SCSL-04-14-A
(806-880)

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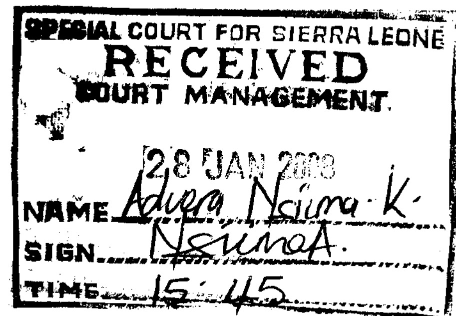
SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

IN THE APPEALS CHAMBER

Before: Hon. Justice George Gelaga King, President
Hon. Justice Emmanuel Ayoola
Hon. Justice Renate Winter
Hon. Justice A. Raja N. Fernando
Hon. Justice Jon Kamanda



Registrar: Mr. Herman Von Hebel

Date filed: 28 January 2008

THE PROSECUTOR **Against** **Moinina Fofana**
Allieu Kondewa

Case No. SCSL-04-14-A

PUBLIC
PROSECUTION REPLY BRIEF

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1. Introduction

1.1 The Prosecution files this Reply Brief to the "Fofana Response to Prosecution Appeal Brief" (the "**Fofana Response Brief**"),[1] and the "Kondewa Response to Prosecution Appeal Brief" (the "**Kondewa Response Brief**").[2]

1.2 The Prosecution relies on all of the submissions in the Prosecution Appeal Brief. This Reply Brief only addresses specific points raised in the Defence Response Briefs that warrant further submissions in reply, and does not address Defence submissions which are already adequately addressed in the Prosecution Appeal Brief, or which merely disagree with the Prosecution submissions. Where the Prosecution omits to address particular paragraphs or points in the Defence Response Briefs, this in no way implies that the Prosecution makes any concession to the Defence arguments.

1.3 The full references for abbreviated citations used in this Reply Brief are given in Appendix A.

2. Prosecution's *Ground 1*: Crimes Against Humanity

A. Reply to the Fofana Response Brief

2.1 As to paragraphs 2 and 17 of the Fofana Response Brief, the Prosecution submits that the specific elements of murder as a crime against humanity (Statute, Article 2(a)) and murder as a war crime (Statute, Article 3(a)) are materially identical.[3] Fofana was convicted of murder as a war crime under Count 2.[4] Fofana has not appealed against that finding, and the specific elements for murder were thus

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1 SCSL-14-816, "Fofana Response to Prosecution Appeal Brief", 21 January 2008 ("**Fofana Response Brief**").

2 SCSL-14-817, "Kondewa Response to Prosecution Appeal Brief", 21 January 2008 ("**Kondewa Response Brief**").

3 **Trial Chamber's Judgement**, paras 143 and 146; ***Stakić*** **Trial Judgement**, para. 631 ("The Trial Chamber agrees with the Prosecution's submission that the constituent elements of murder as a crime against humanity under Article 5 of the Statute are the same as those of murder as a violation of the laws or customs of war under Article 3 of the Statute"). ***Kordić and Čerkez*** **Appeal Judgement**, para. 236: See also **ICC Elements of Crimes**, comparing the specific element of Article 7(1)(a) of the ICC Statute (crime against humanity of murder) and of Article 8(2)(c)(i)-1 of the ICC Statute (war crime of murder), which are both described as "The perpetrator killed one or more persons". In other words, the only difference between murder as a war crime and murder as a crime against humanity lies in the chapeau elements (or general requirements) of war crimes and crimes against humanity respectively: see **Trial Chamber's Judgement**, paras 110 and 122.

4 **Trial Chamber's Judgement**, Disposition.

satisfied in the case. The only issue in this appeal is whether one of the chapeau elements (or general requirements) of crimes against humanity was established, namely, an attack directed against any civilian population.

