John Petrie testified on this discharge booklet, see Transcript 6 October 2005, p. 15-16.
[148] *Prosecutor v. Dragan Nikolic*, Case No. IT-94-2-S, Sentencing Judgment, 18 December 2003, para. 265.
[149] *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-I, Judgement and Sentence, 1 June 2000, paras. 59-60.
[150] Conakry Peace Accord can be found at www.sierra-leone.org/conakryaccord.html.

plan was developed in order to reinstate Tejan Kabbah's government and end the AFRC government. The Accord reads that "the Government of Tejan Kabbah should be enabled to exercise effective control once he is restored to office on 22 May 1998." JPK's government was thus given time until 22 May 1998 to hand over its power to Tejan Kabbah.

155. Witness TF1-511 made a statement to the Prosecution, a statement that was tendered as Exhibit D39 in the Defence case, and reads: "Johnny Paul wanted to go to Conakry to find a way to meet with Kabbah for them to arrange for Kabbah's return."[151] This evidence clearly corroborates the AFRC plans to return power to Tejan Kabbah's government.

156. Nonetheless, in February 1998, ECOMOG came and intervened in Freetown, ousting the AFRC government and reinstating Kabbah's government in power in breach of the Conakry Accord. To this extent, Prosecution witness TF1-334 also testified.[152]

157. The Defence submits that the AFRC government was ousted out of Freetown by ECOMOG in breach of the agreement. Kanu, being part of this government, was thus put in a dilemma, and this together with his loyalty to the Army, should lead to a mitigation of his sentence regarding the events which transpired after the breach of that agreement.

*4.6.14 Amnesty Provided*

158. The Judgement referred to the Appeals Chamber decision on the amnesty provided in the Lomé Accords, substantiating its decision "on the grounds that the Special Court is vested with its own specific jurisdiction and competence by the constitutive documents establishing it and that, as a treaty based institution, it

[151] See Exhibit D39, p. 20118.
[152] See witness TF1-334, Transcript 16 June 2005, p. 82-84.

operates outside the legal system of Sierra Leone and does not derive its jurisdiction from within the national system."[153]

159. The Defence submits that although this argument was clearly dismissed with regard to the determination of the guilt of Mr. Kanu, it should be a mitigating factor in the determination of his sentence given that they did obtain an amnesty, which was consequently circumvented by the government's creation of the Special Court.

*4.6.15 Character Evidence*

160. Evidence relating to the convicted person's character can be used as a mitigating circumstance. This was concluded by the ICTR in *Prosecutor v. Ruggiu*, whilst indicating it accepted "that the accused was a person of good character imbued with ideals before he became involved in the events in Rwanda."[154] On that basis, the Trial Chamber held that "there are good reasons to expect his re-integration into society."[155]

161. Witness C1 states that Kanu can be characterised as "someone who can be hot-tempered," and "he doesn't like to be offended, because of his temper."[156] This aspect of Mr. Kanu often provides a first and false impression of his real personality and should not be seen as characteristic for his personality as a whole.

162. Defence witness C-1, whose late husband was a friend and colleague of Mr. Kanu, stated that during the time in the jungle, where she formed part of the group to which also Mr. Kanu belonged, Kanu was always with his wife Fatmata. "He was always there for the weak and defenseless people. (...) He strived very hard

[153] *Prosecutor v. Kanu,* Case No. SCSL-04-16-AR72(E), Decision on Motion Challenging Jurisdiction and Raising Objections Based on Abuse of Process, 26 May 2004.
[154] *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-I, Judgement and Sentence, 1 June 2000, para. 67.
[155] *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-I, Judgement and Sentence, 1 June 2000, para. 68.
[156] See Confidential Annex to this Defence Sentencing Brief, statement by witness C-1.

to feed the hungry." And in spite of his hot-tempered character, he "would protect the children and make sure they would be fed."[157]

163. As such, many people might have perceived Mr. Kanu differently from who he really is. This, in combination with the popularity of his nickname 'Five-Five,' may have unjustly caused many people to believe he had played a bigger role throughout the conflict than he factually had. This should form a mitigating element in determining the sentence for Mr. Kanu, especially when taking into account his possibilities for rehabilitation in society.

*4.6.16 Conclusion*

164. In conclusion, the Defence submits that several significant mitigating factors exist, which should play a dominant role in the formulation of the sentence for Mr. Kanu.

## V Miscellaneous Considerations Regarding Sentencing

### 5.1 Consecutive and Concurrent Sentences

165. Rule 101(C) specifies: "The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently."

166. Given the Prosecution submissions,[158] the Prosecution obviously suggests the imposition of a single sentence. The Defence submits that the Prosecution submission, by not specifying a submission per count, is not very helpful in case the Trial Chamber decides to impose separate sentences. In the latter situation, which is the Trial Chamber's discretion to decide,[159] the Defence submits the following.

[157] Statement witness C1, attached to this Brief as Confidential Annex.
[158] Prosecution Sentencing Brief, para. 162.
[159] As also indicated by the Prosecution, see Prosecution Sentencing Brief, paras. 154-156.

167. The ICTR found that "In the case of an accused convicted of multiple crimes, as in the present case, the Chamber may, in its discretion, impose a single sentence or one sentence for each of the crimes. The imposition of a single sentence will usually be appropriate in cases in which the offences may be recognized as belonging to a single criminal transaction.[160] The Defence would thus submit that a single sentence be imposed for incidents belonging to single criminal transactions.

168. In the case of multiple sentences, the Chamber will determine whether the sentences shall be served consecutively or concurrently.[161]

169. With regard to several of the convictions, the Defence submits that they refer to the same underlying facts. For instance, the convictions on terrorizing and collective punishments for factually the same behaviour should not be punished twice. The same behaviour underlies both crimes, by spreading terror, punishments were given collectively, and by punishing collectively, terror was spread. Therefore, the sentencing should be limited to one of these crimes. The argument would then be that sentencing should be limited to terrorism only, as this can be considered the most serious of the two, given its element of intent of spreading terror.

170. Therefore, the sentences to be pronounced should be served concurrently if an identical set of facts or connected events underlies those separate convictions.

171. The Prosecution assertion that "it cannot be assumed that the sentences for the crimes other than genocide (for which a life sentence was imposed) would necessarily have been ordered to be served concurrently if they were not to be

[160] *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgement, 3 March 2000, para. 807; *Prosecutor v. Krstic*, Case No. IT-98-33-T, Judgement, 2 August 2001, para. 725.
[161] *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-T, Judgement and Sentence, 16 May 2003, para. 483.

served concurrently with the life sentence for genocide,"[162] should be considered as an unsubstantiated assumption.

## 5.2 Prosecution Submission: Violation of Legal Principles

172. Article 19(1) of the Statute and Rule 101(A) of the Rules indicates that imprisonment should be for a specified number of years. This deliberately excludes the possibility of a life sentence. By way of comparison, the ICC Statute, along with the ICTY and ICTR Statutes, provides in Article 77 imprisonment for a specified number of years or life imprisonment.[163] The legal principle of *expressio unius est exclusio alterius* provides that the terms excluded from a law must be considered as excluded intentionally.[164] Given that the ICC Statute was formulated before the ICC's provisions on this matter, it can be said to be left out intentionally. Therefore, no life sentences can be imposed by the Special Court for Sierra Leone. This has been acknowledged by the Prosecution in its Brief.[165] Moreover, imposing a *de facto* life sentence whilst the Rules do not provide for that, would moreover violate the fundamental legal principle of legality.

173. However, the Prosecution clearly attempts to circumvent this provision by stating that "[t]he Prosecution submits that a consideration of this factor [that similar behaviour of Brima would have led to life imprisonment at the ICTR] would lead to the result that the sentence imposed on Brima should have the practical effect of amounting to an approximation of life imprisonment."[166] Granting such Prosecution submission would lead to a violation of the abovementioned principle of *expressio unius est exclusio alterius*. The Prosecution thus acknowledges that imposition of 60 years imprisonment would factually be a life sentence in the case

[162] Prosecution Sentencing Brief, para. 29. The same argument is made in para. 30 thereof.
[163] See Rule 101(A) of the ICTY Rules of Procedure and Evidence and Rule 101(A) of the ICTR Rules of Procedure and Evidence and Article 77(1) of the ICC Statute.
[164] See S.H. Gifis, Dictionary of Legal Terms (1998), 173.
[165] See Prosecution Sentencing Brief, para. 158-159.
[166] Prosecution Sentencing Brief, para. 76.

of Brima. It even indicates that it strives for "an approximation of life imprisonment."[167]

174. The Prosecution requests an imprisonment of 50 years for Kanu. Given that Kanu is six years older than Brima,[168] this would thus also amount to a factual life sentence for Mr. Kanu. This was also indicated by Prosecutor Stephen Rapp in the Concord Times of 21 June 2007, where it was stated that he said he would "ask for sentences which could see the three accused (...) in prison for the rest of their lives."[169]

175. Both the ICTY and ICTR Rules of Procedure and Evidence also provide for the possibility of life sentences. Whilst the ICTY Appeals Chamber revised the only life sentence imposed by the Trial Chamber to 40 years imprisonment,[170] the ICTR did impose life imprisonment on several occasions.[171]

176. The Prosecution indicates that consideration of ICTR sentences would in the case of Mr. Kanu lead to "a very long sentence of imprisonment,"[172] i.e. not life imprisonment.[173] What the Prosecution considers "a very long sentence of imprisonment", not being life imprisonment, at the ICTR, is not articulated. However, when one looks at the ICTR sentencing practice, one can see that the longest sentences, not being life imprisonment, imposed by the ICTR are:

1. 35 years in one instance,[174]
2. 27 years in one instance,[175] and

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[167] Prosecution Sentencing Brief, para. 76. See also para.
[168] Kanu was born on 15 March 1965; Brima was born on 27 November 1971, see Judgment, para. 11.
[169] See 'We Want Heavy Sentences – Prosecutor,' Concord Times, 21 June 2007, attached as **Exhibit 1**.
[170] *See Prosecutor v. Stakic*, Judgement, Case No. IT-97-24-A, 22 March 2006, para. 428.
[171] See for instance *Prosecutor v. Kambanda*, Judgement and Sentence, Case No. ICTR-97-23-S, 4 September 1998.
[172] Prosecution Sentencing Brief, para. 130.
[173] As opposed to the Prosecution argument in relation to Mr. Brima and Mr. Kamara, in relation to which the Brief indicates that the ICTR would have imposed life sentences; see Prosecution Sentencing Brief, paras. 76 and 108 respectively.
[174] *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-T, Judgement and Sentence, 3 December 2003.

3. 25 years in five instances.[176]

177. These high sentences were only given to persons convicted of genocide (in most cases ICTR suspects were convicted of a combination of genocide and other international crimes).

178. Life expectancy is short in Sierra Leone. The 2004 UNDP estimate for life expectancy at birth is 41 years.[177] Mr. Kanu is currently 42 years of age.[178] Reaching an age of 60 in this part of the world is quite an accomplishment, and it would be unfair to impose a sentence on him which would in practice be harsher than the Rules allow. The Defence submits that any sentence which would keep Mr. Kanu imprisoned after turning 60 will factually amount to life imprisonment. As such, the Prosecution submission to impose a 50 year prison sentence on Kanu is thus *contra legem* and disproportional while it totally negates any form of rehabilitation within the society of Sierra Leone.

179. Rule 101(D) should be taken into account, specifying that "[a]ny period during which the convicted person was detained in custody pending his transfer to the Special Court or pending trial or appeal, shall be taken into consideration on sentencing."

180. The Defence therefore respectfully submits that any sentence to be imposed on Mr. Kanu should not factually amount to life imprisonment, and that any imprisonment beyond his turning 60 years of age factually amounts to such life imprisonment.

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[175] *Prosecutor v. Imanishimwe*, Case No. ICTR-99-46-T, Judgement and Sentence, 25 February 2004.
[176] See *Prosecutor v. Muvunyi*, Case No. ICTR-00-55-T, Judgement and Sentence, 12 September 2006; *Prosecutor v. Gerard Ntakirumana*, Case No. ICTR-96-10-T, Judgement and Sentence, 21 February 2003; *Prosecutor v. Ruzindana*, Case No. ICTR-95-1-T, Judgement, 21 May 1999; *Prosecutor v. Semanza*, Case No. ICTR-7-20-T, Judgement and Sentence, 15 May 2003; *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Judgement and Sentence, 13 December 2005.
[177] See **Exhibit 2**: UNDP, Human Development Report 2006, Human Development Indicators, Country Fact Sheets, Sierra Leone, to be found at URL: http://hdr.undp.org/hdr2006/statistics/countries/country_fact_sheets/cty_fs_SLE.html.
[178] See Judgement, para. 503; Mr. Kanu was born on 15 March 1965.

## 5.3 Primary Objectives of Sentencing

181. Sentencing has three determinative factors: retribution, deterrence and rehabilitation.[179] As indicated by Keller,

> Each of the traditional justifications for punishment – retribution, deterrence, isolation from society, and rehabilitation – has been mentioned as an important objective. Several judgments suggest that of these four justifications, deterrence and retribution are the main purposes of punishment at the Tribunals. However, several of the penalties that have been imposed suggest that the Judges consider rehabilitation to be an equally important goal in the punishment of those convicted of serious violations of international law."[180]

182. These three main factors of retribution, deterrence and rehabilitation will be assessed below.

### *5.3.1 Retribution*

183. With regard to retribution, the Babic Trial Chamber held: "[i]n considering retribution as an objective of punishment, the Trial Chamber focuses on the seriousness of the crimes to which Babic has pleaded guilty."[181] This objective is being dealt with extensively under section 4.4 (Gravity of the Offences) above. This is also supported by the Oric Trial Chamber, which held: "According to the jurisprudence of the Tribunal, retribution is not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes. It is meant to reflect a fair and balanced approach to the exaction of punishment for wrongdoing. This means that the penalty must be proportionate to the wrongdoing; in other words, the punishment must fit the crime. This principle is reflected in the requirement in the Statute that the Trial

[179] *Prosecutor v. Milan Babic*, Case No IT-03-72-S, Sentencing Judgment, 29 June 2004, para. 43.
[180] A.N. Keller, Punishment for Violations of International Criminal Law: An Analysis of Sentencing at the ICTY and ICTR, in: Indiana International and Comparative Law Review 12 (2001) 53, at 57 (footnotes omitted).
[181] *Prosecutor v. Milan Babic*, Case No IT-03-72-S, Sentencing Judgement, 29 June 2004, para. 44.

Chambers, in imposing sentences, must take into account the gravity of the offence."[182]

184. In *Prosecutor v. Dragan Nikolic*, the ICTY Trial Chamber held: "By contrast, this Trial Chamber agrees that retribution should solely be seen as: an objective, reasoned and measured determination of an appropriate punishment which properly reflects the [...] culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offenders conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more."[183] None of these factors have been established here.

*5.3.2 Deterrence*

185. With regard to the second objective, deterrence, the ICTY Trial Chamber in *Prosecutor v. Babic* held that: "[t]he deterrent effect of punishment consists in discouraging the commission of similar crimes. The main effect sought is to turn the perpetrator away from future wrongdoing (special deterrence), but it is assumed that punishment will also have the effect of discouraging others from committing the same kind of crime under the Statute (general deterrence). In the present case, the Trial Chamber considers the likelihood that Babic will commit the same kind of crime in the future to be very small, which considerably reduces the relevance of special deterrence. With regard to general deterrence, imposing a punishment serves to strengthen the legal order in which the type of conduct involved is defined as criminal, and to reassure society of the effectiveness of its penal provisions. Nonetheless, it would be unfair, and it would ultimately weaken respect for the legal order as a whole, to increase the punishment imposed on a person merely for the purpose of deterring others. Therefore, in determining the

[182] *Prosecutor v. Oric*, Case No. IT-03-68, Judgement, 30 June 2006, para. 719.
[183] *Prosecutor v. Dragan Nikolic*, Case No. IT-94-2-S, Sentencing Judgement, 18 December 2003, para. 140, referring to: *R. v. M. (C.A.)* [1996] 1 S.C.R. 500, para. 80 (emphasis in original).

appropriate sentence, the Trial Chamber does not accord undue prominence to deterrence."[184]

186. The ICTY Jokic Trial Chamber added to the foregoing, when discussing general deterrence, "it would be unfair, and would ultimately weaken the respect for the legal order as a whole, to increase the punishment imposed on a person merely for the purpose of deterring others."[185]

187. No evidence has been adduced by the Prosecution that it is likely that Mr. Kanu will commit similar crimes in the future, nor has this become likely through the evidence presented at trial. Especially when one takes into account the specific circumstances of the 1997 AFRC coup, and the then existing war in Sierra Leone, general deterrence should not be accorded undue prominence.

### *5.3.3 Rehabilitation*

188. Rehabilitation is one of the three primary objectives of sentencing is rehabilitation, besides deterrence and retribution.[186] As such, rehabilitation is one of the determinative factors in deciding on the convicted person's sentence. Yet, this factor is ignored by the Prosecution.

189. In the event accused would be convicted in the final instance, he will be able to focus on rehabilitation. Once he will be transferred to the prison where he will serve his sentence, he will be able to focus on the positive aspects of life, rather than spending his time awaiting and preparing trial, sentencing and appeal. In whichever country he will serve his sentence, he will be offered anger management, counselling, and educational programs, to which Mr. Kanu is willing to fully cooperate. Mr. Kanu has been in pre-trial detention now for

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[184] *Prosecutor v. Milan Babic*, Case No IT-03-72-S, Sentencing Judgement, 29 June 2004, para. 45 (footnotes omitted).
[185] *Prosecutor v. Miodrag Jokic*, Case No. IT-01-42/1-S, Sentencing Judgement, 18 March 2004, para. 34.
[186] *Prosecutor v. Milan Babic*, Case No IT-03-72-S, Sentencing Judgement, 29 June 2004, para. 43.

almost four years, and during this time he has not been able to focus on rehabilitation.

190. As indicated by witness C1,[187] Kanu's daughter has been very close to him. Her mother died during the war, and she was living with an aunt until recently. Her aunt passed away. Kanu's mother also passed away during his detention, and now his child is mainly depending on Mr. Kanu's income. It would be of great importance for his daughter's future that Kanu will play a part in her education.

## VI Conclusion

191. For these reasons, the Defence respectfully submits that the Prosecution submission in the Prosecution Sentencing Brief should be dismissed, and respectfully requests the Trial Chamber to:

(i) To allow the Defence to call witness C1 under protective measures similar to the protected measures granted to the Defence witnesses at trial;

(ii) To dismiss the Prosecution submissions as to the proposed sentence for Mr. Kanu;

(iii) To determine a sentence which meets the mitigating factors as set out in this Defence Sentencing Brief, which in view of the Defence should lead to an imprisonment equal to the time served until now or alternatively a limited sentence to be assessed by the Trial Chamber in good justice.

Respectfully submitted,
On 5 July 2007

Geert-Jan Alexander Knoops

[187] See Confidential Annex.

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- *Prosecutor v. Kamuhanda*, Case No. ICTR-99-54-T, Judgement and Sentence, 22 January 2004.
- *Prosecutor v. Kayishema et al.*, Case No. ICTR-95-1-T, Judgement, 21 May 1999: para. 7.
- *Prosecutor v. Muhimana*, Case No. ICTR-95-1-T, Judgement and Sentence, 28 April 2005.
- *Prosecutor v. Musema,* Case No. ICTR-96-13-T, Judgement and Sentence, 27 January 2000: para. 1001.
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- *Prosecutor v. Oric*, Case No. IT-03-68-T, Judgement, 30 June 2006: paras. 719, 753, 757, 758, 765, 767-768.
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## B Transcripts

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# EXHIBIT 1

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EXHIBIT 1



Concord Times
Thursday, 21 June 2007

## We Want Heavy Sentences - Prosecutor

Brima 'Bazzy' Kamara

Santigie Borbor '55' Kanu

***By Danny Glenwright***

Prosecution for the Sierra Leone Special Court (SLSC) case against three former Armed Forces Revolutionary Council (AFRC) leaders will ask for lengthy prison sentences after they were convicted on several counts of crimes against humanity yesterday.

Stephen John Rapp, lead prosecutor, said he was "very satisfied with the judgment," and will, in a submission in one week, ask for sentences which could see the three accused - Alex Tamba Brima, Brima 'Bazzy' Kamara and Santigie Borbor '55' Kanu - in prison for the rest of their lives.

"Historically, this is very important for Sierra Leone, but it is also very important for the region and the rest of the world," he said, noting that the conviction yesterday was the first in world history for conscription of children under the age of 15.

Brima, Kamara and Kanu were found guilty on 11 counts of crimes against humanity, violation of the Geneva Conventions - commonly called 'war crimes' - and international humanitarian law. Collectively, these included acts of terrorism, unlawful killings, sexual violence, rape, outrages upon personal dignity, physical violence and other crimes against humanity.

Kamara and Kanu were also found guilty on two other counts of pillaging and enslavement, while judges found the three not guilty on counts of sexual slavery and other inhumane acts, including forced marriage - a finding Rapp said prosecution will want clarified.

The accused, dressed in suits, were grave during proceedings, often resting with their hand over their mouth, or taking notes.

There were several moments during the two-hour judgment when the three hung their heads, staring at the floor, especially while Presiding Justice Julia Sebutinde read gory accounts of the January 1999 invasion of Freetown.

Describing the 'brutal attack referred to as 'operation cut hand,' Sebutinde recalled the testimony of witnesses who heard Brima tell his subordinates "The hand that they are pointing at us, the fingers they are pointing at us,

*Cont. page 7*

[Note: the continuation is omitted from the paper.]

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# EXHIBIT 2

Human Development Report 2006
Human Development Indicators
Country Fact Sheets

# Sierra Leone

Back to Statistics

## The Human Development Index - going beyond income

Each year since 1990 the Human Development Report has publishedthe human development index (HDI) that looks beyond GDP to a broaderdefinition of well-being. The HDI provides a composite measureof three dimensions of human development: living a long and healthylife (measured by life expectancy), being educated (measured byadult literacy and enrolment at the primary, secondary and tertiarylevel) and having a decent standard of living (measured by purchasingpower parity, PPP, income). The index is not in any sense a comprehensive measure of human development. It does not, for example, include important indicators such as inequality and difficult to measure indicators like respect for human rights and political freedoms. What it does provide is a broadened prism forviewing human progress and the complex relationship between incomeand well-being.

The HDI for Sierra Leone is 0.335, which gives Sierra Leone a rank of176th out of 177 countries with data (Table 1).