2.2 As to paragraphs 3-5 of the Fofana Response Brief, the Trial Chamber expressly found that civilians were ***specifically*** targeted in the relevant attacks.[5]

2.3 As to paragraph 7 of the Fofana Response Brief, the Prosecution submits that the findings of the Trial Chamber referred to by the Defence do not support the conclusion that the attacks by Kamajors on civilians were isolated, random, or unauthorized by the CDF central command. In particular, for the reasons given in paragraphs 2.35 to 2.52 of the Prosecution Appeal Brief, it is submitted that the only conclusion open to any reasonable trier of fact is that the "all out offensive", of which relevant attacks formed part, was an operation that was directed from Base Zero, that it was part of the plan for the "all-out offensive" that civilians would be attacked, and that specific instructions were given to that effect.[6]

2.4 As to paragraph 9 of the Fofana Response Brief, the fact that not all, or not even any, of the *Kunarac* factors need to be present for there to be an attack directed against a civilian population, does not mean that the Trial Chamber is not required to take them into account where they ***are*** present. It is submitted that where such factors exist, the Trial Chamber is required to have regard to them. It is submitted that on the findings of the Trial Chamber and the evidence it accepted, no reasonable trier of fact could conclude that the crimes committed in the "all-out offensive" were merely "the targeting of a select group of civilians - for example, the targeted killing of a number of political opponents".[7]

2.5 As to paragraph 10 of the Fofana Response Brief, the Defence merely asserts that the Trial Chamber did in fact consider (at least some) of the *Kunarac* factors, but gives no references to the Trial Chamber's Judgement in support of this claim, other than to paragraph 114 in which the Trial Chamber merely quotes the

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5 **Trial Chamber's Judgement,** paras 751 ("We find that individuals were killed intentionally; in the majority of cases they were specifically targeted because of the perpetrator's belief that they were "collaborators" or rebels"). See also paras 787, 831 and 884.

6 **Fofana Response Brief**, para 16, acknowledges that Norman gave orders for the commission of crimes against civilians.

7 **Trial Chamber's Judgement**, para. 119.

relevant part of the *Kunarac* Appeal Judgement. The mere fact that the Trial Chamber included this quote in its Judgement does not mean that the Trial Chamber actually took the *Kunarac* factors into account. In any event, even if the Trial Chamber did consider some (or even all) of the *Kunarac* factors, it is submitted that the conclusion that the Trial Chamber ultimately reached was one that was not open to any reasonable trier of fact.

2.6 As to paragraphs 12, 13, 15 and 17 of the Fofana Response Brief, it is not the Prosecution argument that civilians must have been deliberately targeted in the attack, merely by virtue of the fact that the attack was widespread. The Prosecution relies on the evidence and findings of the Trial Chamber in the case as a whole. The Trial Chamber found that civilians were ***specifically*** targeted,[8] and there is therefore no merit in the Defence argument that these civilians were merely "collateral victims" of a military attack. There is a difference between the ***purpose*** of an attack (which may be to contribute to the reinstatement of democracy), and the ***target*** of an attack (which may be a civilian population). Even if the stated purpose of the CDF may have been to protect civilians, the Trial Chamber found that the CDF ***specifically*** targeted civilians who were perceived collaborators of the enemy.

2.7 As to paragraph 14 of the Fofana Response Brief, the fact that "only" about 151 out of some 1000 people were killed in the attack on Tongo Town does not mean that there was not an attack against a civilian population. The 151 who were killed were deliberately murdered because they were perceived to belong to the Loko, Limba and Temne ethnic groups whom the Kamajors assumed to be collaborators of the rebels. While the others may not have been murdered, their village was attacked, they were held captive by the Kamajors for a period, and they were threatened with death if they did not leave the village. They were therefore "attacked". An "attack", for the purposes of the chapeau elements of crimes against humanity, is not confined to acts of murder, but includes any

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[8] See footnote 5 above.