**Table 1: Sierra Leone's human developmentindex 2004**

EXHIBIT 2
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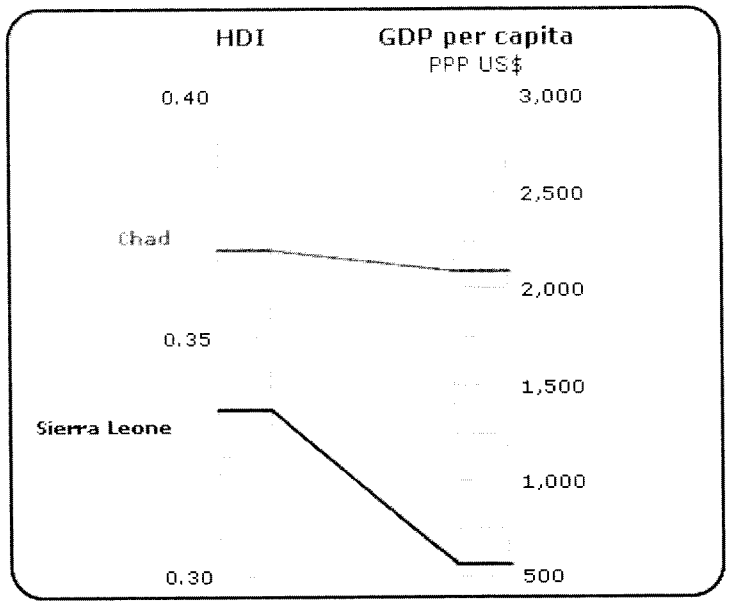
| HDI value | Life expectancy at birth (years) | Adult literacy rate (% ages 15 and older) | Combined primary, secondary and tertiary gross enrolment ratio (%) | GDP per capita (PPP US$) |
|---|---|---|---|---|
| 1. Norway (0.965) | 1. Japan (82.2) | 1. Georgia (100.0) | 1. Australia (113.2) | 1. Luxembourg (69,961) |
| 174. Burkina Faso (0.342) | 168. Mozambique (41.6) | 120. Bhutan (47.0) | 117. Bahamas (65.8) | 170. Tanzania, U. Rep. of (674) |
| 175. Mali (0.338) | 169. Angola (41.0) | 121. Senegal (39.3) | 118. Lesotho (65.5) | 171. Malawi (646) |
| **176. Sierra Leone (0.335)** | **170. Sierra Leone (41.0)** | **122. Sierra Leone (35.1)** | **119. Sierra Leone (64.8)** | **172. Sierra Leone (561)** |
| 177. Niger (0.311) | 171. Malawi (39.8) | 123. Benin (34.7) | 120. Malawi (64.3) | |
| | 172. Central African Republic (39.1) | 124. Guinea (29.5) | 121. Vanuatu (63.8) | |
| | 177. Swaziland (31.3) | 128. Mali (19.0) | 172. Niger (21.5) | |

**Figure 1:**
**The human development index gives a more complete picture than income**

This year's HDI, which refers to 2004, highlights the very largegaps in well-being and life chances that continue to divide ourincreasingly interconnected world. By looking at some of the mostfundamental aspects of people's lives and opportunities it providesa much more complete picture of a country's development than otherindicators, such as GDP per capita. Figure 1 illustrates thatcountries on the same level of HDI as Sierra Leone can have very differentlevels of income and life expectancy.




**Human poverty in Sierra Leone: focusing on the most deprived in multipledimensions of poverty**

---

The HDI measures the average progress of a country in humandevelopment. The Human Poverty Index for developing countries(HPI-1), focuses on the proportion of people below a thresholdlevel in the same dimensions of human development as the humandevelopment index - living a long and healthy life, having accessto education, and a decent standard of living. By looking beyondincome deprivation, the HPI-1 represents a multi-dimensional alternativeto the $1 a

day (PPP US$) poverty measure.

The HPI-1 value for Sierra Leone, 51.9, ranks 95th among 102 developingcountries for which the index has been calculated.

The HPI-1 measures severe deprivation in health by the proportionof people who are not expected to survive age 40. Education ismeasured by the adult illiteracy rate. And a decent standard ofliving is measured by the unweighted average of people withoutaccess to an improved water source and the proportion of childrenunder age 5 who are underweight for their age. Table 2 shows thevalues for these variables for Sierra Leone and compares them to othercountries.

**Table 2: Selected indicators ofhuman poverty for Sierra Leone**

| Human Poverty Index (HPI-1) 2004 | Probability of not survivingpast age 40 (%) 2004 | Adult illiteracy rate (%ages 15 and older) 2004 | People without access to an improved water source (%) 2004 | Children underweight for age (% ages 0-5) 2004 |
|---|---|---|---|---|
| 1. Uruguay (3.3) | 1. Hong Kong, China (SAR) (1.5) | 1. Cuba (0.2) | 1. Bulgaria (1) | 1. Chile (1) |
| 93. Botswana (48.3) | 160. Nigeria (46.0) | 109. Central African Republic (51.4) | 104. Congo (42) | 104. Guinea-Bissau (25) |
| 94. Mozambique (48.9) | 161. Burundi (46.3) | 110. Senegal (60.7) | 105. Zambia (42) | 105. Togo (25) |
| **95. Sierra Leone (51.9)** | **162. Sierra Leone (47.0)** | **111. Sierra Leone (64.9)** | **106. Sierra Leone (43)** | **106. Sierra Leone (27)** |
| 96. Guinea (52.0) | 163. Equatorial Guinea (47.7) | 112. Benin (65.3) | 107. Romania (43) | 107. Rwanda (27) |
| 97. Swaziland (52.5) | 164. Angola (48.1) | 113. Guinea (70.5) | 108. Haiti (46) | 108. Philippines (28) |
| 102. Mali (60.2) | 172. Swaziland (74.3) | 117. Mali (81.0) | 125. Ethiopia (78) | 134. Nepal (48) |

**Building the capabilities of women**

The HDI measures average achievements in a country, but it doesnot incorporate the degree of gender imbalance in these achievements.The gender-related development index (GDI), introduced in HumanDevelopment Report 1995, measures achievements in the same dimensionsusing the same indicators as the HDI but captures inequalitiesin achievement between women and men. It is simply the HDI adjusteddownward for gender inequality. The greater the gender disparityin basic human development, the lower is a country's GDI relativeto its HDI.

Sierra Leone's GDI value, 0.317 should be compared to its HDI valueof 0.335. Its GDI value is 94.6% of its HDI value.Out of the 136 countries with both HDI and GDI values, 133 countries have a better ratio than Sierra Leone's.

Table 3 shows how Sierra Leone's ratio of GDI to HDI compares toother countries, and also shows its values for selected underlyingvalues in the calculation of the GDI.

**Table 3: The GDI compared to the HDI – a measure of gender disparity**

| **GDI as % of HDI** | **Life expectancy at birth (years) 2004** | **Adult literacy rate (% ages 15 and older) 2004** | **Combined primary, secondary and tertiary gross enrolment ratio 2004** |
|---|---|---|---|
| - | Female as % male | Female as % male | Female as % male |
| 1. Luxembourg (100.4 %) | 1. Russian Federation (122.4 %) | 1. Lesotho (122.5 %) | 1. United Arab Emirates (126.0 %) |
| 132. Chad (95.0 %) | 84. Greece (107.0 %) | 105. Togo (56.0 %) | 172. Burkina Faso (75.4 %) |
| 133. Pakistan (95.0 %) | 85. Turkey (106.9 %) | 106. Nepal (55.7 %) | 173. Djibouti (75.1 %) |
| **134. Sierra Leone (94.8 %)** | **86. Sierra Leone (106.9 %)** | **107. Sierra Leone (52.0 %)** | **174. Sierra Leone (74.0 %)** |

| | | | |
|---|---|---|---|
| 135. Niger (94.0 %) | 87. Ireland (106.9 %) | 108. Burkina Faso (51.7 %) | 175. Mali (73.7 %) |
| 136. Yemen (94.0 %) | 88. Bolivia (106.8 %) | 109. Central African Republic (51.7 %) | 176. Liberia (73.1 %) |
| | 191. Kenya (95.8 %) | 115. Afghanistan (29.2 %) | 189. Afghanistan (40.9 %) |

## Sierra Leone in Human Development Report 2006

Sierra Leone was mentioned in the Report in pages 36, 164,and 206.

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# CONFIDENTIAL ANNEX

Statement by Witness C1 (not attached to this Public Version)

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A.N. Keller (Westlaw article)

*Bönisch v. Austria* (ECHR case)

# 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

John R. W. D. Jones
M.A. (Oxon.), M.A. in Law, LL.M.
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Steven Powles
LL.B. (London), LL.M (Cantab.)
of Middle Temple, Barrister

Transnational Publishers, Inc.
Ardsley, NY, USA

OXFORD
UNIVERSITY PRESS

> Todorović also ordered three men to beat Omer Nalic. His direct participation in the crimes, as well as his abuse of his position of authority and of people's trust in the institution, clearly constitute an aggravating factor.
>
> 62. The fact that Stevan Todorović might, initially, have been reluctant to take on the position as Chief of Police does not negate the significance of his abuse of such a superior position. However, the Trial Chamber also recognises that, while the position of Chief of Police is a relatively senior one, Stevan Todorović was not in the very highest levels of the overall hierarchy in the conflict in the former Yugoslavia, nor was he one of its architects.

**9.69** The Appeals Chamber in the *Tadić* case recognised the "need for sentences to reflect the relative significance of the role of the [accused] in the broader context of the conflict in the former Yugoslavia." (*Tadić Judgement in Sentencing Appeals*, para. 55; see also *Delalić et al. Appeals Judgement*, para. 845 and 847). The Appeals Chamber, in *Delalić et al.*, stated that in certain circumstances the gravity of the crime may be so great that a severe penalty is justified even in cases where the accused is not senior in the overall command structure (*Delalić et al. Appeals Judgement*, para. 847; *Tadić Judgement in Sentencing Appeals*, para. 56; *Aleksovski Appeals Judgement*, para. 184; *Musema Appeals Judgement*, para. 383).

**9.70** In conclusion, "the fact that an accused held a position of superior responsibility may seriously aggravate an offence, but there must be regard to the position of the accused in the command structure (see also *Kambanda Trial Judgement*, para. 44).

**9.71** In the *Krstić Trial Judgement*, the Trial Chamber found, "that the fact that General Krstić occupied the highest level of VRS Corps commander is an aggravating factor because he utilised that position to participate directly in a genocide" (*Krstić Trial Judgement*, para. 721).

*Direct Participation of a Superior*

**9.72** The ICTY has considered that "direct participation in the crimes, as well as his abuse of his position of authority and of people's trust in the institution, clearly constitute an aggravating factor" (*Todorović Trial Judgement*, para. 61).

*A Factor Cannot Be Aggravating When It Is an Ingredient of the Crime*

**9.73** The Trial Chamber affirmed in *Todorović* that: "since a discriminatory intent is one of the basic elements of the crime of persecution, this aspect of Todorovic's criminal conduct is already encompassed in a consideration of the offence. Therefore, it should not be treated separately as an aggravating factor" (*Todorović Trial Judgement*, para. 57). It would be more correct to say that that element *cannot* be treated separately as an aggravating factor rather than that it merely "should not." For this same observation with respect to Article 7(3) liability, see 9.66.

*Premeditation*

**9.74** "The Trial Chamber agrees with the Prosecutor on the relevance of premeditation as an aggravating factor in the abstract but, based on the sequence of General Krstić's delayed participation in the genocidal scheme initiated by General Mladić and others, finds

> 91. The Trial Chamber observes that Stevan Todorović has expressed the desire to channel his remorse into positive action by contributing to reconciliation in Bosnia and Herzegovina. This is a commendable aspiration which, in the Trial Chamber's view, further demonstrates Stevan Todorovic's remorse.
>
> 92. The Trial Chamber finds that Stevan Todorovic's statement and demeanour during the Sentencing Hearing reflect his remorse. This conclusion is supported by the fact that he has pleaded guilty and has cooperated with the Prosecution. Accordingly, the Trial Chamber finds that Stevan Todorovic's remorse is genuine and treats it as a mitigating circumstance in determining sentence (ICTY, *Prosecutor v. Todorović*, Judgement, paras. 91-92).

**9.93** In conclusion, it seems that substantial cooperation, guilty plea and remorse are three different mitigating circumstances. However, in certain situations, these three mitigating factors blend into one another; it is hard to imagine an accused who feels remorse for his crimes but who nonethless pleads not guilty. Moreover, in given situations, as in the *Jelisić* case, a guilty plea without remorse loses all of its mitigating effect. See also: *Erdemović Sentencing Judgement*, paras. 96–98; *Erdemović Sentencing Judgement II*, para. 16; *Akayesu Trial Judgement*, para. 35 (i); *Serushago Sentencing Judgement*, paras. 40–41; *Ruggiu Judgement and Sentence*, paras. 69–72; *Foča Trial Judgement*, para. 869; *Blaškić Trial Judgement*, para. 775; *Jelisić Trial Judgement*, para. 127.

### *Superior Orders*

**9.94** In *Erdemović*, the Trial Chamber refused to take duress/extreme necessity into account in mitigation, on the grounds that it had been insufficiently proved. Having identified the following questions, "Could the accused have avoided the situation in which he found himself? Was the accused confronted with an insurmountable order which he had no way to circumvent? Was the accused, or one of his immediate family members, placed in danger of immediate death or death shortly afterwards? Did the accused possess the moral freedom to oppose the orders he had received? Had he possessed that freedom, would he have attempted to oppose the orders?," the Chamber held that:

> 91. . . . the Defence has produced no testimony, evaluation or any other elements to corroborate what the accused has said. For this reason, the Judges deem that they are unable to accept the plea of extreme necessity.

**9.95** This approach was wrong for a host of reasons. First, the only evidence against the accused was his own confession and testimony; it is therefore paradoxical, not to say unfair, to accept the accused's testimony only on the incriminating matters and not on exculpatory matters. Second, the ICTY's Rules do not require corroboration *as a matter of law* except under Rule 90(C), for matters to be proved at trial. Much less then should corroboration be required outside the context of a trial, in a sentencing procedure. Hence the Chamber *could have* accepted the accused's account without further corroboration. Third, even the Prosecution had accepted that the accused had acted under duress.

**9.96** In the second *Erdemović* Trial Chamber's Judgement, it that the guilty plea had been into account as a mitigating

> 17. Duress
>
> The Trial Chamber h does not afford a co humanity and/or a v may be taken into a
>
> It has been accepte in this case. The ea has testified of the brutal nature of th killing pursuant to Croat in the BSA Pelemis, and subse "most certainly, h
>
> The accused disp references in his He speaks of his the Republic of feed my family," behind his bedric the Sreb cnicn the Pilica collec mony of inciden itive action, and X, when he refu when he tried to at the hall in Pil weighed up his and considered
>
> The evidence re Chamber finds t had he disobey choice in the m

**9.97** In fact, in fact main concern was the lives would be lo

*Cross Reference*

Personal Circumstances

**9.98** Trial C mitigation in cer

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## Punishment: General Reflections

**9.115** Punishment must conform to the general principles of criminal law (see bibliography at 9.162).

**9.116** The typology of penalty, with regard to the structure and, most of all, the functions, in the International Criminal Tribunals, partially diverges from the type of penalty which is common to national systems of criminal justice. Concerning the structure, the International Criminal Tribunals have a wider margin of discretion in sentencing than courts on the national level enjoy. Concerning the aims of penalties, the ICTs, in determining sentence, pay particular attention to its exemplary role and the need for credibility. To such an extent, that jurisprudence founds the limits to the structure of its discretion on the need for consistent tariffs, and, in its turn, the need for consistency finds its ground in the need for exemplarity and credibility.

**9.117** In particular, the ICTY Appeals Chamber has held that:

> 756. Public confidence in the integrity of the administration of criminal justice (whether international or domestic) is a matter of abiding importance to the survival of the institutions which are responsible for that administration. One of the fundamental elements in any rational and fair system of criminal justice is consistency in punishment. This is an important reflection of the notion of equal justice. The experience of many domestic jurisdictions over the years has been that such public confidence may be eroded if these institutions give an appearance of injustice by permitting substantial inconsistencies in the punishment of different offenders, where the circumstances of the different offences and of the offenders being punished are sufficiently similar that the punishments imposed would, in justice, be expected to be also generally similar.
>
> 757. This is not to suggest that a Trial Chamber is bound to impose the same sentence in the one case as that imposed in another case simply because the circumstances between the two cases are similar. As the number of sentences imposed by the Tribunal increase, there will eventually appear a range or pattern of sentences imposed in relation to persons where their circumstances and the circumstances of their offences are generally similar. When such a range or pattern has appeared, a Trial Chamber would be obliged to *consider* that range or pattern of sentences, without being *bound* by it, in order only to ensure that the sentence it imposes does not produce an unjustified disparity which may erode public confidence in the integrity of the Tribunal's administration of criminal justice (*Delalić et al. Appeals Judgement*).

*Article:* Schabas, William A., "Sentencing by International Tribunals: A Human Rights Approach," 7(2) *Duke Journal of Comparative & International Law*.

## Minimum Term Recommendation

**9.118** In the *Tadić Sentencing Judgement*, the Trial Chamber made a recommendation that, "unless exceptional circumstances apply, Duško Tadić's sentence should not be commuted or otherwise reduced to a term of imprisonment less than ten years from the date of this Sentencing Judgement or of the final determination of any appeal, whichever is the latter (sic)" (para. 76). There does not appear to be anything wrong

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**Article**

# *583 SENTENCING AND THE GRAVITY OF THE OFFENCE IN INTERNATIONAL CRIMINAL LAW

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## I. INTRODUCTION

An issue has recently arisen in international criminal law concerning the gravity of the offences listed in the Statutes of the International Tribunals: Should offences be ranked according to their seriousness and, hence, as entailing heavier or lighter punishment? Should the same act when charged as a crime against humanity or genocide be punished more severely than when charged as a war crime?

This issue arose in connection with the absence of clear-cut guidelines on sentencing in the Statutes and as result of the wide discretion enjoyed by the international judges. Such discretion is not wrong in itself, as it is not synonymous with an arbitrary approach, but problems do arise when different judges are called upon to deal with similar cases. Judicial fairness requires that the highest degree of uniformity be guaranteed in sentencing individuals. At the ICTY, this issue generated intense debates attested to by the proliferation of dissenting and separate opinions. In the light of this debate and due to the importance of the topic, which impact on the penalties inflicted on individuals, it is here intended to reflect on some issues that, at least from a theoretical point of view, arise therefrom. In this regard, the following questions may be asked: What is the role of the Judge in sentencing at the international level? Do general principles of criminal law impact on international criminal law? Does international case-law provide a definitive answer as to the comparative seriousness of crimes? If not, can principles of criminal law be used to assess the seriousness of an offence? If yes, how and why?

In order to answer these questions clearly, this article is structured as follows. At the outset, the focus will be on the main aspects of international criminal law. This analysis is meant to reflect on the twofold nature of international criminal law as a branch of international law used to govern criminal proceedings and not only relations among states. In this context, the role of the international judge as interpreter of international community values and daily shaper of international criminal law will be addressed. Subsequently, going *584 from the general to the particular, the focus will be on sentencing and the gravity of the offence. In this regard, it is proposed to demonstrate for what reasons and how the concept of gravity of the offence could, in our view, be used by judges to compare international crimes.

The second part of this paper will examine the international practice. In this regard, it will discuss to what

degree, if any, international case law contemplates a distinction in terms of seriousness among international crimes. The last part of the paper is dedicated to an analysis of the ICTY and ICTR case law. In the light of this case law, an effort will be made to compare international crimes with a view to grasping how their gravity is influenced by their constitutive elements.

## II. BASIC ASPECTS OF INTERNATIONAL CRIMINAL LAW

According to one author, [FN2] international criminal law may be defined as a branch of international law consisting of a set of rules establishing individual criminal responsibility for acts that the international community recognises as crimes. This definition correctly reflects the substantive aspects of international criminal law, but it is not complete. As in international criminal law the distinction between procedural and substantive law commonly used in municipal law has not, as yet, been made, the procedural aspects fall into the main category as well. Accordingly, the concept of international criminal law would include not only substantive aspects such as the existing crimes, the criteria for identifying the offenders, and the penalties for the offences, but, in addition, procedural aspects such as the jurisdiction of tribunals, the progress of the trial, the effects of the judgment, the rules governing the assistance to a tribunal and international cooperation in matters of crime repression [FN3] and so on. As this paper will focus on the substantive aspects of sentencing, reference will be made only to the substantive aspects of international criminal law.

While the origins of international criminal law go back to the times when the pirate was regarded as hostis humani generis and each member of the then small international community had jurisdiction over him, [FN4] the defining moment of international criminal law arrived with the trial of the Nazi war criminals at Nuremberg. It was indeed at Nuremberg that, as a result of their first extensive application, the pillars of an international criminal system received a definitive consecration. In its judgment, the first International Military Tribunal (hereinafter 'IMT') in history recognised that 'individuals can be punished for violations of international law' and that 'crimes against international law are committed by men not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international *585 law be enforced'. [FN5] The relevant achievement of the IMT was precisely the practical application of these principles, which previously, despite the efforts made, [FN6] had proved difficult. On the basis of this legacy, it is now possible to say that international criminal law performs three essential functions. It provides the rules of law, which establish a standard of conduct for individuals, the principle of individual responsibility and the punishment for violations of such a standard. [FN7] Like national criminal law, international criminal law is a mechanism by which the values on which a community is based may be protected. It has been observed even recently [FN8] that, as criminal law is the result of a cohesive community sharing common values, it finds no place at the international level, from which such unity is absent. However, this view is difficult to share when one considers the impressive evolution of human rights law over the last 50 years, which has indeed cemented a wide range of common values. In international law, such values may be identified as peace among and within nations and the protection of human rights. In municipal law, these values include peace amongst citizens and respect of their fundamental rights. Accordingly, the distinctive character of the two systems is not to be found in the pursuit of a differing set of protected values. It rather resides in a different degree of their enforcement. At the international level, certain obstacles such as the principle of territoriality can be overcome by the prevalence of the principle of universal jurisdiction. Thus, the distinctive aspect of international criminal law and, to some extent, the necessity for having such a law, is due to the need to supplement national jurisdictions in cases where single States either do not want, or cannot exercise their authority to enforce basic human rights. [FN9] One example is the punishment of war *586 criminals. In some cases, governments protect the individuals indicted by international tribunals simply because they are members [FN10] of these governments or are supported by them [FN11]. In other cases, a country emerging from a turbulent period of its national history may not have adequate means to ensure the natural course of criminal justice.

As is the case for national systems, international criminal law falls within the general category of public law that regulates the relationship between individuals and the community of States. Since, in international criminal law, an individual has immediately enforceable duties and rights, regardless of citizenship, his position is somewhat different from that enjoyed by him under classical international law. The power of the State over its citizens, once practically absolute, is now to some extent diminished, as is shown by the indictment of Slobodan Milosevic, at the time a Head of State, by the ICTY. But such elements should not be emphasised to the point of considering the individual a subject of international law. The individual is not such a subject, or, perhaps more accurately, only a passive one because, as things stand now, States are the makers of international criminal law through custom and

treaties or the appropriate bodies (ie, the Security Council). However, in this field there is an immediate link, not present in other branches of international law, between the international institution and the individual, which results from the fact that an individual may be subject to the jurisdiction of an international body, without the interposition of a State. This is the result of a process agreed upon and pursued by members of the international community but still dependent on them. This dependence clearly appears when one reflects upon the difficulties inherent in the creation of the ICC and the various instances of protection of war criminals by States.

Given that international criminal law is a branch of international law, its sources appear to be those of international law. The topic was dealt with by one of the American Courts set up under Control Council Law No 10 in US v Wilhelm List (Hostage Case). In handing down its judgment, the Court ranked sources as follows:

> The sources of International Law which are usually enumerated are: (1) customs and practices accepted by civilised nations generally, (2) treaties, conventions and other forms of interstate agreements, (3) the decisions of international tribunals, (4) the decisions of national tribunals dealing with international questions, (5) the opinions of qualified text writers, and (6) diplomatic papers. [FN12]

*587 As this list reproduces the main sources of international law, which have not changed since, this statement is still applicable today. [FN13] As the proceedings of the international tribunals are primarily governed by their constitutive charter or statute as lex specialis, it seems that conventional law has primacy among these sources. However, customary law, by establishing the general principles governing the matter, provides international tribunals with a sound basis for the exercise of jurisdiction. As a special place is held in this domain by the principle nullum crimen sine lege, it is to be noted that the previous existence in customary law of a given crime prevents the violation of this principle. The expression 'customs and practices accepted by civilised nations' has been interpreted as meaning not only the practice generally followed by States in their relations with one another (usually referred to as 'State practice'), but also the practice generally followed by States in their own internal affairs. However, there is a difference. The former are a primary source of international law, the latter has a lower rank as it falls within the category of 'subsidiary means of interpretation'. With regard to the latter, it can be said that 'general principles of law' denote legal reasoning common to a significant number of States, and, in regard to criminal law, are evidence of analogous treatment of similar cases. The practical use of general principles of law seems to be somewhat greater than in other domains of international law. Insofar as international criminal law is concerned with prosecuting individuals, it seems legitimate to draw inspiration from the common solutions elaborated by legal systems, which are the result of centuries of effort towards a better administration of justice. Another subsidiary source is the case-law of international and national tribunals. In a recent ICTY judgment, a Trial Chamber held that case-law should be used only as a 'subsidiary mean of interpretation', in compliance with Article 38(1)(d) of the ICJ Statute, to evince the existence or emergence of an international rule, or provide the right solution for a given case. The Chamber also clarified that, in the absence of a rule of stare decisis in international law, precedents were not binding. [FN14]

A subsidiary but not insignificant role is played by the opinions of the major publicists in the field. For instance, the decision rendered on 29 October 1997 by the ICTY Appeals Chamber in which it was held that ICTY had the power to issue binding orders to States, was largely prompted by a number of amicus curiae briefs submitted by academic experts. [FN15]

*588 After describing the relevant sources of international criminal law, it should be noted that the degree of their utilisation depends on how much the interpreters perceive that they can be of assistance in solving concrete cases. It seems a commonly shared view that in both municipal law and international law, the myth of the judge, seen by Montesquieu as the 'mouth' of the law, [FN16] appears impossible to live up to. Accordingly, it is generally accepted that the personality, the ideas and the legal background of the judges will influence their daily activity. But, while in municipal law the sphere of discretion of judges is being reduced by the proliferation of written law, the same cannot yet be said in relation to the international judge. In international law, in the absence of a legislator comparable to what exists in municipal law, the role of the interpreter as maker and shaper of the applicable law is stronger than it is in municipal law. As a result, international criminal law appears to be much more dependent on the creative efforts of the judges than any other comparable branch of law. It is on the understanding of this reality that the next paragraphs will be dedicated to carve out a specific role for the international judge at the sentencing stage.

## III. SENTENCING AND THE GRAVITY OF THE OFFENCE

Similarly to what happens in municipal law, at the international level the study of sentencing can be approached from a procedural or from a substantive viewpoint. In the former case, the study of sentencing would focus upon sentences as the final act of the process of judging individuals, requiring a certain form and appropriate motivation. In the latter case, the accent should be placed on the identification of the factors contributing to the determination of the content of the sentence, and on their respective weight for calculating penalties. The latter will be the line of our enquiry.

Article 27 of the IMT Charter stipulated that 'the Tribunal shall have the right to impose upon a defendant, on conviction, death or such other punishment as shall be determined by it to be just'. Accordingly, the only identifiable criterion for imposing penalties was that punishment had to be 'just', the determination of what was 'just' being left to the court. If one considers that the sentences imposed could be revised only by the Control Council for Germany, not a judicial body, one will note that the margin of discretion left to judges was very high. Article 27 was reproduced in Article 16 of the Tokyo Charter and Article II (3) of Control Council Law No 10.

The provisions contained in the Statutes of the International Tribunals are more detailed. Article 24 of the ICTY and Article 23 of the ICTR indicate three criteria to be considered in sentencing. These criteria include the sentencing practice at the locus commissi delicti (Yugoslavia and Rwanda, ***589** respectively), the gravity of the offence and the individual circumstances of the convicted person. The application of these criteria has not proved easy for at least two reasons. First, the criminal law systems of the former Yugoslavia and Rwanda encompassed the death penalty for the most serious crimes, whereas the Statutes of the International Tribunals, in consonance with international standards, do not. Secondly, both Rwanda and Yugoslavia had a limited sentencing practice concerning crimes now within ICTR and ICTY jurisdiction. Thus the criterion of the locus commissi delicti has been constantly interpreted as guiding but not binding. [FN17]

Among the remaining criteria influencing the amount of punishment upon an individual, the gravity of the offence deserves special attention. The ICTY Appeals Chamber has clearly indicated in the Aleksovski case that the gravity of the offence can be regarded as 'the litmus test for sentencing for the appropriate sentence'. [FN18] As noted by a British author, the gravity of the offence includes two elements: the magnitude of the harm caused (or risked) by the offender, and the offender's culpability with respect to that harm. [FN19] The study of the gravity of the offence may be approached from two angles. One may be termed gravity in personam, subjective gravity or gravity in concreto. In this connection, the ICTY Appeals Chamber, in the Aleksovski case, has recently noted that the gravity of an offence is the result of the combined analysis of the circumstances of the case and of the form and degree of the accused's participation in the crime. [FN20] In this hypothesis, the gravity of the offence will emerge from the process of making an abstract legal provision fit the concrete circumstances of the case and the individual offender in relation to his personality and culpability (nullum crimen sine culpa). This process of interpretation and adjustment of the abstract offence to the concrete case is important because it makes it possible to avoid a mechanical application of penalties, which would be substantially unfair. However, despite its relevance, this approach may be too narrow as it is focused upon the specific case as seen by a specific judge or trial chamber. Therefore, in order to obtain a uniform approach in the imposition of penalties in different cases, the evaluation of the gravity of the offence should be completed by a more general analysis placing a given offence into a wider frame, where its gravity can be assessed in relation to that of other offences. Accordingly, the second perspective from which the gravity of the offence can be evaluated may be termed 'objective', or gravity in rem or in ***590** abstracto. In this case, it is the legal qualification and the constitutive elements of the offence, rather than the individual circumstances of the case, that are the object of the examination. In this regard, the gravity of the offence differs from the other factors affecting sentencing because its assessment does not depend upon the concrete circumstances of the case but can be conducted in abstracto on the basis of the relevance of the constitutive elements of each offence. This approach to the concept of gravity of the offence is well known at the national level. In the common-law countries, the concept of gravity of the offence is widely adopted and is used, often under the label "seriousness of the offence", as the benchmark for offence scales prepared by interpreters [FN21] or sentencing commissions. In some countries belonging to the civil-law tradition, such as Sweden and Italy, the notion of the gravity of the offence has been added to the criminal codes in order to help judges to assess the appropriate penalties. [FN22] In municipal law, it is generally the legislator who, to a certain degree and with differences from one system to another, proceeds to an abstract assessment of the seriousness of the offences in order to determine the penalty for each. This assessment is conducted on the basis of the criminal relevance of the conduct described in a legal provision, which depends, ultimately, upon the values that a given legislator decides to protect. For instance,

the punishment normally prescribed for burglary is higher than that for theft because the former offence involves an element of violence not present in the latter, notwithstanding that the illicit gain may be the same, and because the elimination of violence surely falls within the goals of any legislator. The choices of the legislator are also influenced by his view of the purposes of punishment. In this respect, it seems evident that the death penalty will not be included among the available penalties in a criminal system aimed at the rehabilitation of the offender. At the international level, as noted, judges enjoy a higher degree of discretion, and offences are not ranked in terms of seriousness; neither Statute of the ad hoc Tribunals contains a sentencing scale. Thus, two questions arise: Should offences at the international level be compared in terms of seriousness? If yes, how can this be done?

## IV. THE COMPARISON AMONG INTERNATIONAL CRIMES

In the view of the author, several reasons call for such a comparison to be made. A first reason is that comparing the seriousness of offences may help to achieve the overall objectives of punishment. In municipal law, it is principally the legislator who, through criminal codes or other written law, will mould the criminal system in the light of given objectives, providing precise guidelines to the judges who shall implement a given policy. At the international ***591** level, in the absence of a legislator comparable to that present in municipal law, it is up to the judge to use his discretion effectively. In this regard, the relationship between the purposes of punishment and the gravity of the offence may be seen as one between goals and means; it means that these purposes should be used in a way that makes possible the effective realisation of the proposed goals. In the Resolutions establishing ICTR and ICTY, [FN23] the Security Council emphasised that the work of the international tribunals would 'contribute to ensuring that such violations are halted and effectively redressed'. The word 'halted' suggests that the punishment should serve as a deterrent for potential offenders, whereas the word 'redressed' seems to allude to the retributive character of the punishment. The Appeals Chamber, in its Aleksovski judgment, stressed the importance of the retributive approach and specified that retribution should not be seen as 'fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes'. [FN24] As noted by Professor Ashworth, a leading scholar in this matter, [FN25] the retributive theory is based on the concept of proportionality. It follows that, once a given tribunal holds that its punishment system shall be guided by such a theory, one of the corollaries is that the principle of proportionality applies. The aim of this principle is to make sure that a defendant is sentenced to neither more nor less than what he deserves. This is obtained by imposing upon defendant a sentence that is proportionate not only to the crime itself, but also to those sentences imposed for similar offences in similar cases. By doing so, the unequal treatment of similar cases may be avoided. [FN26] In the Aleksovski judgment, the Trial Chamber adverted to this problem [FN27] and stressed the need to ensure certain uniformity in sentencing. Thus, comparing and, in case of differing seriousness, ranking the offences may be seen as corresponding precisely to the exigency of fairness and non-discrimination, which is a basic requirement of the activity of any tribunal. Last but not least, if punishment represents the stigma of the international community for the wrong done, credibility requires that stigma to be proportionate to the seriousness of the crime in order to reflect adequately the degree of guilt. Analogously, if punishment is meant to deter likely offenders, the higher sentence should be imposed for those crimes that are more a threat to the international community.

A second reason for comparing the seriousness of international crimes is that an individual is entitled to know the nature of the charges against him. As seems logical, an accused is not interested in all the legal distinctions among international crimes but may legitimately wish to understand what kind of ***592** punishment he is likely to receive in relation to certain charges. This issue arose in the Erdemovic case. On 7 October 1997, the ICTY Appeals Chamber ruled, inter alia, that Erdemovic, a Serb soldier who had participated in the firing-squad at Srebrenica in July 1995 and who had entered a guilty plea to crimes against humanity but not to war crimes, should have had the opportunity to plead guilty once more. [FN28] As Judges McDonald and Vohrah explained in their joint separate opinion, [FN29] Erdemovic had been misinformed by his counsel and did not realise, nor did the court explain to him, that crimes against humanity were a more serious offence than war crimes. By not being fully informed of the nature of the charges, the defendant saw one of his basic rights violated and this is why he had the possibility to plead once again.

Another case where clarification on seriousness may be needed is that of persecution as a crime against humanity. This crime differs from other crimes against humanity in that conviction requires, inter alia, the presence of a discriminatory intent. Since the discriminatory element may be seen as making the crime more serious, one may argue that murder characterised as persecution and not as a war crime or as another kind of crime against humanity

is per se a more serious offence. If that is correct, should not the attention of the accused be drawn to this point?

Lastly, such a comparison may help to decide on the penalty to be imposed in cases of multiple conviction. For instance, in some countries that have adopted the principle of ideal concurrence, the punishment in cases of multiple convictions is calculated in terms of punishment laid down for the most serious offence and punishment is then augmented by a certain quantum. This approach may help better to reflect the culpability of an offender. For it seems reasonable to hold that if an accused has committed two distinct crimes rather than one, he should be punished more severely than if he had committed just one, notwithstanding that the conduct was the same. [FN30]

## V. CRITERIA FOR A COMPARISON

As to the ways in which a comparison can be made among international offences, it is submitted that this can be done on the basis of their characteristics as assessed in the light of the criminal relevance that can be attached to them. In the view of the writer, three elements may be adduced as indicative of the criminal relevance of a given offence: the wickedness of the offender, the harm done or threatened and the degree of social disapproval.

The first criterion involves assessing the frame of mind of the offender to determine the amount of disrespect shown by the offender for the rule of law. ***593** The malice of the offender will determine his blameworthiness and, therefore, the severity of the penalty to be inflicted. It may be argued that the determination of the wickedness of the offender can be made only, in concreto, in relation to the specific mens rea demonstrated by the offender in the commission of the crime. However, a preliminary assessment of the gravity of an offence can also be made in abstracto. For instance, the subjective element of the crime of genocide is that the offender had the intention of destroying the whole or part of a given group on discriminatory grounds. Admittedly, this is quite conclusive as regards the wickedness of the offender.

The second criterion consists in verifying to what extent the values protected by a legal provision have been infringed. As a criminal-law system is essentially a mechanism to protect the values of a given community, the most severe penalty will be imposed for those offences, which most imperil such values. According to this criterion, the gravity of each offence will result from the extent to which such values are attacked or put at risk by a given conduct. For instance, deliberate conduct intended to destroy an entire population or exclusively directed at a civilian population seems, in principle, more serious than one just aiming at defeating the enemy in a war causing, inter alia, casualties among civilians.

The third criterion relates to the disapproval of the community on which a given criminal system is based. If punishment is an expression of the censure by a given community for certain deeds, the gravity of the crime will be affected by the way in which that community looks at it. The perception of the gravity of certain acts may vary from one country to another and it may differ from the view held about such acts at the international level. For instance, the international community heavily emphasises human rights issues such as racial or gender discrimination. The penalties inflicted should reflect the international standards and scale of values agreed upon by the majority of the members of that community. In this context, the gravity of certain acts might be deduced from the degree of consensus of States on the legal instruments adopted for the protection of the values concerned.

Lastly, two warnings should be made on comparisons among international crimes.

First, there are cases where comparisons are difficult or of little use. For instance, it is very inconvenient to compare the crime of torture (crimes against humanity) to that the carpet-bombing of a town (war crime). Thus, the comparison should be reduced to cases presenting a certain degree of similarity. These could be the offences found in the lists of both crimes against humanity and war crimes in the Statutes of the International Tribunals, namely: murder, torture, inhumane or cruel treatment, [FN31] and rape. Similarly, ***594** some of these acts, together with the other necessary elements, may also be qualified as genocide. [FN32]

Secondly, the comparison of international crimes is an instrument to better reflect the differences between international crimes and to show how they may have an impact at the sentencing stage. It neither excludes nor underestimates the importance of taking into due account all the other factors which influence sentencing and, above all, of the concrete circumstances of the case.

## VI. THE IMT JUDGMENT

To grasp the approach followed by international tribunals regarding the concept of gravity of the offence and the issue of the comparative seriousness of crimes, the focus of our enquiry will be, first of all, on the IMT judgment.

At the end of the trial of the major war criminals held at Nuremberg from 10 November 1945 to 1 October 1946, 19 defendants out of the 22 tried were found guilty. Fifteen [FN33] of them were held responsible for both war crimes and crimes against humanity. A review of the text of the judgment reveals that the factual aspects of this trial were predominant as one of its goals was that of crystallising, once for all, the crimes committed by the German Nazis and serving as a guideline for historians and a warning for future generations. War crimes were committed 'on a vast scale, never seen before in the history of war', and they were 'attended by every conceivable circumstance of cruelty and horror' in pursuance of the 'total war' planned by the Nazis. In the text of the judgment, the legal distinction between different crimes and, in particular that between war crimes and crimes against humanity, was dealt with, though to a limited extent, under the heading 'The Law Relating to War Crimes and Crimes against Humanity'. The IMT's position is reflected in the following passage:

> With regard to crimes against humanity, there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a vast scale, and in many cases was organised and systematic. The policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The persecution of Jews during the same period is established beyond all doubt. To constitute Crimes Against ***595** Humanity, the acts relied on before the outbreak of war must have been in execution of or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter, but from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also Crimes against Humanity: and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war did not constitute War Crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted Crimes against Humanity. [FN34]

As may be deduced from this passage, the main problem facing the IMT was a jurisdictional one. It related to the necessity of establishing a link with the other crimes listed in the Nuremberg Charter before allowing for the punishment of crimes against humanity. The IMT was required to do so by its constitutive Charter which provided that crimes against humanity could be charged only if they had been committed 'in execution of or in connection with any crime within the jurisdiction of the Tribunal'. [FN35] It was necessary to establish this link because the notion of crimes against humanity firmly entered the domain of international law only as consequence of the wide application of the Nuremberg Charter, notwithstanding that authors like Suarez and Grotius [FN36] had already referred to it. Thus, there were risks of violation of the principle of nullum crimen sine lege.

Furthermore, the passage suggests that no accurate distinction between war crimes and crimes against humanity was made in the IMT judgment. Rather, the IMT tended to apply these characterisations cumulatively to the same set of facts. The introduction of crimes against humanity was, indeed, meant to provide the IMT with a tool for prosecuting the Germans for the extermination, persecution and killing of German Jews who were, as Germans, outside the protection of the laws of war traditionally applicable in international conflicts. Thus, the only difference that it is possible to extrapolate from these cases, is that acts committed by Germans against civilian population of German nationality were by necessity only crimes against humanity, because only the latter could be charged 'whether or not in violation of the domestic law of the country where perpetrated'. Conversely, acts committed against the civilian population of an enemy country could be war crimes as well as crimes against humanity.

This view seems to find confirmation in the words of one of the judges sitting at Nuremberg, Henri Donnedieu de Vabres. In his lectures at the Hague Academy, the French judge argued that in the IMT judgment, the category of ***596** crimes against humanity was practically merged with that of war crimes. [FN37] He noted that crimes against humanity had entered the Statute by the back door and had practically vanished from the judgment. [FN38] He further pointed out that the IMT judges agreed on this approach because, in this way, nobody could claim that the

IMT exceeded its mandate by charging individuals for crimes against humanity without a linkage with the circumstances of war. [FN39] Similarly, another author noted that the interpretation of the Statute joined to the Nuremberg Charter did not clarify the latter's succinct provisions but, rather, added to the difficulties. [FN40] As has been noted [FN41], the opportunity afforded to the Tribunal to make a substantial contribution to the development of the emerging norms on crimes against humanity was simply not used. Thus, the features of crimes against humanity remained uncertain at the end of the IMT trials.

## VII. THE PRACTICE OF THE NUREMBERG US MILITARY TRIBUNALS [FN42]

After the trial of the major war criminals, twelve trials involving 177 defendants were held at Nuremberg before six American military courts from 1947 to 1949. These trials were governed by Control Council Law No10, which largely reproduced the provisions of the Nuremberg Charter. But Control Council Law No 10 contained some novelties as well. In particular, the words 'in connection with any crime within the jurisdiction of the Tribunal', by which Article 6(c) of the Nuremberg Charter had defined the scope of crimes against humanity, were omitted. This change paved the way to the development of crimes against humanity as an autonomous concept and to its consolidation into customary international law.

The first case to be addressed by the American courts was US v Joseph Alstotter (Justice Case). The sixteen defendants were charged with four counts, including war crimes and crimes against humanity. The accused, which belonged to the Ministry of Justice or exercised key legal functions, were found to have participated in a common plan aiming at the persecution of Jews and political opponents in the Third Reich. More specifically, they were held guilty of 'distortion and denial of judicial and penal process' [FN43] by ***597** the use of the 'Special Courts' of the Reich which imposed heavier or artificial sentences against members of specific ethnic groups (Jews, Poles, Ukrainians, and others). At the end of the trial, four defendants were sentenced to life imprisonment, four were acquitted and the remaining ones were sentenced to terms ranging from five to ten years' imprisonment. The differing penalties imposed from one case to another were proportional to the seriousness of the crimes committed and to the degree of participation of the accused. For instance, the defendant Lautz, Chief Public Prosecutor in the 'People's Court' of Berlin, was sentenced to ten years' imprisonment for zealously implementing the Nacht und Nebel Decree, [FN44] a highly discriminatory law. The Court held that the defendant, through having played a minor role as an accessory to the crime, took a consenting part in the crime of genocide. [FN45] In order to explain the gravity of the offences and the severity of the sentences, the Court notably invoked the concept of genocide, although the latter was not within its jurisdiction. Regarding the characteristics of the crimes charged, the Court was keen to outline the difference between war crimes and crimes against humanity, explaining the scope of crimes against humanity as follows:

> Obviously, these sections (crimes against humanity) are not surplusage. They supplement the preceding sections on war crimes and include within their prohibition not only war crimes, but also acts not included within the preceding definition of war crimes. In place of atrocities committed against civilians of or in or from occupied territory, these sections prohibit atrocities against any civilian population. Again, persecutions on racial, religious, or political ground are within our jurisdiction 'whether or not in violation' of the domestic laws of the country where perpetrated. We have already demonstrated that CC Law 10 is specifically directed to the punishment of German criminals. It is, therefore, clear that the intent of the Statute on crimes against humanity is to punish for persecutions and the like, whether in accord with or in violation of the domestic laws of the country where perpetrated, to wit: Germany. Article III of CC Law 10 clearly demonstrates that acts by Germans against German nationals may constitute crimes against humanity within the jurisdiction of this Tribunal to punish. [FN46]

In this passage, the Court recalled that crimes against humanity had been introduced by the drafters of the IMT Charter to fill a lacuna in international law, so as to avoid that crimes against Jews of German nationality committed by Germans in pursuance of a governmental policy remain unpunished. The gap was due to the fact that the concept of war crimes included in the Hague and Geneva Conventions applied in international armed conflicts and, thus, could be used to protect the civilians of a given country from the attack of an enemy, and not civilian victims of their own State. In another passage of the judgment, ***598** the Court construed the category of crimes against humanity as being applicable only to atrocities perpetrated in a systematic way. Isolated offences could be charged only as war crimes. Notwithstanding this distinction, cases of war crimes could amount to crimes against humanity because the circumstances of the cases revealed that they had been committed systematically on political, racial or religious grounds. If this was the case, the differences between the two categories of crimes appear substantially diluted and,

this probably explains why no distinction was made at the sentencing stage.

In US v Karl Brandt et al. (Medical Case), twenty-two defendants were charged, inter alia, with war crimes and crimes against humanity. The accused, mainly doctors, were held guilty of conducting medical experiments using human beings as guinea pigs in a number of concentration camps. The bulk of the defendants were sentenced to death by hanging or to life imprisonment. Regarding the concept of crimes against humanity, the defence of Rudolf Brandt remarked that:

> The answer to the question of what the crime against humanity itself consists of can only be given from the examples of the Statute and can be supported by the interpretation which the International Military Tribunal has given. According to this, crimes against humanity are the aggravation of a war crime or crimes against peace. It differs from these crimes by its dimension, its system, and the manner of execution. [FN47]

However, the Court did not focus upon this distinction. In summing up the indictment, it just observed that the difference between crimes against humanity and war crimes was that the former applied to 'German civilians and nationals of other countries', while the latter applied to 'civilians and members of the armed forces then at war with the German Reich'. [FN48] As a result, it declared that both counts were 'identical in content' and were 'treated as one and discussed together'. [FN49] Furthermore, the Court, in examining the culpability of the offenders, often used the formula: 'to the extent that these criminal acts did not constitute war crimes they constituted crimes against humanity.' [FN50] The Court stressed that the identity of the two types of offences resulted from the fact that the incriminated medical experiments did not consist of

> the isolated and casual acts of individual doctors and scientists working solely on their own responsibility, but were the products of co-ordinated policy-making and planning at high governmental, military and Nazi Party levels, conducted as an integral part of the total war efforts. [FN51]

*599 In US v Erhard Milch (Milch Case), the single defendant, a Field-Marshal in the German Air force, was sentenced to life imprisonment. He was found guilty of the medical experiments carried out by individuals under his command and of the deportation of civilians used for slave labour who were also victims of cruel and inhuman treatment. In explaining the reasons for finding the defendant guilty, the Court, following the legacy of the IMT, closed by saying that:

> Our conclusion is that the same unlawful acts of violence which constituted war crimes under Count One of the Indictment also constituted crimes against humanity as alleged in Count Three of the Indictment. [FN52] Having determined the defendant to be guilty of war crimes under Count One, it follows, of necessity, that he is also guilty of the separate offence of crimes against humanity, as alleged in count Three, and this Tribunal so determines. [FN53]

This passage confirms the author's previous finding that the same facts were often labelled as crimes against humanity and war crimes without passing on the comparative seriousness of these offences.