mistreatment of the civilian population.[9] Furthermore, an "attack against the civilian population" need not be an attack against ***every*** individual that is part of that population. An attack against only those members of a population who belong to a particular ethnic, political or religious group can, for instance, be an attack against a civilian population.[10]

2.8 Paragraph 16 of the Fofana Response Brief does not cite any findings of the Trial Chamber to support the argument made. In any event, the mere fact that an attack was ordered by the head of the CDF out of his own "personal excesses", does not mean that it was not an attack directed against a civilian population.[11] The mere fact that Norman's orders were not always obeyed (which is not conceded[12]) does not mean that an attack that ***was*** committed pursuant to Norman's orders to kill civilians was not an attack directed against a civilian population. The mere fact that some Kamajors may have acted on a "frolic on their own" (which is also not conceded) does not mean that their acts do not form part of an attack against a civilian population. For crimes against humanity, "the acts of the accused must comprise part ***of a pattern*** of widespread or systematic crimes directed against a civilian population",[13] but it is not necessary that all crimes within that pattern of crimes be committed by perpetrators belonging to the same group or under the

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9 See **Trial Chamber's Judgement**, para 111 and the authorities there cited, especially ***Kunarac*** **Appeal Judgement**, para. 86.

10 ***Stakić*** **Appeal Judgement**, para. 247: "The Appellant's submissions appear to presume that a systematic attack against a civilian population must encompass the entire civilian population of the particular territory attacked. That presumption is incorrect [...]. ***Accordingly, an attack against a civilian population may be classified as systematic even where some members of that civilian population are not targeted.***" (Emphasis added.) Reference was made in this passage to ***Kunarac Appeal Judgement,*** para. 90: "It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian "population", rather than against a limited and randomly selected number of individuals." See also ***Tadić*** **Trial Judgement**, para. 644.

11 The argument of the Fofana Defence that the crimes were committed out of Norman's "personal excesses" appears not to be directed to the question of whether the attack was "directed against any civilian population", but rather to the question of whether Fofana (as opposed to Norman) was individually responsible for those crimes. However, each of the crimes for which Fofana was convicted of war crimes under Counts 2 and 4 were also charged as crimes against humanity under Counts 1 and 3. It follows for the reasons given in the Prosecution Appeal Brief that if the Appeals Chamber finds that the attacks were "directed against any civilian population", Fofana will necessarily also be individually responsible for those crimes as crimes against humanity under Counts 1 and 3, except to the extent that Fofana succeeds in any of his own grounds of appeal.

12 See paragraph 3.4 below.

13 ***Tadić*** **Appeal Judgement**, para. 248 (emphasis added).

same command. Even an isolated crime committed by an independent perpetrator for purely personal motives may be a crime against humanity if the crime forms part of such a ***pattern*** of widespread or systematic crimes.[14]

B. Reply to the Kondewa Response Brief

2.9 To the extent that the Kondewa Response Brief raises similar issues as the Fofana Response Brief, the Prosecution relies on its submissions above.

2.10 As to paragraph 1.6 of the Kondewa Response Brief, to the extent that the Trial Chamber's finding involved an evaluation of evidence, the Prosecution submits that the Trial Chamber erred in fact.

2.11 As to paragraphs 1.7 and 1.8 of the Kondewa Response Brief, the mere fact that an organisation or force was fighting for the restoration of democracy does not mean that it or its members were incapable of conducting an attack against the civilian population: the commission of crimes against humanity is not intrinsically inconsistent with a fight for democracy. (See paragraph 2.6 above.) The Trial Chamber found that the CDF/Kamajors ***specifically*** targeted members of the civilian population who were perceived collaborators of the rebels.[15] Even if the CDF/Kamajors did not attack other members of the civilian population, that does not negate the existence of an attack directed against the civilian population.[16] The fact that on one occasion civilians were warned to leave villages prior to attacks does not mean that a civilian population was not attacked: the civilians who remained behind were specifically attacked. The fact that one commander (BJK Sei) gave an order to be "careful about the civilians"[17] does not in the circumstances of this case negate the existence of an attack against the civilian population.[18]