In US. v Oswald Pohl and Others (The Pohl Case), six members of the SS Central Office for Economic and Administrative Matters were found guilty of war crimes and crimes against humanity for the killings, cruel treatment and enslavement of the inmates of concentration camps. The penalties inflicted ranged from ten years' imprisonment to death. Even though the Prosecutor charged war crimes in Count Two and crimes against humanity in Count Three of the indictment, the Court did not make any distinction between the two categories. It dealt with them together, noting that the counts were identical in content and that the only difference was the nationality of the victims. [FN54] As a consequence, no distinction was made at the sentencing stage.

In US v Otto Ohlendorf and Others (Einsatzgruppen Case), the twenty-three defendants were accused of war crimes and crimes against humanity for, inter alia, killings, atrocities, deportation and enslavement. Among the defendants were the leaders and members of the Einsatzgruppen, execution squads liable, inter alia, for directly having caused the death of 90,000 people. The sentences imposed were of the highest severity. The acts charged in Counts One (crimes against humanity) and Two (war crimes) were identical in character. Here, as in the other cases, the only difference between the two counts was the nationality of the victims.

The Court dealt at a certain length with the concept of crimes against humanity. First, it noted that the Allied

Control Council, in its Law No 10, had *600 removed the limitation set by the IMT Charter so that crimes against humanity could be prosecuted without there being a restriction as to the nationality of the accused or the victim or as to the place of commission. In the Court's view, when crimes against humanity were at stake, humanity was the sovereign who had been offended. Thus, if humanity as whole was considered the victim of crimes against humanity, it could claim justice without being subject to either political boundaries or geographical limitations, with the result that 'a common man need not lack for a court to proclaim [crimes against humanity] and for a marshal to execute them'. [FN55] It is submitted, however, that the strong wording used on that occasion was probably meant to justify the prosecution of these crimes at the international level rather than to serve as an aggravating factor. Probably, the Court focused upon this aspect of crime against humanity because, in those times, it must have appeared odd that a non-German court had jurisdiction to try Germans for crimes against Germans.

In the light of the above survey of the American courts' case law, it seems that, as for the IMT, the decisive issue for the American courts was that of jurisdiction because crimes against humanity were a relatively new offence, though not a new concept, whose precise scope remained to be determined. In addition, the borders between the two categories of crimes were much less clear than today, although distinctions as to the defining aspects of war crimes and crimes against humanity had begun to be made. Today, the gravity of the cases tried is often less than it was at Nuremberg. Only rarely is each charge so serious as to attract the maximum sentence, whereas this was often the case at Nuremberg. Therefore, in situations where a number of relatively light penalties are being imposed, the need to make distinctions arises. As the legal views expressed by the American courts and also by the IMT were the result of the facts and law then available, their legal findings may not necessarily be binding on today's interpreter. It is submitted therefore that, in a different factual and legal context, the issue of the comparative seriousness of the international crimes may no longer be secondary.

## VIII. THE GRAVITY OF THE OFFENCE IN THE ICTR CASE LAW

The case law of the ICTR has focused on genocide and crimes against humanity. Little was said with regard to the distinction between war crimes and crimes against humanity. This is mainly due to the fact that the notion of war crimes was difficult to apply in the context of the Rwandan genocide. [FN56] *601 Conversely, as the genocide which occurred in Rwanda has been widely acknowledged and as several defendants admitted participation therein, several cases of genocide have been tried so far. [FN57]

On 1 May 1998, Jean Kambanda, Prime Minister of Rwanda in 1994, pleaded guilty to a six-count indictment charging him with violations ranging from genocide to crimes against humanity. On 4 September 1998, he was sentenced to a single penalty of life imprisonment. In the judgment, the Trial Chamber constructed the first ever scale of offences in international criminal law. According to the Trial Chamber, there were no doubts that violations of Article 3 common to the 1949 Geneva Conventions were less serious offences than genocide or crimes against humanity. [FN58] At the same time, the Trial Chamber observed that it was more difficult to rank genocide and crimes against humanity in terms of their respective gravity. [FN59] Further, the Trial Chamber expressed the view that an aggravating element of crimes against humanity was that they amounted to an assault against humanity; regarding genocide, the Chamber explained that the extreme gravity of this offence was that the presence of a dolus specialis consisting of the intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such. In addition, it observed that genocide had to be regarded as the 'crime of crimes' and that this facet should be taken into account at the sentencing stage. [FN60] The Chamber also held that crimes against humanity were of such gravity that they could not be punished less severely than genocide. [FN61]

On 2 October 1998, Jean Paul Akayesu, mayor of Taba, a Rwandan city, was sentenced to life imprisonment for the crimes of genocide and of direct and public incitement to commit genocide, for extermination as a crime against humanity, and to a number of lighter penalties for various crimes against humanity. Wherever the defendant was found guilty for the same acts of both genocide and crimes against humanity, the penalty inflicted was the same. The Trial Chamber referred to Kambanda in connection with the difficulty it faced in ranking genocide and crimes against humanity in terms of their respective gravity. [FN62] However, genocide was rated as the crime of crimes because of the great losses it inflicted on humanity and of the dolus specialis characterising it. As to crimes against humanity, the Chamber held that they were 'particularly shocking because they typified inhuman acts committed against civilians on a discriminatory basis'. [FN63] In the light of these considerations, it found that both crimes were of extreme gravity.

*602 In the Kayishema case, Clement Kayishema, prefect of the city of Kibuye, was sentenced to life imprisonment for four counts of genocide while Obed Ruzindana, a trader in Kigali, was sentenced to 25 years for one count of genocide. In this case, the imposition of a term of life imprisonment was, inter alia, justified, in line with the previous ICTR case law, by the fact that genocide was the crime of crimes and that it was an offence beyond human comprehension and of the most extreme gravity. [FN64]

In the Serushago case, Omar Serushago, one of the leaders of the Interahamwe, a paramilitary group made up of extremist Hutus, pleaded guilty to four counts of genocide and, on 5 February 1999, was sentenced to a single penalty of 15 years imprisonment. The penalty inflicted in this case was relatively light for the kind of crime committed, but it was proportionate to the reduced role played by the defendant in the perpetration of these crimes. Following settled case-law, the Trial Chamber rated genocide as the crime of crimes and added that it was difficult to rank genocide and crimes against humanity in relation to each other, because both crimes were inhuman acts committed against civilians on a discriminatory basis. [FN65]

In the Rutaganda case, Georges Rutaganda, formerly a prefect and during the genocide second-vice president of the Interahamwe, was found guilty of three counts, namely, genocide, extermination and murder as a crime against humanity and sentenced to life imprisonment. The Trial Chamber remarked that the extreme seriousness of the offences of genocide and crimes against humanity was per se a circumstance rendering the acts ascribed to Rutaganda more serious. [FN66]

In the light of this case law, the following observations can be made. First, it seems that the defining aspect of the crime of genocide, the so-called dolus specialis, can be regarded as element that renders this crime per se more serious than the other international crimes. For the presence of dolus specialis, defined as being 'the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such', reveals on the part of the author of the crime an uncommon wickedness. [FN67] The author of the crime, indeed, not only desires the death of one or more persons but aims at the destruction of an entire group or part of it. The intention must be that of destroying a 'group' as a separate and distinct entity, and not merely some individuals because of their membership of a particular group. [FN68] In this respect, it must be proven that the offender had the intent to commit the offence as an act instrumental to the destruction, *603 in whole or in part, of the group concerned. Conversely, in the case of crimes against humanity, it is sufficient to establish that the offender was aware of the broader context of which the criminal acts were part. A general principle of criminal law requires that an offender be punished more severely when he has the intent to commit a criminal deed than when he is reckless to the consequences that may derive from it. In this respect, the crime of genocide seems to be worse than that of crimes against humanity. Indeed, the intent to pursue a given unlawful course of conduct reveals the wickedness of the offender and disregard for the values protected by the relevant legal provision. Nevertheless, it happens quite often that a person guilty of such crimes also shares certain criminal policy goals. If this is the case, the intent of implementing a certain policy may be seen as an aggravating circumstance to be considered at the moment of assessing culpability.

Secondly, if one takes into account the values protected by the provisions on genocide and crimes against humanity, one may perceive a common element and a difference. The element common to the two categories is the aim of protecting the fundamental rights of individuals in war and peace. The difference lies in the fact that the ban on genocide is specifically meant to protect the existence of a group in whole or in part from attacks aiming at its extinction. A survey of the Nuremberg case law reveals how the concept of crimes against humanity could be interpreted as covering the mass destruction of people on a discriminatory basis. Still, it does not protect populations as such. This is why the international community decided, after the horrors of the Second World War, to make genocide the object of an ad hoc convention. It seems, therefore, that the value protected here, which is the right to existence of a population, is even higher than the values protected by other prescriptions. If an individual acting in a way aimed at the destruction of an entire population is not punished adequately, the existence of humanity will be imperilled. For this reason, the international judge should in this case manifest the disapproval and censure of the international community by inflicting the severest possible penalty.

The conduct of an offender seems even more blameworthy when it occurs on a discriminatory basis because the offender disregards principles of international law based on the equality of all human beings. As the avoidance of any form of discrimination is one of the pillars of modern international law, [FN69] the presence of a discriminatory animus should be regarded as making the crime more serious. This view finds support in Rule 145 of the Rules of

***604** Procedure of the ICC, which provides for the imposition of life imprisonment instead of the normal term of 30 years set out by Article 77 of the Statute, if discrimination is present.

## IX. THE GRAVITY OF THE OFFENCE IN THE ICTY CASE LAW

Contrary to the ICTR, the ICTY has dealt with the topic of the comparative seriousness of crimes against humanity and war crimes at length, generating intense debates. Regarding the crime of genocide, the ICTY had, until very recently, little opportunity to pass on its seriousness [FN70]. However, a trial chamber did so in the Krstic case, in its judgment of 2 August 2001, whereby, for the first time before the ICTY, an individual was found guilty of the crime of genocide.

On 7 October 1997, in the Erdemovic case, the Appeals Chamber confirmed the finding of a lower chamber concerning the greater seriousness of crimes against humanity as compared to war crimes. The reasons supporting the Appeals Chamber's view are set out in the joint separate opinion of judges McDonald and Vohrah. Although it is somewhat regrettable that the reasoning of the Appeals Chamber is not spelled out in the body of the judgment, but only in a separate opinion, the reasoning followed by the two judges deserves mention. First, crimes against humanity injure larger interests than those of the immediate victims. Secondly, crimes against humanity do not consist of isolated acts like war crimes, but must be part of a wider context that contributes to 'a broader scheme of violence against a particular systematically targeted civilian group'. [FN71] Thirdly, in the case of crimes against humanity, the author knows that certain acts form part of a widespread or systematic attack against civilians [FN72]. Fourthly, several international cases confirm such a distinction. [FN73] By contrast, Judge Li, another member of the Appeals Chamber, in a dissenting opinion, argued that neither the specific characteristic of these offences nor the current status of international law allowed for the drawing of such a distinction. He stressed that the seriousness of the punishment is determined by the 'intrinsic nature of the act itself and not by its classification under one category or another'. [FN74]

In several subsequent judgments, the ICTY trial chambers dedicated little attention to the topic of the abstract gravity of the offences listed in the Statute and, instead, focused upon their gravity in concreto. For instance, in Celebici, ***605** the trial chamber referred to the gravity of the offences as the 'litmus test for the appropriate sentence' and stressed the importance of determining the gravity in personam of offences by taking in due account the harm done to the victims. [FN75] Further, the trial chamber noted that 'the gravity of the offence and the individual circumstances of the offender are typically to be considered with respect to the particular and, if need be, the peculiar circumstances of each case'. [FN76]

On 11 November 1999, in the sentencing judgment in Tadic, a trial chamber imposed on the defendant a penalty of 25 years' imprisonment for crimes against humanity and one of 24 years for war crimes in relation to the same conduct. The Chamber's majority found that crimes against humanity were offences intrinsically more serious than war crimes. By contrast, the third member of that Trial Chamber, Judge Robinson, in a separate opinion, argued that the alleged distinction between the two categories of crimes had no basis whatsoever in international law. [FN77]

On appeal, the view of the minority became that of the majority. The Appeals Chamber, in its judgment of 26 January 2000, held that 'there is in law no distinction between the seriousness of a crime against humanity and that of war crimes'. [FN78] Thus, it revised the sentencing judgment of 11 November 1999 by imposing, in cases of multiple convictions, identical punishment for war crimes and crimes against humanity. To buttress its view, the Chamber noted that a distinction in terms of seriousness of international crimes was not to be found in the Statute or the Rules of Procedure and Evidence of the ICTY, or in the ICC Statute. Judge Shahabuddeen endorsed and explained the position of the Appeals Chamber in a separate opinion. He observed that neither the ICTY Statute, nor customary law nor international case law, nor treaty law accredited a distinction in terms of seriousness among international crimes. As to the constitutive elements of the crimes, the judge added that he was not persuaded that the elements characterising crimes against humanity were sufficient to demonstrate that they were more serious than war crimes. [FN79]

By contrast, Judge Cassese wrote a dissenting opinion. On the one hand, he addressed the topic of the comparative seriousness of the crimes from an international law point of view, rebutting the findings of the Appeals Chamber. On the other, he dealt with the elements of crimes as well. He focused in particular upon the subjective

element of crimes against humanity. He noted that, in the event of crimes against humanity, 'the requisite intent of the perpetrator ***606** was more serious than murder as a war crime' [FN80] because it involved that the perpetrator 'was hoping to enjoy impunity by engaging in conduct that, being widespread, might ultimately have gone unpunished'. [FN81] Judge Cassese added that the subjective frame of mind of perpetrators of crimes against humanity was of such a nature as to 'imperil fundamental values of the international community to a greater extent than in the case of war crimes' and, hence, requiring a heavier penalty. [FN82]

On 21 July 2000, the Appeals Chamber, in the Furundzija judgment, confirmed its previous position. [FN83] By contrast, Judge Vohrah in a declaration, developed his traditional view whereby, all else being equal, crimes against humanity are intrinsically more serious than war crimes. He stressed the importance of the values protected by genocide and crimes against humanity by noting that:

> for it to be held that the additional elements required for constituting genocide or crimes against humanity and the fact that a broader society is affected by such crimes do not deserve to be reflected in the sentence of a person convicted of these crimes, amounts to a failure to take into consideration the exceptionally egregious nature of genocide and crimes against humanity. [FN84]

On 22 February 2001, in the Kunarac case, the Trial Chamber considered it to be 'wrong to resort to some abstract comparison of the "per se gravity of the crime"'. It also agreed with the Appeals Chamber that crimes against humanity do not, in principle, attract a higher sentence than war crimes. [FN85]

On 26 February 2001, in the Kordic case, the Trial Chamber stressed that the gravity of the offences can be deduced by the 'nature, magnitude and the manner in which they were committed, the number of victims involved and the degree of suffering endured by the victims'. [FN86]

Last but not least, in the Krstic case, the Trial Chamber, similarly to the ICTR case law, found that: 'it can be argued, however, that genocide is the most serious crime because of its requirement of the intent to destroy, in whole or in part, a national ethnic, racial or religious group, as such', [FN87] and added that the 'convicted person is because, of his specific intent, deemed to be more blameworthy'. [FN88] However, the Chamber considered its duty 'to decide on the appropriate punishment according to the facts of each case'. [FN89]

***607** In the light of the foregoing, the following observations may be made. As to the concept of gravity of the offence, it appears that there is still disagreement as to its interpretation. Although a study of ICTR case-law reveals uniformity of approach in that gravity in abstracto should be taken into account at the sentencing stage and not only the gravity in concreto, the ICTY practice seems to focus primarily upon the gravity of crimes in concreto. Thus, it remains open to question whether only the gravity in concreto should be taken into account when determining penalties or whether both approaches should be used.

Secondly, it seems that there is a divergence between the new approach set out by the Appeals Chamber of the ICTY and the scale of crimes constructed by the ICTR on the basis of their constitutive elements. Thus the issue is that of determining what weight should be given to the ICTR case law. For example, if one applies the ICTY Appeals Chamber's method, the immediate conclusion would be that acts of genocide are of the same seriousness as war crimes. Indeed, neither lex specialis nor general international law says that genocide is in itself a more serious offence than war crimes. The Appeals Chamber did not take advantage of an opportunity to clarify the issue in the Kambanda and Akayesu appeals judgments. Thus, uncertainty remains.

Thirdly, notwithstanding that the Appeals Chamber's finding that neither international law nor the ICTY Statute provides for a distinction in terms of seriousness among international crimes is unquestionable, some theoretical observations as to the criminal relevance of war crimes and crimes against humanity may still be formulated.

To begin with, it may be noted that one of the main differences between the objective elements of war crimes and those of crimes against humanity is that the former do not necessarily have to be part of a widespread or systematic attack against the civilian population. War crimes may consist of single acts which can be the work of isolated individuals and which are perpetrated for personal motives, regardless of the overall context in which they occur. By contrast, offences falling within the category of crimes against humanity must be part of an extensive criminal scheme aimed at the implementation of a given policy or, in any event, affect the civilian population. True,

even war crimes can be widespread or systematic, but this is not a constitutive element of such crimes.

Generally speaking, war crimes, though they can be committed for a number of reasons, are perpetrated in order to achieve certain objectives of war. For instance, torture may be directed to obtaining information from the enemy which may be fundamental to win a battle; the carpet-bombing of a city or the use of prohibited weapons may be considered appropriate by the generals conducting the hostilities to win a battle. Conversely, policies falling within the concept of crimes against humanity are exclusively conceived and perpetrated to harm civilians. Therefore, if the civilians are the exclusive targets of certain acts, the menace to them appears even greater than in the ***608** case of war crimes. The ratio of prohibiting crimes against humanity is precisely that of protecting civilians from policies and attacks directed exclusively against them. For this reason, in customary international law, this category of crime can be prosecuted regardless of the existence of an armed conflict. As criminal law is meant to protect certain values, a punishment should be proportionate to the harm done or the risk caused to these values. If the threat to the values protected or the risk they are placed at is higher in the case of crimes against humanity than in that of war crimes, the punishment inflicted should reflect it.

Furthermore, there are at least three reasons for holding that the simple knowledge of the overall context is an aggravating factor of crimes against humanity but not of war crimes.

First, an individual, in committing a crime against humanity, reveals total disregard for the consequences to the victims of his actions. This disregard becomes evident when one considers that if an individual objects to a given attack against civilians, he should simply refrain from it and not join in. The existence of an overall criminal plan or a definite course of conduct should act as a brake to the commission of certain deeds rather than as an authorisation. In the case of crimes against humanity, the perpetrator is reckless to the consequences that may derive from his actions and this reveals a special wickedness.

Secondly, the perpetration of a plan or attack against civilians is highly facilitated if all these people who know about it contribute to it, without adequately pondering the consequences of their acts or trying to avoid them. By choosing to act, while being aware of the overall context, an individual accepts that his conduct contributes to policies or attacks against the civilian population. A reasonable person should refrain from committing a crime when she knows, or has a reason to know, that criminal conduct may occur thanks to his actions and that of his associates. The policy of ethnic cleansing or even genocide would not be implemented if those participating would oppose it. Accordingly, if the punishment imposed is to express the censure of the international community, those who contributed to or permitted the successful implementation of certain policies by their effective participation should be punished accordingly.

Last but not least, if punishment is to deter likely offenders from implementing certain policies, those who, willingly or at least knowingly, facilitated the commission of crimes should be punished more severely than those who did not.

## X. CONCLUSIONS

International criminal law, as a branch of international law, has developed considerably over the last fifty years and it is reasonable to expect further growth with the coming into existence of the ICC. Today a number of consolidated ***609** principles govern this discipline. Among those principles are the concepts of fairness in sentencing and the imposition of punishment that is not based on the idea of revenge. The perpetrator should be punished for no more and no less than what he deserves. In this light, the international judge is called upon to assess the gravity of the offence, which is the basic criterion for calculating the penalties fixed in the Statutes of the ad hoc International Tribunals. The gravity of an offence can be determined in abstracto and in concreto. The gravity in abstracto is based on an analysis, in terms of criminal law of the subjective and objective elements of the crime. The gravity in concreto depends on the harm done and on the degree of culpability of the offender. ICTY and ICTR case law reveals divergences in the application of these concepts. The former focuses mainly on the concrete gravity of the crime inferred from the circumstances of the case. The latter assessment has been broader in that both the gravity in abstracto of the crime and its gravity in concreto were taken into account. A distinction in terms of seriousness among international crimes can be made by resorting to a criminal-law approach, which involves answering these questions: What is the stigma attached by the international community to the crimes at issue? Which are the values protected and to what degree are they endangered by the conduct contemplated in this category of crimes? What is

the criminal relevance to be attached to a subjective element? Are the knowledge of the criminal context into which a single crime falls and the objective contribution to it, aggravating factors? It is submitted that if an analysis is conducted along these lines, as has been attempted here, differences between international crimes may be identified. This method for evaluating international offences is not in contradiction with international law. As noted, the latter makes no distinction among international offences based on their seriousness, and the fact that, for a number of reasons, this distinction was not expressly made at Nuremberg does not necessarily justify the conclusion that all international crimes are equally serious. Thus, as international criminal law is a discipline that combines international law and criminal law, it is suggested that an analysis of the seriousness of crimes should also be conducted on the basis of a criminal law approach. Perhaps the suggested method, by better reflecting the differing facets of international crimes, may help to effectively punish an individual for no more and no less than he deserves.

[FN1]. The author is an Associate Legal Officer at the ICTY. The opinions expressed in this article are those of the author and should not be attributed to the institution with which he is associated. The author thanks Professor Lucius Caflisch for his invaluable suggestions and remarks and Professor Georges Abi-Saab for his enlightening comments.

[FN2]. S Glaser, Introduction à l'étude du droit international pénal, (Paris: Sirey, 1954), 7.

[FN3]. A-M La Rosa, Dictionnaire de droit international penal (Geneva: PUF, 1998), 36-7.

[FN4]. See LC Green, 'New Trends in International Criminal Law', Israel Yearbook of Human Rights, vol 5 (1981), 12.

[FN5]. Judgment of the International Military Tribunal sitting at Nuremberg, 30 Sept 1946, in: The Trials of German Major War Criminals, published under the authority of HM Attorney-General (London: His Majesty's Stationery Office, vol I, 1950), 53.

[FN6]. Art 227 of the 1919 Versailles Treaty provided a special tribunal for the Emperor William II. But the Netherlands, where the Emperor had sought asylum at the end of the conflict, never agreed to extradite him. Similarly, Germany never handed over for trial by the Allies German nationals as provided by the Versailles Treaty. War crimes trials occurred before Nuremberg, but on a national basis, either in the captor State or in the national country of the accused (Leipzig trials), above n 3, 14-15.

[FN7]. While today the existence of international criminal law is generally accepted, doubts arose just after the Nuremberg trials. One author argued that: 'In the present state of world society, international criminal law in any true sense does not exist.' See G Schwarzenberger, 'The Problem of an International Criminal Law', Current Legal Problems, vol 3 (1950), 295. However, we share the more practical view of Quincy Wright: 'Since the concept of crimes against international law is well-established, and since liability for those criminal acts is also well-founded, it is only logical to conclude that international criminal law does in fact exist.' See Q Wright, 'The Scope of International Criminal Law: A Conceptual Framework', Vanderbilt Journal of Transnational Law, vol 15 (1975), 561.

[FN8]. EM Wise, 'Terrorism and the Problems of an International Criminal Law', Connecticut Law Review, vol 63 (1987), 829.

[FN9]. J Caflisch, 'Réflexions sur la création d'une cour criminelle internationale', in J Makarczyk (ed), Theory of International Law at the Threshold of the 21st Century, Essays in Honour of Krzsztof Skubiszewski (The Hague: Kluwer, 1996), 860.

[FN10]. Milosevic is the first Head of State to be indicted by an international tribunal whist still in office.

[FN11]. As long as Franjo Tudjman, the leader of the Croatian nationalist party HDZ, was President of Croatia, his country did not cooperate with ICTY by handing over evidence for the trials of Croat nationalist leaders as Dario Kordi and Tihomir Blaskic or by arresting other indictees residing in Croatia.

[FN12]. US v Wilhelm List and others (Hostages Case), judgment of 19 Feb 1948, Trials of War Criminals before

the Nuremberg Military Tribunals under Control Council Law No 10, Vol VIII (Washington, US Government Printing Office, 1949), 49.

[FN13]. The reference to the sources of international criminal law is meant to propose a general framework, within which a role for the international judge at the sentencing stage can be reasonably construed. Although an attempt is made, it is not here intended to provide the definitive answer as to which sources govern international criminal law. The author is, indeed, well aware of the difficulties linked with the topic of the sources of international criminal law and of the need of dedicating to it careful consideration. See, among others, A Cassese, International Law (Oxford: Oxford University Press, 2001), 159-62.

[FN14]. Prosecutor v Zoran Kupreskic and Others, Case No IT-95-16-T, Trial Chamber II, judgment of 14 Jan 2000, paras 537-42.

[FN15]. See Prosecutor v Tihomir Blaskic, decision on the objection of the Republic of Croatia on the issuance of subpoena duces tecum, Case IT-95-14, Trial Chamber I, 18 July 1997.

[FN16]. Montesquieu, The Spirit of the Laws (Cambridge: Cambridge University Press, 2000), Book 11, ch VI, 163. See also Montesquieu, De l'esprit de lois in Oeuvres Completes, ed Gallimard.

[FN17]. See, inter alia, with regard to ICTY, Prosecutor v Goran Jelisic, Case No IT-95-10-T, Trial Chamber I, judgment of 14 Dec 1999, para 114, and with regard to ICTR, See Prosecutor v Omar Serushago, Case No ICTR-98-39-A, Appeals Chamber, reasons for judgment of 6 Apr 200, para 30.

[FN18]. Para 1225.

[FN19]. A von Hirsch, 'Guidance by Numbers or Words Numerical versus Narrative Guidelines Sentencing', Sentencing Reform: Guidance or Guidelines? (Manchester: Manchester University Press, 1987), 46-67.

[FN20]. Prosecutor v Zlatko Aleksovski, Case No IT-95-14/1-A, Appeals Chamber, judgment of 24 Mar 2000, para 182.

[FN21]. A Ashworth, Principles of Criminal Law, 2nd edn (Oxford: Clarendon Law Series, 1995) 19-20.

[FN22]. See Swedish Criminal Code, Ch 29, and Italian Criminal Code, Art 133.

[FN23]. The ICTY was set up by Security Council Resolutions 808 and 827 of 22 Feb and 25 May 1993. The ICTR was set up by Security Council Resolution 955 of 8 Nov 1994.

[FN24]. Above n 20, para 185.

[FN25]. Above n 21 and below n 26.

[FN26]. A Ashworth and E Player, 'Sentencing, Equal Treatment and the Impact of Sanctions', in Fundamentals of Sentencing Theory (ed. A Ashworth and M Wasik) (Oxford: Clarendon Press, 1998), 251-3.

[FN27]. Prosecutor v Zlatko Aleksovski, Case No IT-95-14/1-A, Trial Chamber I, judgment of 7 May 1999, para 243.

[FN28]. Prosecutor v. Drazen Erdemovic, Appeals Chamber, Case No.IT-96-22-A, judgment of 7 Oct 1997, para 20.

[FN29]. Above n 28, joint separate opinion of Judges GK McDonald and LC Vohrah, paras 20-7.

[FN30]. For instance, see Arts 54 of the German Criminal Code, 68 of the Swiss Criminal Code, 46 of the Yugoslav Criminal Code, and 81 of the Italian Criminal Code.

[FN31]. The Trial Chamber in Jelisic noted that that 'the notions of cruel treatment within the meaning of Art 3 and of inhumane treatment set out in Article 5 of the ICTY Statute have the same legal meaning'. Above n 15, para 52.

[FN32]. The Trial Chamber in the Akayesu case found that 'causing serious bodily harm to members of the group' under Art 2(2) (b) of the ICTR Statute and Art 4(b) of the ICTY Statute, amounted to 'acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution'. Regarding the crime of rape, it was held that it could constitute a 'measure to prevent births within the group' and, thus, fall into the category of genocide established in Art 2(2)(d) of the ICTR Statute and in Art 4(d) of the ICTY Statute. Prosecutor v Jean Paul Akayesu, Case No ICTR-96-4-T, Trial Chamber I, judgment of 2 Sept 1998, paras 504 and 507.

[FN33]. The fifteen defendants were: Göring, Von Ribbentrop, Keitel, Kaltenbrunner, Rosenberg, Frank, Frick, Funk, Raeder, Sauckel, Jodl, Bormann, Seyss-Inquart, Speer, and von Neurath.

[FN34]. Above n 5, 254.

[FN35]. See Art 6 (c) of the IMT Charter.

[FN36]. J Graven, 'Les crimes contre l'humanité', RCADI, vol 76-I (1950), 438-44.

[FN37]. H Donnedieu de Vabres, 'Le procès de Nuremberg devant les principes modernes de droit pénal international', RCADI, vol 70, 1947-I, 525.

[FN38]. Ibid, 527.

[FN39]. Ibid, 525.

[FN40]. See the Report of JB Herzog presented at the 8th International Conference for the Unification of Criminal Law published in Revue internationale de droit pénal, vol I (1947), 155-7.

[FN41]. GINSBURGS, George and KUDRIAVTSEV,V.N. (eds.), The Nuremberg Trial and International Law (The Hague: Kluwer, 1990), 196.

[FN42]. Covering all of the post-Second World War military tribunals was beyond the scope of this article due to the large number of cases dealt with. The author has chosen to restrict his analysis to cases before the American tribunal as some of the best-known cases, which may be seen as examples of the overall whole.

[FN43]. Below n 95.

[FN44]. This Decree allowed the secret arrest of opponents of the Nazi Regime in the occupied countries.

[FN45]. US v Josef Alstotter and Others, Law Reports of Trials of War Criminals, United Nations War Crimes Commission, Vol III (London: His Majesty's Stationery Office, 1948), 1128.

[FN46]. Ibid, 972-3.

[FN47]. US v Rudolf Brandt (Medical Case), judgment of 19 and 20 Aug 1947, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10 (Washington: US Government Printing Office, 1949), vol II, 171.

[FN48]. Ibid, 174.

[FN49]. Ibid.

[FN50]. This was said in respect of the defendant Becker-Freyseng, at 285, Beiglboeck, at 292, Hoven, at 290, and Rose, at 271.

[FN51]. Ibid, 181.

[FN52]. US v Erhard Milch (Milch Case), judgment of 16 Apr 1947, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10, (Washington: US Government Printing Office, 1949), vol II, 791.

[FN53]. Ibid, 791.

[FN54]. US v Osvald Pohl and Others, judgment of 2 Nov 1947, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10 (Washington: US Government Printing Office, 1950), vol V, 192.

[FN55]. US v Otto Ohlendorf (Einsatzgruppen Case), judgment of 9 Apr 1948, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10, (Washington: US Government Printing Office, 1949), vol IV, 411-587.

[FN56]. In the Akayesu case, the defendant was also charged with war crimes under Article 4 of the ICTR Statute; but these rules proved to be inapplicable to the case, as the necessary nexus with the armed conflict had not been adequately proved by the Prosecutor. See judgment, para 643.

[FN57]. The following defendants were sentenced to life imprisonment for genocide: Akayesu, Kambanda and Kayshema. Two defendants, Musema and Ruzindana, were sentenced to 25 years. The lightest punishments were inflicted on Serushago (15 years) and Ruggiu (12 years).

[FN58]. Prosecutor v Jean Kambanda, Case No ICTR-97-23-S, Trial Chamber I, judgment and sentence of 4 Sept 1998, para 13.

[FN59]. Ibid, para 14.

[FN60]. Ibid, para 16.

[FN61]. Ibid, para 17.

[FN62]. Prosecutor v Jean Paul Akayesu, Case No ICTR-96-4-T, Trial Chamber I, sentence of 2 Oct 1998, 2.

[FN63]. Ibid, 3.

[FN64]. Prosecutor v Clement Kayishema and Obed Ruzindana, Case No ICTR-95-1-T, Trial Chamber II, sentence of 21 May 1999, para 9.

[FN65]. Prosecutor v Omar Serushago, Case No ICTR-98-39-S, Trial Chamber I, sentence of 5 Feb 1999, para 3.

[FN66]. Prosecutor v. Georges Anderson Nderubumwe Rutaganda, Case No ICTR-96-3-T, Trial Chamber I, judgment and sentence of 6 Dec 1999, para 487.

[FN67]. As stated by the Trial Chamber in the Akayesu judgment, dolus specialis is not required to find an individual guilty of complicity in genocide. See judgment, para 485.

[FN68]. Above n 17, para 79.

[FN69]. The importance of the concept of discrimination in today's international community appears evident when one reviews the quantity of the international instruments dedicated to it. The following may be recalled: the 1948 Universal Declaration of Human Rights, the 1958 Convention Concerning Discrimination in Respect of Employment and Occupation, the 1963 United Nations Declaration on the Elimination of All Forms of Racial

Discrimination, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, the 1966 International Covenants and the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid.

[FN70]. Radovan Karadzic and Ratko Mladic are accused of acts of genocide in relation to the policy of 'ethnic cleansing' perpetrated, specifically, at Srebrenica in July 1995, but they are still at large. See Prosecutor v Karadzic and Mladic, Case No IT-95-18, indictment of 24 July 1995. In Jelisic, the count of genocide was dismissed, Above n 16, para 98.

[FN71]. Joint separate opinion of Judges McDonald and Vohrah, above n 27, para 20.

[FN72]. Ibid, para 21.

[FN73]. The two Judges quoted passages of the Albrecht, Stalag Luft III and the Einsatzgruppen cases, ibid., paras 23-4.

[FN74]. Separate and dissenting opinion of judge Li, above n 28, para 19.

[FN75]. Prosecutor v Delalic, Mucic, Delic and Landzo, Case No IT-96-21- T, Trial Chamber II, judgment of 16 Nov 1998, para 1226.

[FN76]. Ibid, para 1227.

[FN77]. See separate opinion of judge Robinson, Prosecutor v Dusko Tadic, Case No IT-94-1-T and IT-94bis-R117, sentencing judgment of 11 Nov 1999, para 4.

[FN78]. Prosecutor v Dusko Tadic, Case No IT-94-1-T and IT-94-1 Abis, Appeals Chamber, judgment in sentencing appeals of 26 Jan 2000, para 69.

[FN79]. Separate opinion of judge Shahabuddeen, ibid, 38.

[FN80]. Separate opinion of judge Cassese, above n 77, para 14.

[FN81]. Ibid.

[FN82]. Ibid, para 15.

[FN83]. Prosecutor v Anto Furundzija, Case IT-95-17/1-T, Appeals Chamber, judgment of 21 July 2000, para 243.

[FN84]. Ibid, Declaration of Judge Vohrah, 88-9.

[FN85]. Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case No IT-96-23-T&IT-96-23/1-T, Trial Chamber II, judgment of 22 Feb, paras 851 and 860.

[FN86]. Prosecutor v Dario Kordic and Mario Cerkez, Case IT-95-14/2-T, Trial Chamber III, judgment of 26 Feb 2001, para 847 and n 1793.

[FN87]. Prosecutor v Radislav Krstic, Case IT-98-33-T, Trial Chamber I, judgment of 2 Aug 2001, para 700.

[FN88]. Ibid, para 700.

[FN89]. Ibid, para 701.

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Articles

# *53 PUNISHMENT FOR VIOLATIONS OF INTERNATIONAL CRIMINAL LAW: AN ANALYSIS OF SENTENCING AT THE ICTY AND ICTR

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## I. Introduction

Imposing a just penalty for violations of international criminal law is fundamental to the purposes of the International Criminal Tribunals for the former Yugoslavia ("ICTY") and Rwanda ("ICTR"). The United Nations Security Council created these Tribunals to prosecute international crimes committed in the two regions. The creation of the Tribunals represents an effort to end impunity for the perpetrators of the crimes and to promote peace *54 and reconciliation within the former Yugoslavia [FN1] and Rwanda. [FN2] Success in achieving these goals is possible only if the Tribunals impose appropriate sentences for crimes committed within their respective jurisdictions. Determining an appropriate penalty that contributes to peace and national reconciliation is a difficult task. Perpetrators of heinous crimes and their victims will almost never agree on a just sentence. Likewise, members of the perpetrator's nationality or ethnic group will usually not agree on the appropriateness of a sentence with members of the victim's nationality or ethnic group. In addition, the international and domestic military tribunals set up in the aftermath of World War II left few sentencing guidelines to help the ICTY and ICTR. [FN3] Finally, the sentencing provisions in the Tribunals' Statutes do not add much guidance.

Even so, in light of their difficult task, the ICTY and ICTR have each developed a fledgling sentencing practice. This Article analyzes the sentencing practices of these Tribunals. Part II details the relevant provisions of their Statutes and Rules of Evidence and Procedure. Part III briefly summarizes the punishment philosophy of the Tribunals and how this philosophy relates to the sentences handed down thus far. Part IV analyzes the following specific areas of the Tribunals' sentencing practices: the use of aggravating and mitigating circumstances in the determination of a sentence and the elimination of a separate sentencing hearing from their procedures. The discussion of these issues reveals several areas in which the Tribunals should make adjustments to their sentencing practices.

II. Relevant Provisions of the Statutes and Rules of Procedure and Evidence of the ICTY and ICTR

Articles 23 and 24 of the ICTY Statute govern the pronouncement of sentences and imposition of penalties at the ICTY. Article 23 reinforces the purpose of the creation of the Tribunal by declaring that the "Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law." [FN4] Article 24 provides the following minimal guidelines to the Trial Chambers regarding the imposition of penalties:

*55 1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.

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

3.In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners. [FN5]

Almost identical provisions in the ICTR Statute provide the basis for sentencing by the Rwanda Tribunal. [FN6]

Under their powers to create rules of evidence and procedure, [FN7] the Judges of the ICTY and ICTR have added to the sparse provisions for sentencing in the Tribunals' Statutes. Rule 101 of the ICTY Rules of Procedure and Evidence ("Rules") states:

(A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life.

(B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as:

(i) any aggravating circumstances;

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

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

(iv) the extent to which any penalty imposed by a court of any State on the convicted person for the *56 same act has already been served, as referred to in Article 10, paragraph 3, of the Statute. (C) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal. [FN8]

Through the implementation of the above principles, the judges of both Tribunals have created a basic sentencing practice for violations of international criminal law.

III. The Sentences and Sentencing Philosophy of the ICTY and ICTR

To date, twenty-six defendants at the ICTY and eight defendants at the ICTR have been convicted of crimes over which the Tribunals have jurisdiction, including genocide, crimes against humanity, grave breaches of the Geneva Conventions, and war crimes. [FN9] ICTY sentences have ranged from *57 five [FN10] to forty-six years imprisonment, [FN11] while ICTR sentences have ranged from twelve years [FN12] to life imprisonment. [FN13]

The Trial Chambers of the ICTY and ICTR have given various justifications for the punishment of crimes within their respective jurisdictions. Each of the traditional justifications for punishment - retribution, deterrence, isolation from society, and rehabilitation - has been mentioned as an important objective. [FN14] Several judgments suggest that of these four justifications, deterrence and retribution are the main purposes of punishment at the Tribunals. [FN15] However, several of the penalties that have been imposed suggest that the Judges consider rehabilitation to be an equally important goal in the punishment of those convicted of serious violations of international law. [FN16]

IV. Sentencing Issues at the ICTY and ICTR

A. The Use of Aggravating and Mitigating Circumstances

The Statutes and Rules of the ICTY and ICTR do not elaborate on the use of aggravating and mitigating factors for sentencing purposes. They merely require the Trial Chambers to take into account the gravity of the crime, the individual circumstances of the accused, and any relevant aggravating and mitigating factors. [FN17] The jurisprudence of the Tribunals, however, gives the Trial Chambers full discretion to consider any other aggravating and mitigating circumstances, and to give "due weight" to those factors in the determination of an appropriate punishment. [FN18] As illustrated by the case discussions below, the Trial Chambers' discretion is perhaps too broad and should be limited by general sentencing guidelines.

i. Kambanda

a. Facts of the Case and Aggravating and Mitigating Circumstances

Jean Kambanda pleaded guilty to genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in *58 genocide, and crimes against humanity, including murder and extermination. [FN19] In his role as the Prime Minister of the Interim Government of Rwanda, between April 8, 1994 and July 17, 1994, he was intimately involved with the murder of Tutsi civilians. [FN20] For example, he exercised control over government ministers and military leaders involved in the genocide, issued directives encouraging the murder of Tutsis, distributed arms and ammunition to groups involved in murdering Tutsis, and gave speeches and made radio broadcasts inciting massacres against the Tutsi population. [FN21]

In determining an appropriate sentence for Kambanda, the ICTR Trial Chamber considered at length the gravity of his crimes, all of which were aggravating circumstances, and the relevant mitigating factors. Not surprisingly, the Trial Chamber found that Kambanda had committed crimes of the utmost gravity. It explained that the intrinsically heinous nature of genocide and crimes against humanity and the enormous magnitude of his crimes both served as aggravating factors. [FN22] Furthermore, through his personal participation in the genocide as Prime Minister, Kambanda "abused his authority and the trust of the civilian population." [FN23] Finally, he "committed the crimes knowingly and with premeditation," and failed to take steps to prevent the genocide or punish perpetrators. [FN24]

In mitigation, the Trial Chamber found that Kambanda had cooperated with the Prosecutor, was willing to do so in the future, and had pleaded guilty. [FN25] It held,

however, "that the aggravating circumstances surrounding the crimes committed by Jean Kambanda [negated] the mitigating circumstances, especially since [he] occupied a high ministerial post, at the time he committed the said crimes." [FN26] It sentenced Kambanda to life imprisonment, which is the most severe sentence that an accused can receive under the Statute. [FN27] The Appeals Chamber later upheld Kambanda's life sentence. [FN28]

b. The Decision to Impose a Life Sentence

Despite the existence of mitigating factors and certain policy arguments in favor of a more lenient sentence, life imprisonment is an appropriate punishment for Kambanda's crimes. Nonetheless, some critics of the Kambanda Judgement argue that a life sentence was unduly harsh, in light of *59 Kambanda's voluntary guilty plea and substantial cooperation with the Prosecutor. First, as the Trial Chamber noted, a guilty plea is considered a mitigating circumstance in most national jurisdictions, including Rwanda, as well as at the ICTR and ICTY. [FN29] Here, the guilty plea likely saved the Prosecutor and the Trial Chamber substantial amounts of time and money. Instead of having to devote resources to investigating and prosecuting Kambanda, the Prosecutor could use them towards the prosecution of other persons accused of committing similar atrocities in Rwanda. The guilty plea allowed the Trial Chamber to efficiently dispose of Kambanda's case and move on to try other accused. [FN30]

As mentioned above, besides pleading guilty, Kambanda substantially cooperated with the Prosecutor. He provided "invaluable information" about the atrocities in Rwanda and those responsible and agreed to testify for the Prosecutor in the trials of others. [FN31] This cooperation, which is also considered a mitigating factor in most national jurisdictions, is incredibly useful to the Prosecutor. In addition to saving investigation resources, it gives the Prosecutor an unparalleled view into the workings of the Rwandan government and the planning and execution of the atrocities. Such evidence can be used effectively in prosecuting other accused.