2.12 As to paragraphs 1.10 and 1.11 of the Kondewa Response Brief, the *Limaj* Trial Judgement was only a judgement at the Trial Chamber level, and in any event, the

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14 ***Tadić* Appeal Judgement**, paras 248-272.
15 See footnote 5 above.
16 See paragraph 2.7 above.
17 **Trial Chamber's Judgement** , para. 392.
18 At the time BJK Sei said this, large numbers of crimes were being committed against civilians, and continued in the days after he said this: **Trial Chamber's Judgement,** paras 393-410.

facts of that case were distinguishable from the facts of the present case. In the *Limaj* case, it was found that there was no policy or plan to attack civilians,[19] while in the present case, for the reasons given in the Prosecution Appeal Brief, there was a plan, and specific orders were given by Norman, at the top level of the CDF command, to target civilians during the attacks in the "all-out offensive". In the *Limaj* case, the attacked civilians were "targeted as individuals rather than as members of a larger targeted population",[20] while in the present case, during the relevant attacks civilians were attacked indiscriminately in large numbers.[21] The attacks that were part of the "all-out offensive" occurred in different geographic locations in a concentrated period of time, pursuant to an orchestrated plan that included the commission of crimes against civilians.

2.13 As to paragraphs 1.14 to 1.17 of the Kondewa Response Brief, the fact that the towns in question were of strategic importance to the CDF is not inconsistent with the CDF conducting an attack directed against the civilian population.[22]

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19 ***Limaj*** **Trial Judgement**, para. 212 ("Although not a legal element of Article 5, evidence of a policy or plan is an important indication that the acts in question are not merely the workings of individuals acting pursuant to haphazard or individual design, but instead have a level of organisational coherence and support of a magnitude sufficient to elevate them into the realm of crimes against humanity" (footnote omitted)); para. 215 ("From the evidence before the Chamber, the KLA evinced no policy to target civilians *per se*. Peter Bouckaert stated that he never saw anything issued by the KLA which constituted ***an order to its members to target innocent civilians or to loot or destroy Serbian property***...". In the present case, the Trial Chamber found that Norman ***had*** ordered innocent civilians to be killed and their property destroyed. It is however emphasised that the existence of policy or plan is not ***required*** for proof of a crime against humanity: ***Kunarac*** **Appeal Judgement**, para 98; ***Blaškić*** **Appeal Judgement**, para 120. See also ***Kordić and Čerkez*** **Appeal Judgement**, para 98.

20 ***Limaj*** **Trial Judgement**, para. 217.

21 In the incident referred to in paragraph 2.7 above, about 151 civilians were killed merely because of their ethnicity. **Kondewa Response Brief**, para. 1.30, concedes that "In the particular circumstances of this case under review by the Appeal Chamber [*sic*], attacks on individual civilians by Kamajors were done because of their *affiliation* or *suspected affiliation* with a fighting force, not because of a freestanding characteristic of the individual" (emphasis added). The evidence on which the Trial Chamber relied in finding that an attack directed against a civilian population had not been proved was confined to the evidence of Norman and Albert Joe Demby (**Trial Chamber's Judgement**, paras 693-694). The Prosecution submits that the Trial Chamber erred in not also considering all other evidence in the case as a whole.

22 Srebrenica (and the surrounding Central Podrinje region) were of immense strategic importance to the Bosnian Serb leadership. Radislav Krstić was, *inter alia*, found guilty of crimes against humanity (including persecution through murders and inhumane treatment) in respect of crimes that occurred after the military capture of Srebrenica in July 1995. See ***Krstić*** **Appeal Judgement**, paras 15-16 and the findings in ***Krstić*** **Trial Judgment**, paras 12 and 36-87.