Critics of the Kambanda Judgement argue that imposing a life sentence upon an accused who has pleaded guilty and cooperated with the Prosecutor demonstrates a lack of concern for the policy constraints that affect the ICTR and ICTY. [FN32] Judicial economy and budgetary constraints, while significant concerns to any court, are particularly important to the operations of the Tribunals. After all, ICTR Trial Chambers have sentenced only eight defendants during the seven years of the Tribunal's existence. [FN33] while over twenty others await the beginning of their trials. [FN34]

Because judicial economy benefits greatly from guilty pleas, both Tribunals should encourage those rightfully charged to plead guilty. Many people argue, however, that by imposing the harshest possible penalty upon Kambanda, the ICTR Trial Chamber failed to encourage this behavior. After Kambanda, critics contend, "lawyers practicing before the ICTR have less motivation to encourage defendants to plead guilty if there is the possibility that the sentence will be the same as that received following a trial." [FN35] Furthermore, because both Tribunals must rely on the co-operation of *60 other authorities to arrest and detain indictees, [FN36] the Tribunals should do everything in their power to encourage indictees (and those who have committed atrocities but have not yet been indicted) to come forward, confess their crimes, and co-operate with the

Prosecutor. The Trial Chamber, many argue, also diminished this goal by imposing the harshest possible sentence on Kambanda.
Nevertheless, despite the policy considerations that point to a more lenient sentence, the Trial Chamber's sentence of life imprisonment for Kambanda was appropriate. One need only look to the sentence that Kambanda would have received had he been tried in Rwanda, the gravity of his crimes, his position of power, and the sentencing goals of both Tribunals to justify the life sentence imposed.
Although ICTR Trial Chambers are not bound by the sentencing practice of Rwanda, the Statute and Rules of the ICTR do require that they take into account the country's sentencing practice. In doing so, the Trial Chamber in Kambanda noted that had Kambanda been tried and found guilty in Rwanda, he would have been included in the most serious category of offenders and would have received the death penalty. [FN37] If the Trial Chamber had given Kambanda anything other than a life sentence, it would have demonstrated a lack of comprehension of the magnitude and seriousness of his crimes. Such a decision could have strained the relationship between the ICTR and the Rwandan government and caused the Tribunal to lose legitimacy in the eyes of the Rwandan people.
Assuming the Trial Chamber had not given Kambanda a life sentence, it would be difficult to imagine the kind of perpetrator deserving of such a sentence. After all, Kambanda held the highest position in a government that systematically planned, instigated, and carried out the murder of hundreds of thousands of people. Kambanda not only knew of the atrocities and failed to take any action to punish the perpetrators, but he voluntarily participated in the *61 effort to exterminate all Tutsis. The crimes alone are of the utmost gravity, but are rendered even more shocking by Kambanda's leadership position.
Furthermore, Kambanda's sentence coincides with the twin goals of deterrence and retribution that have served as the prime justifications for the Tribunals' sentencing judgments. By sentencing Kambanda to life imprisonment, the ICTR Trial Chamber both warns future Rwandan leaders that they will be held accountable for their behavior and expresses the shock and outrage of the international community. Any sentence less than life imprisonment would not have sufficiently served these goals.

ii. Serushago
On December 14, 1998, Omar Serushago pleaded guilty to genocide and crimes against humanity, including murder, extermination, and torture. [FN38] He was a leader of the interhamwe [FN39] in Gisenyi and commanded a group of militiamen during the atrocities in Rwanda. He personally killed four Tutsis and ordered militiamen under his command to execute thirty-three other Tutsi and moderate Hutu. [FN40] The ICTR Trial Chamber considered the following aggravating factors in determining Serushago's sentence: that he committed extremely serious offenses and ordered his subordinates to do so as well, that he played a leading role and participated in the planning of the fate of the Tutsis, and that he committed crimes voluntarily, knowingly, and with premeditation. [FN41]
The Trial Chamber additionally found substantial mitigating circumstances. For example, Serushago cooperated with the Prosecutor, resulting in the arrest and detention of several high-ranking officials suspected of committing crimes during the genocide, and he agreed

to testify as a prosecution witness in other trials before the ICTR. [FN42] Furthermore, he voluntarily surrendered, even though he had not been indicted by the ICTR and was not on the list of persons wanted by the Rwandan government, and he pleaded guilty. [FN43] Other mitigating factors included Serushago's highly politicized upbringing, his lack of formal military training, the assistance he gave to certain potential Tutsi victims, his individual circumstances, including his six children and his age of thirty-seven years, and his public expression of remorse and contrition. [FN44] The Trial Chamber believed that these mitigating circumstances demonstrated a possibility of rehabilitation for Serushago and *62 sentenced him to a single term of fifteen years imprisonment. [FN45] The Appeals Chamber subsequently upheld this sentence. [FN46]

iii. Erdemovic

Drazen Erdemovic pleaded guilty to murder as a crime against humanity on May 31, 1996 and was sentenced to ten years imprisonment. [FN47] However, in his appeal against the Sentencing Judgement, the Appeals Chamber held that his guilty plea was not informed, and directed that he be allowed to replead. [FN48] In the new hearings in front of the Trial Chamber, Erdemovic pleaded guilty to a violation of the laws and customs of war and was sentenced to five years imprisonment. [FN49]

As a member of the 10th Sabotage Detachment of the Bosnian Serb Army, Erdemovic participated in one of the many massacres of Muslim men that occurred during the fall of Srebrenica. [FN50] Busloads of Muslim civilian men, who had surrendered to the Bosnian Serbs, were transported to a collective farm where Erdemovic and the other members of his unit awaited them. [FN51] As the Muslim men arrived, Erdemovic and other soldiers lined them up and executed them by shooting them in the back with automatic rifles. [FN52] The killings lasted through July 16, 1995 and resulted in the deaths of over one thousand Bosnian Muslim men. [FN53] Erdemovic personally killed between seventy and one hundred of these men. [FN54]

In arriving at a sentence of five years, the ICTY Trial Chamber found few aggravating circumstances and myriad mitigating factors. In aggravation, it considered "the magnitude of the crime and the scale of [Erdemovic's] role in it," as well as the fact that Erdemovic continued to kill throughout most of the day of the massacre. [FN55]

In mitigation, it cited positive factors relating to Erdemovic's personal circumstances, his character, his admission of guilt, his remorse, his cooperation with the Prosecutor, and the duress under which he committed the *63 crime. The Trial Chamber believed Erdemovic to be ripe for reform. [FN56] It found his youthful age (of twenty-three years) at the time of the commission of the crime, his lack of command authority in the crime, and his pacifist and anti-nationalist beliefs all demonstrated a likelihood for successful rehabilitation. [FN57] It further held that Erdemovic's genuine remorse for his crimes and his admission of guilt were considerable mitigating factors. [FN58] The Trial Chamber rationalized that the admission of guilt encourages others to come forward and confess to the Tribunal, which saves it valuable time and resources. [FN59]

The Trial Chamber also found that Erdemovic's substantial cooperation with the Prosecutor justified considerable mitigation. Erdemovic gave the Prosecutor valuable information regarding the killings at Srebrenica and the Bosnian Serb Army. Moreover, he testified in a Rule 61 [FN60] hearing against Karadzic and Mladic and expressed willingness to testify in the future. [FN61] Finally, the Trial Chamber acknowledged that

Erdemovic participated in the massacre under duress. He initially protested against shooting the prisoners, but his superiors threatened to kill him if he did not participate. Thus, although duress could not be a complete defense to Erdemovic's crime, the Trial Chamber considered it a mitigating circumstance. [FN62]

a. Sentences of Five and Fifteen Years

The Trial Chambers in the Erdemovic and Serushago Sentencing Judgements placed excessive emphasis on relevant mitigating factors and, as a result, imposed exceedingly lenient terms of imprisonment. Prison sentences of five and fifteen years, respectively, do not reflect the gravity of the crimes committed and do not further the goals of deterrence and retribution.

Such light prison sentences for genocide, crimes against humanity, and war crimes are inconsistent with the sentencing practices of several national jurisdictions, including Rwanda, the former Yugoslavia, and the United States, as well as the sentencing practice of the ICTR. While the Tribunals are not bound by the sentencing practice of any national jurisdiction, punishments that are completely out of line with domestic sentencing practice are suspect.

*64 For example, Chapter 16 of the former Socialist Federal Republic of Yugoslavia ("SFRY") Criminal Code, entitled "Criminal Offenses Against Humanity and International Law," penalized genocide, crimes against humanity, and war crimes. Articles 141-144 covered crimes analogous to those brought against Erdemovic and direct punishment "by no less than five years in prison or by the death penalty." [FN63] Although Erdemovic did not deserve the maximum sentence because of significant mitigating circumstances, sentencing him to the minimum term of imprisonment possible in the former Yugoslavia is inexplicable, considering the magnitude of his crimes.

Serushago's sentence appears to be similarly inadequate in comparison to the sentence he would have received had he been tried in Rwanda. Under Rwandan law, Serushago would have been most likely tried as a Category I offender and would have received the death penalty if convicted. [FN64] In the unlikely event that he would have been tried as a Category II offender, he would have received a sentence of life imprisonment upon conviction. [FN65] Serushago's punishment, therefore, suggests that the ICTR Trial Chamber completely ignored Rwandan sentencing practice. [FN66]

Likewise, Erdemovic and Serushago would have likely received significantly higher sentences had they committed their crimes in the United States. Under federal law, a conviction for genocide or war crimes resulting in death carries with it a serious fine and/or life imprisonment. [FN67] A court may also impose the death penalty upon conviction for either of those crimes. [FN68]

Furthermore, Serushago's punishment is inconsistent with ICTR sentencing judgments issued both before and after Serushago's sentence. In addition to Serushago, the ICTR has convicted six persons accused of genocide. Five of them received sentences of life imprisonment while the other received a sentence of twenty-five years imprisonment. [FN69]

Even after considering the substantial mitigating factors, it remains difficult to justify Serushago's sentence of fifteen years in light of the sentences that others have received for committing genocide and crimes against humanity. For example, similar to Serushago, Musema was not a de *65 jure official. [FN70] Both men acted with the

intent to destroy the Tutsi in Rwanda, but Musema was sentenced to life imprisonment [FN71] while Serushago received a sentence of only fifteen years. Pleading guilty, cooperating with the Prosecutor, and demonstrating remorse are all significant mitigating factors; however, they do not justify the difference between life and fifteen years imprisonment in these cases.

Both Serushago and Erdemovic committed heinous crimes. They were each responsible for the deaths of defenseless civilians. Erdemovic personally killed between seventy and one hundred people and participated for hours in a massacre that resulted in the deaths of possibly 1,200 people, while Serushago killed and commanded others to kill with the intent to destroy the Tutsi. The Trial Chamber consequently held that in committing genocide, Serushago committed the "crime of crimes" and should be sentenced accordingly. [FN72] Thus, the sentences of five and fifteen years that Erdemovic and Serushago received, respectively, appear grossly disproportionate to the gravity of their confessed crimes. [FN73]

Additionally, the two sentences are completely inconsistent with the goals of retribution and deterrence. Even though these defendants confessed their guilt and expressed remorse, they should be punished accordingly for committing such horrendous crimes. The damage resulting from the crimes is not limited to the victims who lost their lives. It also includes the effect of the crimes upon the victims' families and their communities. Although both Tribunals may recognize that an accused must receive due punishment [FN74] and that they "must not lose sight of the tragedy of the victims and the sufferings of their families," [FN75] the sentences imposed upon Erdemovic and Serushago do not adequately reflect the retributive aspect of punishment.

If the Trial Chambers correctly surmised that both defendants were remorseful for their actions, then a lengthy prison sentence seems unnecessary for the purpose of specific deterrence. Arguably, these defendants understand and regret the serious and heinous nature of their crimes and would refrain from committing similar acts in the future. However, as discussed above, general deterrence is possibly a more significant goal of sentencing for international criminal crimes than specific deterrence. The sentences imposed as punishment for international crimes must be sufficiently severe to deter potential perpetrators from committing *66 such acts. Unfortunately, neither Erdemovic's nor Serushago's prison sentences "communicate the appropriate disgust or intolerance necessary to dissuade" potential perpetrators in the Balkans or Rwanda from massacring other innocent civilians. [FN76] In her criticism of the Erdemovic sentence, Mary Penrose comments: "The level of hate still festering in the Former Yugoslavia may encourage men and women to sacrifice five years of their respective lives to 'settle a score.'" [FN77] Sentences at the ICTY and ICTR should demonstrate that "no one is permitted to engage in ethnic cleansing, rape, genocide, torture, murder, or any other crime against humanity." [FN78] Unfortunately, Erdemovic's and Serushago's sentences do not adequately fulfill this goal. General sentencing guidelines, which place certain limits on a Trial Chamber's discretion with regard to aggravating and mitigating circumstances, can help Trial Chambers make more appropriate sentencing determinations in the future.

B. The Lack of a Separate Sentencing Hearing

i.The Change in Procedure

Both the ICTY and ICTR formerly held separate sentencing hearings and issued separate sentencing decisions in their initial cases. The Rules of Procedure and Evidence of both Tribunals implied this distinction, although neither their Rules nor their Statutes specifically mandated a sentencing hearing distinct from the trial. [FN79] Under Rule 100 (Pre-Sentencing Procedure), the Prosecutor and Defense could submit information that would be relevant to the Trial Chamber in determining an appropriate sentence after a defendant had pleaded guilty or the Trial Chamber had rendered a guilty verdict. [FN80] The original version of Rule 85, which governed the presentation of evidence at trial, did not include evidence pertaining to sentencing in the types of evidence that were appropriate to present at trial. [FN81]

*67 In practice, the Trial Chambers refused to hear evidence relevant only to sentencing before rendering a verdict. [FN82] For example, in the Tadic case, the ICTY Trial Chamber held as follows:

[N]o information that relates exclusively to sentencing should be presented by a witness during the trial as to the guilt or innocence of the accused. So, if a witness is testifying about guilt or innocence of the accused, that witness should not be able at the same time to offer evidence exclusively as to sentencing. [FN83]

Pursuant to this policy, the Trial Chambers in both Tadic and Akayesu held sentencing hearings after they had already determined the guilt of the accused. [FN84]

The separation of the guilt or innocence phase of the proceedings from the sentencing hearing is characteristic of several common law jurisdictions. Criminal trials held in Canada and England, as well as those held in the federal courts of the United States include a sentencing hearing that is distinct from the part of the trial in which the judge or jury determines the guilt or innocence of the defendant. [FN85]

The Tribunals' practice of holding a separate sentencing hearing after an accused had been found guilty ended in July 1998. The Judges abandoned the common law approach and modified the Rules to conformwith the civil law approach to sentencing. The Judges eliminated any suggestion of a separate sentencing phase from the Rules and added language requiring that the guilt or innocence and sentencing phases occur as part of the same proceeding. [FN86] Rule 85 currently allows the Prosecutor and Defense to present "any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more of the charges in the *68 indictment." [FN87] Rule 86 states that the parties shall "address matters of sentencing in closing arguments." [FN88] Finally, Rule 87 requires the Trial Chamber to determine the penalty to be imposed if it finds the accused guilty of the charge or charges against him or her. [FN89]

The motivation behind this change in procedure is not entirely clear because the Judges do not publish the reasoning behind their decisions to change the Rules of Evidence and Procedure. However, this change was probably an effort to save time and money by having only one proceeding instead of two. For example, following the change in the Rules, a witness who was a victim of atrocities in the Balkans could testify about the guilt of the accused and about the effect of the injury during the same proceeding. This avoids the need to have a break between the guilt or innocence phase and the sentencing hearing and allows the Prosecutor and Defense time to prepare their sentencing submissions. It

also eliminates the administrative hassle of scheduling and holding a second proceeding, thereby freeing the Trial Chamber to move on to other cases.
Furthermore, the change can be cost-effectivewith regard to particular witnesses. If the victim considered in the above example still lived in the Balkans, he or she would have to come to The Hague twice - once to testify regarding the guilt of the accused and a second time to testify about the impact of the injury on the victim. Two trips are both more costly to the Tribunal and more disruptive to the victim's life. The Judges eliminated this problem by amending the Rules.
Nevertheless, the Judges may have compromised the fairness of the trials through their efforts to save time and money. Their decision to eliminate a distinct sentencing hearing from the Tribunals' proceedings could put an accused at a serious disadvantage by limiting possible strategies for his defense. [FN90] Furthermore, this change could jeopardize an accused's right to be tried by neutral and objective Judges. Thus, the risks involved in conducting only one proceeding heavily outweigh any savings of time and money.
The elimination of a separate sentencing hearing may limit the tactical decisions that an accused can make at trial. "As a general matter, an indictee who has pleaded not guilty may not wish to present evidence relevant to sentencing prior to a conviction, so as not to prejudice the outcome on the merits . . ." [FN91] After all, there is a certain lack of logic in having an accused present evidence on an appropriate sentence for crimes to which he pleaded not guilty and has not yet been convicted.
*69 Furthermore, this change diminishes a defendant's right to silence at trial. [FN92] Article 21 of the ICTY Statute and Rule 85 of the ICTY Rules give an accused the right to testify in his own defense, but protects him from being "compelled to testify against himself or to confess guilt." [FN93] A defendant "may be in a position to submit relevant evidence in mitigation of sentence, for example concerning the individual's specific role in the crimes vis-a-vis accomplices, or efforts by the offender to reduce the suffering of the victim." [FN94] Unfortunately, the "only way to introduce such evidence may be for the accused to renounce the right to silence and the protection against self-incrimination." [FN95]
Finally, the rule change may negatively impact the fairness and legitimacy of trials at the Tribunals beyond the tactical disadvantages to the accused discussed above. It may undermine the right of a defendant to be presumed innocent until proved guilty, [FN96] as well as his right to a fair trial. [FN97] Without a separate sentencing hearing, evidence that is often relevant only to sentencing, such as victim-impact testimony, must be heard at trial. This evidence is often poignant and extremely disturbing. It has minimal probative value concerning the primary issue of guilt or innocence, and the danger of unfair prejudice to an accused is substantial. Therefore, the presentation of sentencing evidence during the guilt and innocence phase may endanger the integrity of the judicial process at the Tribunals.

ii. The Krstic Trial
The trial of General Radislav Krstic demonstrates the negative impact that the presentation of sentencing evidence during the trial can have on the perception and possibly the reality of the fairness of the proceedings. General Krstic was the Chief of Staff and Commander of the Drina Corps of the Bosnian Serb Army, [FN98] which was

responsible for "crimes committed following the take-over of Srebrenica." [FN99] He was tried for genocide, crimes against humanity, and war crimes for his role in the events that occurred in Srebrenica in July 1995. [FN100] The Prosecutor contended that Krstic was responsible for the murder of over seven thousand Muslim men and the deportation of Muslim women and children from the Srebrenica enclave to Bosnian government held *70 territory, specifically Tuzla. [FN101] General Krstic pleaded not guilty to the charges against him and argued that a parallel chain of command, under the control of General Mladic, planned and carried out the atrocities that occurred during and after the fall of the enclave. [FN102] ICTY Trial Chamber I, consisting of Presiding Judge Almiro Rodrigues, Judge Fouad Riad, and Judge Patricia Wald, heard the case and found General Krstic guilty of genocide, crimes against humanity, and war crimes. [FN103]

The Prosecutor ended its case against Krstic by calling three victim impact witnesses to testify. One of these witnesses, witness DD, [FN104] was a Bosnian Muslim woman who had been deported from Srebrenica to Tuzla by the Bosnian Serbs. [FN105] The other two witnesses were a psychologist and therapist, who worked with the women and children in Tuzla that comprised the remnants of the Bosnian Muslim community of Srebrenica. [FN106]

These witnesses gave intensely moving and emotional testimony about the disastrous effect that the massacres have had on the surviving Muslims of Srebrenica. Witness DD gave the following testimony regarding her youngest son who was taken away by a Bosnian Serb soldier and is presumed dead:

As a mother, I still have hope. I just can't believe that this is true. How is it possible that a human being could do something like this, could destroy everything, could kill so many people? Just imagine this youngest boy I had, those little hands of his, how could they be dead? I imagine those hands picking strawberries, reading books, going to school, going on excursions. Every morning I wake up, I cover my eyes not to look at other children going to school, and husbands going to work, holding hands. [FN107]

She then concluded her testimony by imploring the Judges to ask General Krstic to give her information on her missing child, asking if he is still alive and if he will return. [FN108] Next, Witnesses Zecevic and Ibrahimefendic described at length the patriarchal nature of the Muslim community that *71 existed in Srebrenica. They explained that because of this phenomenon, the surviving women have had major difficulties adjusting to life without their husbands, sons, fathers, and brothers. They also testified as to the impoverished conditions in which the Srebrenica Muslims live and the difficulties that they have had in adjusting from their rural life in Srebrenica to city life in Tuzla. [FN109]

The Judges' reaction to this testimony shows that they are not immune from such powerful images. In response to Witness DD's testimony, Judge Riad told her that "we understand and feel for your pain, but there is a life ahead of you, and the whole world is on your side." [FN110] Judge Riad's consolation of this witness is commendable; however, stating that the "whole world" is on the side of a prosecution witness is, at the same time, troubling because the Judges have a duty to remain neutral and objective throughout the trial.

Furthermore, when Witness DD finished testifying, Judge Wald thanked her and said that her testimony "will help us in making our decision." [FN111] The potential implications of Judge Wald's comment are disturbing when one considers that Witness DD's testimony was relevant only to sentencing. One interpretation is that Judge Wald meant that the

testimony would help the Trial Chamber determine guilt or innocence. If so, evidence relevant only to sentencing colored the Judges' analysis of the evidence pertaining to guilt or innocence. A second interpretation is that Judge Wald believed that the testimony would helpthe Judges decide on an appropriate sentence for General Krstic. When one considers that only those defendants that have been found guilty are sentenced, this interpretation suggests that Judge Wald had already found Krstic guilty. This result is particularly troubling because the General had not yet begun his defense. Most likely, neither of the above interpretations is correct, and Judge Wald made the comment merely out of politeness to the witness. Regardless, her statement demonstrates the danger that the elimination of a separate sentencing hearing poses to the perception of justice at the ICTY.

Many observers argue that the current system does not adversely affect the quality of justice at the ICTY. They claim that the Tribunal, like courts in civil law countries, is staffed by "professional judges." After years of training and experience, these judges supposedly can isolate the effect of the victim impact testimony and insure that it only affects their sentencing determination and not the determination of guilt or innocence. These arguments are unpersuasive for several reasons. First, trial judges in civil law systems normally do not handle cases involving crimes of the same magnitude, complexity, and shocking nature as those attributed to General *72 Krstic. A civil law judge, judging a defendant accused of committing a single murder, will preside over a shorter trial with less witnesses and exhibits. In theory, therefore, it is easier for such a judge to guard against evidence relevant only to sentencing from improperly affecting his or her determination of guilt or innocence.

In contrast, Prosecutor v. Krstic was massive, both in terms of the crimes charged in the indictment and the trial itself. As discussed above, the Prosecutor charged Krstic with individual and command responsibility for the deportation of between 17,000 and 35,000 Bosnian Muslim women and children and the murder of approximately 7,500 Bosnian Muslim males. [FN112] The trial lasted ninety-eight days, and the Trial Chamber heard testimony from over 110 witnesses and examined approximately 1,000 exhibits. [FN113] Accordingly, the potential for victim-impact testimony to impede an objective analysis of the evidence relevant to guilt or innocence is significantly greater in Prosecutor v. Krstic than in a typical criminal case in a civil law system.

Furthermore, the background of judges in civil law jurisdictions is different from the background of the judges at the Tribunals. A lawyer in a civil law jurisdiction usually must undergo extensive judicial training and testing before he or she becomes a judge. After becoming a judge, he or she will routinely make decisions concerning both law and fact because most civil law jurisdictions do not rely on juries to make decisions of fact. In contrast, the judges at the Tribunals often are not "professional judges" in the civil law sense. Although some of them were judges in their respective national jurisdictions prior to arriving at the Tribunals, many of them had no prior experience on the bench. Of those that had prior judicial experience, it was often in common law countries, where juries, not judges, make factual determinations.

Examining the background of the Judges in the Krstic trial highlights these differences. Judge Almiro Rodrigues, the Presiding Judge, took a one year training course before becoming a judge in Portugal in 1982. [FN114] This course reflects his only judicial experience prior to working at the ICTY. [FN115] Afterwards, he worked as a prosecutor

in Portugal and taught law at the university level. [FN116] Similarly, Judge Fouad Riad had not had any experience as a judge before arriving at the Tribunal. His legal career was almost exclusively in academia. [FN117] On the other hand, Judge Patricia Wald had extensive judicial experience before arriving at the Tribunal. She served as a justice on the U.S. Court of Appeals for the D.C. Circuit for twenty years prior *73 to assuming her position at the ICTY. [FN118] Her experience, however, was completely different from that of a civil (or common law) judge at the trial level. As an appellate judge, her work did not consist of listening to highly emotional witness testimony, and she dealt primarily with questions of law, not fact. Therefore, even though Judge Wald has many years of experience on the bench, she does not have the relevant trial experience that would make her comparable to a trial judge in a civil law system. The Judges' backgrounds consequently reveal that they have not had extensive experience with lengthy and emotional trials such as Prosecutor v. Krstic.

The separate sentencing phase enhanced the perception of justice even if, as some people argue, it did not enhance the reality of justice. Present-day observers and tomorrow's historians will perceive the ICTY and ICTR as legitimate institutions only if the proceedings are eminently fair. Unfortunately, the elimination of a separate sentencing hearing jeopardizes the perception of fairness at the Tribunals in return for mere marginal increases in operating efficiency.

iii. The Rome Statute of the ICC

The Judges of the ICTY and ICTR should look to the Rome Statute of the International Criminal Court (ICC) [FN119] for guidance on the issue of a separate sentencing phase. Article 76 of the Rome Statute states, "the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence." [FN120] Commentators on the ICC explain that this provision "creates a strong presumption in favour of a distinct sentencing hearing following conviction." [FN121] Therefore, in a lengthy, complex, and highly emotional case, such as Prosecutor v. Krstic, the parties or the Trial Chamber may demand a separate sentencing proceeding. In contrast, a Trial Chamber may consider all relevant evidence in one proceeding when both parties and the Trial Chamber agree that the accused will not be unfairly prejudiced. If adopted by the ICTY and ICTR, a similar provision would enhance the legitimacy of the Tribunals' proceedings and, when appropriate, save time and money.

V. Conclusion

The ICTY and ICTR should reassess certain aspects of their sentencing practices, as revealed by the above discussion. With regard to the use of *74 aggravating and mitigating circumstances, the Trial Chambers must refrain from deviating substantially from the principles of deterrence and retribution merely because of the existence of mitigating factors. In light of the complexity of many of the Tribunals' cases, the Judges should stress legitimacy over marginal cost-effectiveness and adopt a provision similar to that of Article 76 of the Rome Statute of the ICC. Such a provision, which would enable either party or the Trial Chamber to call for a separate sentencing hearing, would help ensure the neutrality and objectivity of the Judges.

The ICTY and ICTR are "developing an unprecedented jurisprudence of international humanitarian law." [FN122] Although the evolution of substantive international criminal law receives the most attention, the Tribunals must also concentrate on sentencing law and procedure. The development of appropriate sentencing law and procedure will help ensure that punishments imposed by the Tribunals are fair and legitimate, and it will serve as a valuable precedent for the ICC and other courts tasked with judging those accused of similar atrocities. Perhaps most importantly, it will advance the Tribunals' roles as vehicles for peace and reconciliation in the former Yugoslavia and Rwanda.

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I am indebted to my friends and colleagues at the Tribunal for their lively discussions and correspondence on sentencing and other issues. Special thanks to Tina Giffin for her encouragement to write on this topic and her insightful comments on sentencing at the Tribunals.

[FN1]. See UN Sec. Council Res. 827, UN SCOR, 48th Sess., 3217th mtg., UN Doc. S/RES/827 (1993).

[FN2]. See UN Sec. Council Res. 955, UN SCOR, 49th Sess., 3453rd mtg., UN Doc. S/RES/955 (1994).

[FN3]. See William A. Schabas, Sentencing by International Tribunals: A Human Rights Approach, 7 Duke J. Comp. & Int'l l. 461, 461 (1997).

[FN4]. Statute of the International Criminal Tribunal for the former Yugoslavia Art. 23(1), in Report of the Secretary General Pursant to Paragraph 2 of UN Sec. Council Res. 808, UN Doc. S/25704 (1993) [hereinafter ICTY Statute].

[FN5]. Id. at Art. 24

[FN6]. See Statute of the International Criminal Court for Rwanda, Article 23, in UN Sec. Council Res. 955, UN SCOR, 49th Year, Res. And Dec., at 15, UN Doc. S/INF/50 (1994) [hereinafter ICTR Statute].

[FN7]. ICTY Statute, Article 15 states: "The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters." See ICTY Statute, supra note 4, at Art. 15. Article 14 of the ICTR Statute gives the judges of the Rwanda Tribunal identical powers. See ICTR Statute, supra note 5, at Art. 14.

[FN8]. Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, Rule 101, March 14, 1994, as amended [hereinafter ICTY Rules]. Rule 101 of the Rwanda Tribunal is almost identical. See Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, Rule 101, July 5, 1995, as amended [hereinafter ICTR Rules].

[FN9]. See http://www.un.org/icty (last visited Dec. 7, 2001) Prosecutor v. Tadic, Case No. IT-94-1-T, Sentencing Judgement, July 14, 1997 [hereinafter Tadic Sentencing Judgement ]; Prosecutor v. Erdemovic, Case No. IT-96-22- Tbis, Sentencing Judgement, Mar. 5, 1998, [hereinafter Erdemovic Sentencing Judgement]; Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgement, Dec. 10, 1998, [hereinafter Furundzija Judgement]; Prosecutor v. Delalic, Case No. IT-96-21-T, Judgement, Nov. 16, 1998 [hereinafter Delalic Judgement]; Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Judgement, June 25, 1999; Prosecutor v. Jelisic, Case No. IT-95-10-T, Judgement, Dec. 14, 1999; Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgement, Mar. 3, 2000 [hereinafter Blaskic Judgement]; Prosecutor v. Kupreskic, Judgement, Case No. IT-95-16-T, Jan. 14, 2000 [hereinafter Kupreskic Judgement]; Prosecutor v. Kunarac, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgement, Feb. 22, 2001; Prosecutor v. Kordic, Case No. IT-95-14/2-T, Judgement, Feb. 26, 2001; Prosecutor v. Todorovic, Case No. IT-95-9/1-S, Sentencing Judgement, July 31, 2001; Prosecutor v. Krstic, Case No. IT-98-33-T, Judgement, Aug. 2, 2001 [hereinafter Krstic Judgement]; Prosecutor v. Sikirica et al., Case No. IT-95-8, Sentencing Judgement, Nov. 13 2001; Prosecutor v.Kvocka et al., Case No. IT-98-30/1, Judgement, Nov. 3,2001; Prosecutor v. Kupreskic et al., Case No.IT-95-16-A, Judgement, Oct. 23, 2001. See http://www.ictr.org (last visited Dec. 7, 2001) Prosecutor v. Rutaganda, Case No. ICTR-96-3, Judgement and Sentence, Dec. 6, 1999 [hereinafter Rutaganda Judgement and Sentence]; Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Sentence, Oct. 2, 1998 [hereinafter Akayesu Sentence]; Prosecutor v. Kambanda, Case No. ICTR-97-23- S, Judgement and Sentence, Sept. 4, 1998, [hereinafter Kambanda Judgement and Sentence]; Prosecutor v. Serushago, Case No. ICTR-98-39-S, Sentence, Feb. 5, 1999 [hereinafter Serushago Sentence]; Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T, Judgement and Sentence, May 21, 1999 [hereinafter Kayishema Judgement and Sentence]; Prosecutor v. Musema, ICTR-96- 13-T, Judgement and Sentence, Jan. 27, 2000 [hereinafter Musema Judgement and Sentence]; Prosecutor v. Ruggiu, Case No. ICTR-97-32-I, Judgement and Sentence, June 1, 2000 [hereinafter Ruggiu Judgement and Sentence].

[FN10]. See Erdemovic Sentencing Judgement, supra note 9, at para. 23; Kvocka Judgement, supra note 9, at para. 757.

[FN11]. See Krstic Judgement, supra note 9, at para. 727.

[FN12]. See Ruggiu Judgement and Sentence, supra note 9.

[FN13]. See Kambanda Judgement and Sentence, supra note 9, at Verdict; Akayesu Sentence, supra note 9; See Musema Judgement and Sentence, supra note 9; Kayishema Judgement and Sentence, supra note 9, at para. 32; Rutaganda Judgement and Sentence,

supra note 9.

[FN14]. See generally George P. Fletcher, Rethinking Criminal Law 409-18, 461-63, 814-17 (2000).

[FN15]. See Kupreskic Judgement, supra note 9, at para. 848.

[FN16]. See Schabas, supra note 3, at 503-05.

[FN17]. See ICTY Statute, supra note 4, at Art. 24; ICTY Rules, supra note 8, at Rule 101; ICTR Statute, supra note 6, at Art. 23; ICTR Rules, supra note 4, at Rule 101.

[FN18]. See Blaskic Judgement, supra note 8, at para. 767.

[FN19]. See Kambanda Judgement and Sentence, supra note 9, at para. 40.

[FN20]. See id. at paras. 39-44.

[FN21]. See id. at para. 39.

[FN22]. See id. at para. 42.

[FN23]. Id. at para. 44.

[FN24]. Id. at para. 61.

[FN25]. See id. at paras. 46-62.

[FN26]. Id. at para. 62.

[FN27]. See id. at Verdict; See ICTR Statute, supra note 6, at Art. 23.

[FN28]. See Kambanda v. Prosecutor, Case No. ICTR-97-23-A, Judgement, Oct. 19, 2000, para. 126.

[FN29]. See Kambanda Judgement and Sentence, supra note 9, at paras. 53, 61; ICTR Statute, supra note 6, at Art. 23; ICTY Statute, supra note 4, at Art. 24.

[FN30]. See Schabas, supra note 3, at 496.

[FN31]. See Kambanda Judgement and Sentence, supra note 9, at para. 47.

[FN32]. See Mary Penrose, Lest We Fail: The Importance of Enforcement in International Criminal Law, 15 Am. U. Int'l L. Rev. 321, 383-86 (2000).

[FN33]. See ICTR List of Detainees, http://www.ictr.org, (last visited Dec. 7, 2001).

[FN34]. See id.

[FN35]. See Penrose, supra note 32, at 384.

[FN36]. See generally Paolo Gaeta, Is NATO Authorized or Obliged to Arrest Persons Indicted by the ICTY?, 9 Emory J. Int'l l. 174, 174-81(1998); see Susan Lamb, The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia, 70 Brit. Y.B. Int'l l. 165, 165-244 (1999).

[FN37]. See Kambanda Judgement and Sentence, supra note 9, at para. 18. The Trial Chamber based this discussion on Organic Law No. 8/96, the Rwandan Organic Law on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity, committed since Oct. 1, 1990. See id. The most serious offenders fall into Category 1 (of 4) and, if found guilty, are punished by death. See id. Persons in Category 1 include the following: "a) persons whose criminal acts or those whose acts place them among planners, organizers, supervisors and leaders of the crime of genocide or of a crime against humanity; b) Persons who acted in positions of authority at the national, prefectural, communal, sector or cell, or in a political party, the army, religious organizations, or militia and who perpetrated or fostered such crimes; c) Notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities, distinguished themselves in their areas of residence or where they passed; d) Persons who committed acts of sexual violence." Id.

[FN38]. See Serushago Sentence, supra note 9, at para 4.

[FN39]. The interhamwe was a Hutu youth militia that participated in the genocide in Rwanda. See Philip Gourevitch, We Wish to Inform You That Tomorrow We Will Be Killed With Our Families 93 (Picador USA 1998).

[FN40]. See Serushago Sentence, supra note 9, at paras. 25-29.

[FN41]. See id. at paras. 27-30.

[FN42]. See id. at paras. 31-33.

[FN43]. See id. at paras. 34-35.

[FN44]. See id. at paras. 36-42.

[FN45]. See id. at paras. 39, Verdict.

[FN46]. See Serushago v. Prosecutor, Case No. ICTR-98-39-A, Reasons for Judgement, Apr. 6, 2000, para. 34.

[FN47]. See Erdemovic Sentencing Judgement, supra note 9, at paras. 5-6.

[FN48]. See id. at para. 7. The Appeals Chamber found that Erdemovic's guilty plea was not informed because he pleaded guilty to murder as a crime against humanity instead of murder as a war crime, without knowing that the Trial Chamber would consider murder as a crime against humanity a more serious crime. See id.

[FN49]. See id. at paras. 8, 23.

[FN50]. See id. at para. 13.

[FN51]. See id.

[FN52]. See id.

[FN53]. See id.

[FN54]. See id. at paras. 13-15.

[FN55]. Id. at para. 15.

[FN56]. Id. at para. 16.

[FN57]. See id.

[FN58]. See id. Erdemovic came forward voluntarily and confessed to the Tribunal before his involvement in the massacre was known to any investigating authorities. See id.

[FN59]. See id.

[FN60]. Rule 61 sets out a detailed procedure in case of failure to execute a warrant for arrest for a person indicted pursuant to the jurisdiction of the ICTY. See ICTY Rules, supra note 8, at Rule 61.

[FN61]. See Erdemovic Sentencing Judgement, supra note 9, at para. 16. Erdemovic was also a prosecution witness in Prosecutor v. Krstic, Case No. IT-98-33-T. See id.

[FN62]. See id. at para. 17.

[FN63]. SFRY Penal Code, Arts. 141-144; See Furundzija Judgement, supra note 9, at para. 285 (citing Art. 142 and Tadic Sentencing Judgement, supra note 9, at para. 8).

[FN64]. See supra note 37.

[FN65]. See Kambanda Judgement and Sentence, supra note 9, at paras. 18- 19.

[FN66]. The Trial Chamber was obviously aware of Rwandan sentencing practices; however, this is not reflected in the final sentence. See Serushago Sentence, supra note 9, at paras. 17, Verdict.

[FN67]. See 18 U.S.C.A. § 2441 (2001).

[FN68]. See Id.

[FN69]. Kambanda, Akayesu, Kayishema, Rutaganda, and Musema were sentenced to life imprisonment. See Kambanda Judgement and Sentence, supra note 9, at Verdict; Akayesu Sentence, supra note 9; Kayishema Judgement and Sentence, supra note 9, at para. 32; Rutaganda Judgement and Sentence, supra note 9; Musema Judgement and Sentence, supra note 9. Ruzindana was sentenced to twenty-five years imprisonment. Kayishema Judgement and Sentence, supra note 9.

[FN70]. Musema was the Director of the Gisovu Tea Factory. See Musema Judgement and Sentence, supra note 9, at para. 12.

[FN71]. See Musema Judgement and Sentence, supra note 9, at Sentencing. The Appeals Chamber recently affirmed Musema's sentence of life imprisonment. See Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgement, Nov. 16, 2001.

[FN72]. Serushago Sentence, supra note 9, at para. 15.

[FN73]. See Daniel B. Pickard, Proposed Sentencing Guidelines for the International Criminal Court, 20 Loy. L.A. Int'l & Comp. L.J. 123, 134-37 (1997).

[FN74]. See Serushago Sentence, supra note 9, at para. 20.

[FN75]. Erdemovic Sentencing Judgement, supra note 9, at para. 21.

[FN76]. Penrose, supra note 32, at 382.

[FN77]. Id. at 382-83

[FN78]. Id. at 383.

[FN79]. See William A. Schabas, Article 76: Sentencing, in Commentary on the Rome Statute of the International Criminal Court 980, 981 (Otto Triffterer ed., 1999).

[FN80]. The Nov. 12, 1997 version of Rule 100, entitled "Pre-sentencing Procedure," stated: "If the accused pleads guilty or if a Trial Chamber finds the accused guilty of a crime, the Prosecutor and the defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence." Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.12 (1997).

[FN81]. The Nov. 12, 1997 version of Rule 85, entitled "Presentation of Evidence," stated: (A) Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence: (i) evidence for the prosecution; (ii) evidence for the defence; (iii) prosecution evidence in rebuttal; (iv) defence evidence in rejoinder; (v) evidence ordered by the Trial Chamber pursuant to Rule 98. (B) Examination-in-chief, cross-examination and re-examination shall be allowed in each case. It shall be for the party calling a witness to examine such witness in chief, but a Judge may at any stage put any question to the witness. (C) If the accused so desires, the accused may appear as a witness in his or her own defence. Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.12 (1997).

[FN82]. See Schabas, supra note 79, at 981.

[FN83]. Tadic Sentencing Judgement, supra note 9, Transcript of Trial, May 3, 1996 (cited in Schabas, supra note 79, at 981).

[FN84]. See Tadic Sentencing Judgement, supra note 9; Akayesu Sentence, supra note 9.

[FN85]. Section 720 of the Canadian Criminal Code states: "A court shall, as soon as practicable after an offender has been found guilty, conduct proceedings to determine the appropriate sentence to be imposed." Martin's Annual Criminal Code (2000); See also Archbold, Chapter 5, Section I "Procedure Between Verdict or Plea and Sentence" (2000) for sentencing procedures in England; See also Fed. R. Crim. P. 32 for sentencing procedures in the United States.

[FN86]. See Schabas, supra note 79, at 981; See Sean D. Murphy, Developments in International Criminal Law: Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, 93 Am. J. Int'l l. 57, 92 (1999).

[FN87]. See ICTY Rules, supra note 8, at Rule 85.

[FN88]. See id. at Rule 86.

[FN89]. See id. at Rule 87.

[FN90]. See Schabas, supra note 79, at 981.

[FN91]. Murphy, supra note 86, at 92.

[FN92]. See Schabas, supra note 79, at 981.

[FN93]. See ICTY Statute, supra note 4, at Art. 21(g); ICTY Rules, supra note 8, at Rule 85.

[FN94]. Schabas, supra note 79, at 981.

[FN95]. Id.

[FN96]. See ICTY Statute, supra note 4, at Art. 21(3) (stating that the "accused shall be presumed innocent until proved guilty according to the provisions of the Statute.").

[FN97]. See id. at Art. 21(2) (stating that the "accused shall be entitle to a fair and public hearing.").

[FN98]. See Krstic Judgement, supra note 9, at para. 3.

[FN99]. Id.

[FN100]. See Id.

[FN101]. See Amended Indictment, Prosecutor v. Krstic, Case No. IT-98-33- T, Aug. 2, 2001 [hereinafter Krstic Amended Indictment].

[FN102]. See Trial Transcript, Oct. 16, 2000, Prosecutor v. Krstic, Case No. IT-98-33-T, Aug. 2, 2001; See also Krstic Judgement, supra note 9, at para. 308.

[FN103]. See Krstic Judgement, supra note 9, at paras. 687-89, 727.

[FN104]. "DD" is a pseudonym given to the witness as a protective measure to keep the witness' identity from becoming public. See Trial Transcript, July 26, 2000, at 5742, Prosecutor v. Krstic, Case No. IT-98-33-T, Aug. 2, 2001 [hereinafter Krstic Trial Transcript I].

[FN105]. See Krstic Trial Transcript I, supra note 101, at 5744.

[FN106]. See id at 5769-803; See also Trial Transcript, July 27, 2000, at 5804-60, Prosecutor v. Krstic, Case No. IT-98-33-T, Aug. 2, 2001 [hereinafter Krstic Trial Transcript II].

[FN107]. Krstic Trial Transcript I, supra note 101, at 5761.

[FN108]. See id. at 5769.

[FN109]. See id. at 5769-803; See also Krstic Trial Transcript II, supra note 103, at 5804-60.

[FN110]. Krstic Trial Transcript I, supra note 101, at 5763.

[FN111]. Id. at 5768.

[FN112]. See Krstic Amended Indictment, supra note 98.

[FN113]. See Krstic Judgement, supra note 9, at para. 4.

[FN114]. See ICTY Yearbook (1998), at 38.

[FN115]. See id.

[FN116]. See id.

[FN117]. See id. at 37.

[FN118]. Patricia M. Wald, Judging War Crimes, 1 Chi. J. Int'l L. 189, n.a1 (2000).

[FN119]. Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9 [hereinafter ICC Statute].

[FN120]. Id. at Article 76.

[FN121]. Schabas, supra note 79, at 980.

[FN122]. Murphy, supra note 86, at 95.
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# CASE OF BÖNISCH v. AUSTRIA

In the Bönisch case (*),

(*) Note by the Registrar: The case is numbered 6/1984/78/122.
The second figure indicates the year in which the case was referred to the court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr. G. Wiarda, President,
Mr. J. Cremona,
Mrs. D. Bindschedler-Robert,
Mr. F. Gölcüklü,
Mr. F. Matscher,
Mr. B. Walsh,
Mr. R. Bernhardt,

and also Mr. M.-A. Eissen, Registrar, and Mr. H. Petzold, Deputy Registrar,

Having deliberated in private on 23 January and 22 April 1985;

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The present case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Government of the Republic of Austria ("the Government") on 16 July and 21 August 1984, respectively, within the period of three months laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. The case originated in an application (no. 8658/79) against the Republic of Austria lodged with the Commission on 18 June 1979 by Mr. Helmut Bönisch, a German national, under Article 25 (art. 25) of the Convention.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Austria recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Article 48 (art. 48). Their object was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d) of the Convention.

2. In response to the inquiry made in accordance with Rule 33 para. 3 (b) of the Rules of Court, the Agent of the Government of the Federal Republic of Germany advised the Registrar, on 30 July 1984, that her Government did not intend to participate in the proceedings.

The applicant, on the other hand, stated that he wished to participate in the proceedings pending before the Court and designated the lawyer who would represent him (Rules 30 and 33 para. 3 (d)).

3. The Chamber of seven judges to be constituted included, as ex officio members, Mr. F. Matscher, the elected judge of Austrian nationality (Article 43 of the Convention) (art. 43), and Mr. G. Wiarda, President of the Court (Rule 21 para. 3 (b)). On 2 August 1984, the President drew by lot, in the presence of the Registrar, the names of the five other members of the Chamber, namely Mrs. D. Bindschedler-Robert, Mr. D. Evrigenis, Mr. F. Gölcüklü, Mr. E. García de Enterría and Mr. B. Walsh (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently, Mr. Evrigenis and Mr. García de Enterría, who were prevented from taking part in the consideration of the case, were replaced by Mr. J. Cremona and Mr. R. Bernhardt, substitute judges (Rule 24 para. 1).

4. Having assumed the office of President of the Chamber (Rule 21 para. 5), Mr. Wiarda consulted, through the Deputy Registrar, the Agent of the Government, the Delegate of the Commission and the lawyer for Mr. Bönisch regarding the need for a written procedure (Rule 37 para. 1). On 17 September 1984, he directed that the Agent and the lawyer should each have until 15 December 1984 to file a memorial and that the Delegate should be entitled to reply in writing within two months from the date of the transmission to him by the Registrar of whichever of the aforesaid pleadings should last be filed.

The Registrar received the applicant's memorial on 17 December, and the Government's memorial on 28 December 1984.

On 3 January 1985, the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearings. On the same date, after consulting, through the Registrar, the Agent of the Government, the Delegate of the Commission and the lawyer for the applicant, the President directed that the oral proceedings should open on 21 January (Rule 38). He had previously granted the applicant leave to use the German language at the hearings (Rule 27 para. 3).

On 17 January, the Commission transmitted to the Registrar a number of documents whose production the Registrar had requested on the instructions of the President.

5. Meanwhile, on 26 November 1984, the applicant had sent the Registrar a letter requesting that the President recommend the Government to suspend, until delivery of the Court's judgment in the instant case, execution of fines imposed on him in Austria (Rule 36 and paragraph 19 below). The President thereupon contacted the Government, who replied on 17 December that they had no comments to make. On 19 December, although he took the view that recovery of the fines in question did not constitute a serious and irreparable measure, Mr. Wiarda, acting through the Registrar and without prejudice to the Court's ultimate decision on the merits of the case, expressed the wish that the Austrian authorities should consider the possibility of suspending execution. The Permanent Representative of Austria to the Council of Europe notified the Registrar on 11 January 1985 that this wish had been brought to the attention of the responsible authorities.

6. The hearings were held in public at the Human Rights Building, Strasbourg, on the appointed day. Immediately before they opened, the Court had held a preparatory meeting.

There appeared before the Court:

- for the Government

Mr. H. Türk, Legal Adviser,
Ministry of Foreign Affairs, Agent,

Mrs. G. Kabelka, Staatsanwältin, Federal
Ministry of Justice,

Mr. G. Lindner, Ministerialrat, Federal Ministry
of Health and Protection of the
Environment, Advisers;

- for the Commission

Mr. H. Schermers, Delegate;

- for the applicant

Mr. D. Roessler, Rechtsanwalt,

Mrs. B. Thaler, Rechtsanwältin, Counsel.