2.14 As to paragraphs 1.18 to 1.23 of the Kondewa Response Brief, the Prosecution relies on the Prosecution Appeal Brief. Norman's order was that "anybody that was met there [in Koribondo] should be killed" and that nothing should be left "not even a farm" or "[...] a fowl",[23] which in the Prosecution's submission amounts to an order to exterminate the civilian population and not, as the Defence suggests, "the targeting of particular individuals". In relation to the attack on Bo, Norman's instruction was that all houses were to be burnt, and specific people killed.[24] The burning of all houses is an attack on the civilian population, even if not all civilians were killed.[25] Contrary to what is suggested in paragraph 1.23 of the Kondewa Response Brief, the Trial Chamber did find that Kondewa was at the commanders meetings where the attacks on Tongo,[26] Koribondo[27] and Bo[28] were discussed, and a reading of the Trial Chamber's findings in those paragraphs shows that Norman gave orders for the commission of crimes in those attacks.

2.15 As to paragraphs 1.25 to 1.31 of the Kondewa Response Brief, a discriminatory intent is a legal ingredient only with regard to the crime against humanity of persecution (Statute, Article 2(h)), and other types of crimes against humanity do not contain any such requirement.[29] The cited article by Cherif Bassiouni, a copy of which was not filed with the Kondewa Response Brief, is therefore incorrect.

3. Prosecution's *Ground 3* and *Ground 4*:

A. Reply to the Fofana Response Brief

(i) Tongo (instigating)

3.1 As to paragraphs 23-25 of the Fofana Response Brief, the *actus reus* of "instigating" requires that the act of the accused "substantially contributed" to the

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23 **Trial Chamber's Judgement**, para. 335.
24 *Ibid.* para. 336.
25 See paragraph 2.7 above. Paragraph 1.18 of the Kondewa Response Brief further suggests that it is a tautology for the Prosecution to state that "The manner of perpetration of these incidents makes clear that the attacks against the civilians were specifically intended to make victims out of the civilians". The Prosecution submits that it is not a tautology to conclude that the manner of perpetration of an attack is evidence of an ***intent*** to ***specifically target*** civilians in that attack.
26 **Trial Chamber's Judgement**, para. 322.
27 **Trial Chamber's Judgement**, para. 328.
28 **Trial Chamber's Judgement**, para. 332.
29 ***Tadić*** **Appeal Judgement**, paras 273-305.

commission of the crime by the direct perpetrator,[30] but does not require it to be shown that the offence would *not have been perpetrated without the act of the accused.*[31] Similarly, the *actus reus* of "aiding and abetting" requires that the act of the accused had a "substantial effect" on the commission of the crime by the direct perpetrator, but does not require proof that the acts of the accused served as a condition precedent of the actions of the perpetrator.[32] These definitions of the *actus reus* of these two modes of liability are not materially different.[33]

3.2 It is noted that in the *Orić* Trial Judgement, which is only a decision at the Trial Chamber level, and which is presently on appeal before the Appeals Chamber of the ICTY, the Trial Chamber did identify a difference between the *actus reus* of the two modes of liability. The Trial Chamber stated that aiding and abetting involves "facilitating" the commission of a crime, while instigating involves "prompting" the commission of a crime.[34] It added that "prompting" "requires some kind of ***influencing*** the principal perpetrator by way of inciting, soliciting or otherwise inducing him or her to commit the crime", although this does not mean that it must necessarily have been the instigator who had the original idea or plan to commit the crime.[35] In other words, it is submitted that it is sufficient that the acts of the instigator "strengthened the resolve" of the direct perpetrator, even if the direct perpetrator already intended to commit the crime.[36] As to the *mens rea* of instigating, it is submitted that it is sufficient that the accused intended to provoke or induce the commission of the crime, "or had *reasonable knowledge*

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30 **Trial Chamber's Judgement**, para. 223.

31 ***Gacumbitsi*** **Appeal Judgement**, para. 129; ***Kordić and Čerkez*** **Appeal Judgement**, para. 27.