The Court heard addresses and replies to its questions from Mr. Türk, Mrs. Kabelka and Mr. Lindner for the Government, Mr. Schermers for the Commission and Mr. Roessler for the applicant. The various speakers also produced to the Court several documents.

The applicant lodged three further documents on 19 February.

AS TO THE FACTS

I. The particular circumstances of the case

7. The applicant, who is a citizen of the Federal Republic of Germany born in 1936, lives in Vienna. He runs a firm that specialises in meat smoking. He bought the production plant from the firm Krizmanich GmbH, which was thereafter called Bönisch GmbH, following the death of Mr. Krizmanich in 1975.

A. Background

8. Mr. Krizmanich had been reported under the then applicable legislation to the prosecuting authorities by the Federal Food Control Institute (Bundesanstalt für Lebensmitteluntersuchung - "the Institute") for suspected offences resulting from the technique he used for smoking meat. In 1973, during the course of these proceedings, the Medical Faculty of the University of Vienna had been asked to draw up an expert report (Fakultätsgutachten). In this report, the maximum quantity permissible in smoked meats of a carcinogenic substance called benzopyrene 3.4 was stated to be one part per (American) billion ("ppb").

9. After Mr. Bönisch had bought the firm, similar complaints were lodged with the prosecuting authorities. These led to the prosecution of the applicant before the District Criminal Court of Vienna (22 May 1975 and 27 January 1977) and before the Regional Court of Vienna (28 October 1976). Basing themselves mainly on the expert opinions of the Director of the Institute (see paragraph 20 below), these courts came to the conclusion that the products prepared with the impugned smoking technique were dangerous to health because they contained an excessive quantity - more than one ppb - of benzopyrene 3.4 and that their distribution consequently constituted an infringement of section 56(2) of the Food Act 1975 ("the 1975 Act"). It was further found that the products were adulterated (verfälscht)

by reason of an excessive water content not apparent to the consumer, whereby they also contravened section 63 (1), no. 1, of the 1975 Act. Mr. Bönisch was accordingly convicted. His appeals against these decisions, which are not in issue in the present case, were unsuccessful.

B. Proceedings prompting the present case

1. The first proceedings

10. In October 1976, the Market Office of the City of Vienna drew two samples of smoked meat from the production of the Bönisch company, leaving two counter-samples from the same pieces to the applicant (see paragraph 20 below). The Institute was entrusted with carrying out the analysis of these samples. In its analysis, which was carried out on 19 October 1976, the Institute found a benzopyrene concentration of 2.7 and 3.0 ppb respectively and an excessive water content. The samples were therefore described as being dangerous to health and adulterated. This opinion by the Institute, which had been drafted on 28 November 1976 by the Director of the Institute, amounted to the lodging of a complaint (Anzeigegutachten); it was transmitted by the Market Office to the prosecuting authorities with a view to the institution of criminal proceedings.

11. The case came before the same judge of the Regional Court who in 1976 had dealt with an earlier case against the applicant (see paragraph 9 above). Pursuant to section 48 of the 1975 Act, he again appointed the Director of the Institute as expert in order to hear him in connection with the opinion submitted. On 17 April 1978, Mr. Bönisch challenged both the judge and the expert; in his contention, the conduct of the proceedings had shown that both were biased against him and resolved to disregard his rights of defence, in particular the right - guaranteed by Article 6 (art. 6) of the Convention - to the attendance and examination of witnesses and experts for the defence under the same conditions as those for the prosecution. In addition, the applicant asked for the hearing of several experts.

On 26 April 1978, the President of the Regional Court rejected the challenge concerning the investigating judge on the ground that it was unfounded. However, he did not formally examine the challenge concerning the expert, who in fact took part in the proceedings.

12. On 29 June 1978, at the request of Mr. Bönisch, the Regional Court heard as witness Mr. Prändl, the Director of the Institute for Meat Hygiene and Technology of the Veterinary University of Vienna. According to written evidence submitted by this Institute after analysis of the two counter-samples, the concentration of benzopyrene was only 0.75 ppb and 0.12 ppb respectively, and there was accordingly no reason for any objections.

In reply to questioning by both the judge and the expert, the witness explained in detail the method of analysis applied by his Institute, which was very similar to that used by the German Federal Institute for Meat Research.

The expert thereafter developed his personal opinion. As regards the benzopyrene concentration, he pointed out that the method employed by the Federal Food Control Institute was subject to criteria which were especially stringent and rigorously controlled; its degree of accuracy was maximised and the margin of error did not exceed 20 per cent. On the other hand, he criticised the method used by the witness; in his view, the margin of error had to be considerable as the results obtained from each of the two counter-samples differed greatly, whereas the Institute's analysis showed analogous results in both instances. He emphasised that the products made by Mr. Bönisch's

firm showed a water content of 3.6 per cent, whereas, according to the Food Code (Codex Alimentarius Austriacus), it should not have exceeded 1.8 per cent.

On his side, Mr. Bönisch, who was not represented by a lawyer, stated that a water content below 1.8 per cent was technically unattainable and requested the hearing of a meat and sausage expert on this point. The Regional Court however refused this, on the ground that black smoking was forbidden if the water content could not be limited to the required level.

13. In a judgment delivered the same day (29 June 1978), the Regional Court found the applicant guilty of offences under section 56(1), nos. 1 and 2, and section 63(1), no. 2, of the 1975 Act and accordingly sentenced him to two months' imprisonment. It particularly stressed that, at the time of the takeover of the firm, the Institute had informed Mr. Bönisch of the requirements of the Food Code, that the applicant was aware of the criminal proceedings instituted against his predecessor and that, moreoever, he too had been the subject of criminal proceedings for the same reasons but had nonetheless continued his production without changing method.

The Regional Court considered that the expert opinion of the Director of the Institute was conclusive and that there were no doubts as to the reliability of his findings. It shared his view that the different results at which the Institute for Meat Hygiene and Technology of the Veterinary University had arrived were erroneous. Even allowing for a margin of error of 20 per cent in the Institute's findings, it held that the concentration of benzopyrene in the applicant's products was by far in excess of the permissible level (1 ppb). The carcinogenic effects of this substance were found to have been established by the Medical Faculty (see paragraph 8 above); the evidence to the contrary adduced by the applicant - in particular letters from two German experts and a publication written by three other experts - did not seem convincing to it.

14. Mr. Bönisch appealed. In essence, he took issue with the Director of the Institute for not having adhered to the opinion of his colleagues, which - in Mr. Bönisch's view - nevertheless reflected the prevailing view, and submitted that the Director was biased. He also raised objections of principle against the appointment as court expert of the very person who had reported the case to the prosecuting authorities, and complained that this person had been heard as a court expert whereas Mr. Prändl had appeared as a mere defence witness; this seemed to him contrary to the requirements of Article 6 (art. 6) of the Convention. In addition, he requested the hearing of several experts.

The Vienna Court of Appeal rejected the appeal on 19 December 1978. As to the carcinogenic effects of benzopyrene, it noted that the Regional Court had based its decision on the opinion of the Medical Faculty, which, according to settled case-law, could not be contested. Apart from that, the Regional Court had extensively dealt with all relevant aspects of the case before holding that the products made by the applicant were adulterated and dangerous to health. The findings of the Regional Court were not open to doubt as they were based on the detailed explanations of the expert. As the latter had already refuted Mr. Bönisch's arguments, it was not necessary to take any additional evidence on the adulterated and dangerous character of the said products. In particular, the Court of Appeal ruled out the hearing of a counter-expert since the expert opinion obtained in the first-instance proceedings was not tainted with any defects (Articles 125 and 126 of the Code of Criminal Procedure). Finally, it rejected the challenge of the Director of the Institute as expert (Article 120 of the same Code).

2. The second proceedings

15. Following analysis of samples taken in October 1977 and May 1978 from products made by the applicant's firm, the Institute once more found an excessive concentration of benzopyrene (6.1 ppb) and an undeclared high water-content.

Criminal proceedings were accordingly instituted against the applicant before the Vienna Regional Court. The case came before the same judge as before, who again appointed the Director of the Institute as expert pursuant to section 48 of the 1975 Act.

16. Hearings were held on 20 September 1979. Invoking Article 6 (art. 6) of the Convention, Mr. Bönisch unsuccessfully challenged the expert. The Regional Court pointed out that the 1975 Act required the appointment of an expert from the staff of the Institute; it added that even though the Director had previously given opinions unfavourable to applicant, this did not substantiate the challenge.

The expert then presented his report. When the Regional Court examined him on recent research said to support the views of the applicant, he acknowledged that this research had arrived at less emphatic results on the carcinogenic effects of benzopyrene; but, according to him, this did not cause the opinion of the Medical Faculty to lose any of its validity in the particular circumstances. In reply to defence counsel's questions, he explained the method for analysing foodstuffs used by the Institute, which made it possible to detect 80 per cent of benzopyrene; he conceded that this method differed from the one used by the German Institute, but declared himself not to be bound by the findings of a foreign authority. The defence asked for the hearing of witnesses on the subject; the Regional Court did not accede to this request, considering itself sufficiently informed through the opinions of the Medical Faculty and the expert from the Institute.

17. On the same day (20 September 1979), the Regional Court found the applicant guilty of offences against sections 56 and 63 of the 1975 Act. For reasons almost identical to those stated in the judgment of 29 June 1978 (see paragraph 13 above), it sentenced him to one month's imprisonment.

18. Mr. Bönisch appealed from this decision on grounds similar to those pleaded in the first proceedings (see paragraph 14 above).

The Vienna Court of Appeal dismissed the appeal on 20 May 1980. In its view, the appointment of a particular person as expert was not prohibited unless the person lacked competence to give evidence as a witness (Article 152(1), no. 1, of the Code of Criminal Procedure); apart from this, the applicant had failed to adduce any reasons casting doubt on the impartiality and professional qualifications of the Director of the Institute. Whilst the Director had admittedly already formulated opinions unfavourable to the applicant on several occasions, this did not warrant his being challenged, as the Regional Court had rightly noted. As regards the alleged violation of Article 6 para. 1 (art. 6-1) of the Convention, the Court of Appeal emphasised that section 48 of the 1975 Act required that the official of the Institute who had analysed the samples taken or drawn up the report should be appointed as expert. Rejecting the request for counter-expertise made by Mr. Bönisch, the Court of Appeal reiterated, as far as the remaining issues were concerned, the reasoning contained in its judgment of 19 December 1978 (see paragraph 14 above).

19. On 28 February 1984, the Federal President, exercising his power to grant a pardon, commuted the two prison sentences imposed on the applicant to fines of 30,000 and 15,000 Schillings (see paragraphs 13 and 17 above).

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II. The relevant Austrian legislation and case-law

A. The 1975 Act

20. Under the terms of the 1975 Act, the Market Office of a city shall periodically draw samples of foodstuffs and send them for analysis to the Institute (section 43), making available a sealed counter-sample to be used by any private expert that the firm subjected to control might wish to consult. This expert must possess special professional qualifications and have a special authorisation from the Federal Ministry of Health (sections 47 and 50).

Several members of the Institute's staff are involved in the examination of the samples, for which purpose standard scientific techniques are employed. The various results are submitted to the Director of the Institute, who draws up a report.

If the Institute has cause to suspect the commission of an offence, it must state so in its report and notify the responsible authorities (section 44). In practice, the report (Anzeigegutachten) is sent to the Market Office, which in such cases transmits it to the public prosecutor's department. The prosecuting authorities have to decide whether or not criminal proceedings should be brought, but they usually adhere to the Institute's opinion.

21. Whilst the provisions of the Code of Criminal Procedure are applicable in such cases, section 48 of the 1975 Act involves a derogation from them in so far as expert evidence is concerned:

"If the court has doubts concerning the findings or the opinion of a Federal Food Control Institute or if it considers that such findings or opinion need to be amplified or if justifiable objections have been raised in respect thereof, it shall hear as expert the official of the said Institute who carried out the analysis or drew up the report for the purpose of explaining and supplementing the findings or the report ... In all other respects, expert evidence shall be governed by the provisions of the Code of Criminal Procedure ..."

Under Article 120 of the said Code, the prosecuting authorities and the accused are to be informed of the names of the experts appointed by the court; should they raise valid objections, other experts are to be consulted.

Thus, the court is bound to appoint one of the Institute's officials who carried out the analysis or formulated the opinion. This official may be the person who drew up the report which served as the complaint prompting the criminal proceedings, such a circumstance is not capable of giving cause for a challenge. Should there be other grounds, such as a personal bias against the accused, the expert may be replaced by another official of the Institute who took part in the analysis and in the drafting of the opinion.

If any doubts persist or if the findings of these experts "are unclear, vague, contradictory", etc. (Articles 125 and 126 of the Code of Criminal Procedure), the court may call another expert.

Under the terms of Article 149 of the same Code, only the prosecutor and the defence counsel or the accused are entitled to put questions to witnesses and experts. Nevertheless, the court may authorise experts to examine witnesses and the accused. Witnesses, on the contrary, do not have this possibility.

B. Public discussion on the 1975 Act and the practice followed

22. The provisions of the 1975 Act, as well as certain practices followed by the courts and the Institutes, have been the subject of controversy in academic writings and on the occasion of an enquiry organised in 1977 by the Federal Ministry of Justice. The matter was debated in Parliament prior to the passing of the Act and subsequently in 1978 when a proposed amendment to section 48 was examined (see paragraph 21 above). This amendment, which was not in fact adopted, provided that both the Institute's expert and any private expert called by the accused were to be heard only as witnesses and that, in case of doubt, an independent expert should be appointed.

The receipt by Institute officials of certain bonus payments also gave rise to some discussion which subsequently provoked their discontinuance (see paragraphs 64-66, 74, 81-83 and 122-125 of the Commission's report, paragraph 7 of the applicant's memorial and point C of the Government's memorial).

PROCEEDINGS BEFORE THE COMMISSION

23. Mr. Bönisch had lodged a first application (no. 8141/78) relating to the facts mentioned in paragraph 9 above. The Commission declared this application inadmissible on 4 December 1978.

24. In his second application of 18 June 1979 (no. 8658/79), Mr. Bönisch reiterated some of the complaints made in his previous application. He alleged, inter alia, that the proceedings taken against him had violated two provisions of Article 6: paragraph 1, in that they had not provided a fair trial, and paragraph 3 (d) (art. 6-1, art. 6-3-d), by reason of the inequality of treatment between the Institute's expert and the defence's expert, who had been heard only as a witness.

25. The Commission declared the application admissible on 14 July 1982.

In its report of 12 March 1984 (Article 31) (art. 31), the Commission expressed the unanimous opinion that there had been a breach of Article 6 para. 3 (d) (art. 6-3-d) in the two proceedings complained of and of Article 6 para. 1 (art. 6-1) in the first proceedings.

The full text of the Commission's opinion is reproduced as an annex to the present judgment.

AS TO THE LAW

26. The applicant claimed to have been the victim of a breach of paragraphs 1, 2 and 3 (d) of Article 6 (art. 6-1, art. 6-2, art. 6-3-d), which provide:

"1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ... .

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

...

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

... ."

In the applicant's submission, this breach resulted from the dominant position enjoyed by the Director of the Institute, who had been appointed as expert by the Vienna Regional Court in the two proceedings in issue, as well as from the legal system ensuing from the combined application of sections 44 and 48 of the 1975 Act.

27. With regard to the second allegation, the Court would refer to its settled case-law to the effect that, in proceedings originating in an individual application, it has to confine its attention, as far as possible, to the issues raised by the concrete case before it (see, inter alia, the Adolf judgment of 26 March 1982, Series A no. 49, p. 17, para. 36). The Court's task is thus not to review in abstracto under the Convention the domestic law complained of, but to examine the manner in which that law has been applied to the applicant (see, inter alia, the X v. the United Kingdom judgment of 5 November 1981, Series A no. 46, p. 19, para. 41 in fine, and the above-mentioned Adolf judgment, loc. cit.).

I. Alleged breach of Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d)

28. The Commission based the main part of its reasoning on paragraph 3 (d) of Article 6 (art. 6-3-d). At the hearings on 21 January 1985, the Delegate of the Commission, being of the view that the right to a fair trial had not been respected, suggested however that the Court might alternatively rely on paragraph 1 (art. 6-1). The Government disputed this conclusion.

29. Read literally, sub-paragraph (d) of paragraph 3 (art. 6-3-d) relates to witnesses and not experts. In any event, the Court would recall that the guarantees contained in paragraph 3 (art. 6-3) are constituent elements, amongst others, of the concept of a fair trial set forth in paragraph 1 (art. 6-1) (see, inter alia, the Artico judgment of 13 May 1980, Series A no. 37, p. 15, para. 32, the Goddi judgment of 9 April 1984, Series A no. 76, p. 11, para. 28, and the Colozza judgment of 12 February 1985, Series A no. 89, p. 14, para. 26). In the circumstances of the instant case, the Court, whilst also having due regard to the paragraph 3 (art. 6-3) guarantees, including those enunciated in sub-paragraph (d) (art. 6-3-d), considers that it should examine the applicant's complaints under the general rule of paragraph 1 (art. 6-1) (see, as the most recent authority, the above-mentioned Colozza judgment, loc. cit.).

30. The Government stressed that under Austrian law an "expert" was a neutral and impartial auxiliary of the court, appointed by the court itself, and that the application of section 48 of the 1975 Act did not in any way detract from that. In the applicant's submission, the Director of the Institute could not be regarded as an "expert" in the classic sense of the term; the applicant shared the Commission's opinion that such an expert was properly to be described as a "witness against the accused" (Article 6 para. 3 (d)) (art. 6-3-d).

31. As far as domestic law is concerned, it is not for the Court to depart from the definition which the Government have furnished of the notion of "expert". However, in order to assess the role played in the particular circumstances by the Director of the Institute, the Court cannot rely solely on the terminology employed in the Austrian legislation but must have regard to the procedural position he occupied and to the manner in which he performed his function.

In this connection, the Director had drafted the Institute's reports, the transmission of which to the prosecuting authorities had set in motion the criminal proceedings against Mr. Bönisch (see

paragraphs 10 and 15 above). Thereafter he was designated as expert by the Vienna Regional Court in pursuance of section 48 of the 1975 Act (see paragraphs 11 and 15 above); under the terms of this section, he had the duty of "explaining and supplementing the findings or the opinion" of the Institute (see paragraph 21 above).

32. It is easily understandable that doubts should arise, especially in the mind of an accused, as to the neutrality of an expert when it was his report that in fact prompted the bringing of a prosecution. In the present case, appearances suggested that the Director was more like a witness against the accused. In principle, his being examined at the hearings was not precluded by the Convention, but the principle of equality of arms inherent in the concept of a fair trial (see, mutatis mutandis, the Delcourt judgment of 17 January 1970, Series A no. 11, p. 15, para. 28) and exemplified in paragraph 3 (d) of Article 6 (art. 6-3-d) ("under the same conditions" - see, mutatis mutandis, the Engel and Others judgment of 8 June 1976, Series A no. 22, p. 39, para. 91) required equal treatment as between the hearing of the Director and the hearing of persons who were or could be called, in whatever capacity, by the defence.

33. The Court considers, as did the Commission, that such equal treatment had not been afforded in the two proceedings in issue.

In the first place, the Director of the Institute had been appointed as "expert" by the Regional Court in accordance with Austrian law; by virtue of that law, he was thereby formally invested with the function of neutral and impartial auxiliary of the court. By reason of this, his statements must have carried greater weight than those of an "expert witness" called, as in the first proceedings, by the accused (see paragraphs 12 and 13 above), and yet his neutrality and impartiality were, in the particular circumstances, capable of appearing open to doubt (see paragraph 32 above).

In addition, various circumstances illustrate the dominant role that the Director was enabled to play.

In his capacity of "expert", he could attend throughout the hearings, put questions to the accused and to witnesses with the leave of the court and comment on their evidence at the appropriate moment (see paragraph 21 above).

The lack of equal treatment was particularly striking in the first proceedings, by reason of the difference between the respective positions of the court expert and the "expert witness" of the defence. As a mere witness, Mr. Prändl was not allowed to appear before the Regional Court until being called to give evidence; when giving his evidence, he was examined by both the judge and the expert; thereafter he was relegated to the public gallery (see paragraph 12 above). The Director of the Institute, on the other hand, exercised the powers available to him under Austrian law. Indeed, he directly examined Mr. Prändl and the accused.

34. In addition, as the applicant experienced in his case, there was little opportunity for the defence to obtain the appointment of a counter-expert (see paragraphs 11, 14, 16 and 18 above).

If the competent court has need of clarification in respect of the Institute's opinion, it must first hear a member of the Institute's staff (section 48 of the 1975 Act); the court may not have recourse to another expert except in the contingencies referred to in Articles 125 and 126 of the Code of Criminal Procedure (see paragraph 21 above), none of which obtained in the present case.

35. Consequently, there has been a breach of Article 6 para. 1 (art. 6-1).

This conclusion dispenses the Court from giving a separate ruling on the alleged violation of paragraph 3 (d) of Article 6 (art. 6-3-d) and from examining the Commission's argument as to the possible incidence of the system of bonus payments on the impartiality of Institute officials summoned to testify as experts (section 48 of the 1975 Act - see paragraph 22 above).

II. Alleged breach of Article 6 para. 2 (art. 6-2)

36. In his memorial of 17 December 1984, Mr. Bönisch contended that the facts of the case also fell within the ambit of Article 6 para. 2 (art. 6-2), in that there had been a reversal of the burden of proof contrary to the rule of the presumption of innocence.

The Government and the Commission were agreed in viewing this complaint as inadmissible on the ground that it had not been previously pleaded before the Commission.

37. The Court rejects the objection. Even though the complaint in question was not mentioned in the applicant's written and oral arguments before the Commission, it has an evident connection with the complaints he did make (see, amongst others, mutatis mutandis, the above-mentioned Delcourt judgment, Series A no. 11, p. 20, para. 40, and the Handyside judgment of 7 December 1976, Series A no. 24, p. 30, para. 66). The Court thus has jurisdiction to entertain the matter, subject to taking into consideration possible preliminary objections such as non-exhaustion of domestic remedies. However, having already found a violation of Article 6 para. 1 (art. 6-1), the Court sees no useful purpose in also ruling on the merits of this complaint.

III. Application of Article 50 (art. 50)

38. At the hearings on 21 January 1985, the applicant lodged a number of documents setting out his claims for just satisfaction.

Since the Government have not yet commented on these claims, the question is not ready for decision. Accordingly, it is necessary to reserve the matter and to fix the further procedure, taking due account of the possibility of an agreement between the respondent State and Mr. Bönisch (Rule 53 paras. 1 and 4 of the Rules of Court).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a breach of Article 6 para. 1 (art. 6-1);

2. Holds that it is not necessary to examine the applicant's complaint concerning Article 6 para. 2 (art. 6-2);

3. Holds that the question of the application of Article 50 (art. 50) is not ready for decision;

accordingly,

(a) reserves the whole of the said question;

(b) invites the Government to submit, within the forthcoming two months, their written comments on the said question and, in

particular, to notify the Court of any agreement reached between themselves and the applicant;

(c) reserves the further procedure and delegates to the President of the Chamber power to fix the same if need be.

Done in English and in French, and delivered at a public hearing at the Human Rights Building, Strasbourg, on 6 May 1985.

Signed: Gérard WIARDA
President

Signed: Marc-André EISSEN
Registrar