32 See **Prosecution Response Brief**, para. 5.38(3) and the authorities there cited.

33 The case law of the ICTY and ICTR referred to in paragraph 223 of the Trial Chamber's Judgement referring to a "causal relationship" indicates that this means nothing more than the requirement of substantial contribution. The case law also uses sometimes the term "nexus" (***Brđanin*** **Trial Judgement**, para. 269), and indicates that it is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused (see ***Kordić and Čerkez*** **Appeal Judgement**, para. 27).

34 ***Orić*** **Trial Judgement**, para. 270 (and see the earlier authorities cited in footnore 735), ***Ndindabahizi*** **Appeal Judgement**, para. 117.

35 ***Orić*** **Trial Judgement**, paras. 271 (emphasis added), 681. Compare also, ***Kvočka*** **Trial Judgement**, para. 252; ***Kordić and Čerkez*** **Trial Judgement**, para. 387, indicating that it is sufficient that the act of the instigator was a "clear contributing factor" to the commission of the crime.

36 See the prosecution submission referred to in ***Kordić and Čerkez*** **Trial Judgement**, para. 380.

that a crime would likely be committed as a result of that instigation".[37] It is further submitted that a crime may logically be simultaneously instigated by more than one person: several people at the same time, through their own individual acts, may influence or strengthen the resolve of a particular perpetrator.

3.3 As to paragraphs 26-27 of the Fofana Response Brief, the Prosecution submits that on the evidence and the findings of the Trial Chamber, the only conclusion open to any reasonable trier of fact is that Fofana's conduct, in view of the matters referred to in the Prosecution Appeal Brief, influenced or strengthened the resolve of the Kamajors to commit the crimes in the Tongo attack,[38] and that Fofana was at the very least aware of the likelihood that this was the case.[39] It is immaterial that the plan to commit the crimes may not have originated with Fofana, or that the crimes might have been committed without Fofana's instigation.

3.4 As to paragraph 28 of the Fofana Appeal Brief, the Trial Chamber made no finding that Norman's speech referred to in paragraph 3.52 of the Prosecution Appeal Brief was "nothing but grumbles". The Kamajors committed horrific crimes in Tongo in execution of Norman's orders, and Norman subsequently admonished them for not going to even greater extremes.

3.5 As to paragraphs 29-31 of the Fofana Response Brief, it was open to a reasonable trier of fact to conclude that at the December 1997 Passing Out Parade, Norman gave orders to commit crimes in Tongo. Immediately afterwards, Fofana gave a speech telling Kamajors to comply with Norman's order or else "just decide to kill yourself there and don't come to report to us".[40] The only reasonable

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[37] **Trial Chamber's Judgement**, para. 223. See also ***Kvočka* Trial Judgement**, para. 252; ***Akayesu* Trial Judgement**, para. 482 ("or was aware of the substantial likelihood that the commission of a crime would be a probable consequence of his acts").

[38] Fofana said that the commanders should *kill themselves* and not report to the High Command if the failed to perform accordingly": **Trial Chamber's Judgement**, para. 221. Such a threat is at the very least "prompting".

[39] Fofana has not appealed against the Trial Chamber's finding that he aided and abetted the crimes in Tongo, and that he was "he was aware that one of a number of crimes would probably be committed" (**Trial Chamber's Judgement**, para. 724). That finding must therefore be accepted for the purposes of this appeal.

[40] **Trial Chamber's Judgement**, para. 321.

conclusion is that Fofana thereby called upon the Kamajors to comply with Norman's order to commit crimes.[41]

(ii) Tongo (planning)

3.6 The Prosecution relies on the submissions in the Prosecution Appeal Brief.

(iii) Koribondo, Bo and Kenema (planning)

3.7 As to paragraphs 39-40 of the Fofana Response Brief, the Prosecution does not argue that Fofana's mere presence at meetings establishes his involvement in planning crimes. The Prosecution relies on all of the evidence and findings of the Trial Chamber.[42]

3.8 As to paragraphs 44 to 45 of the Fofana Response Brief, Fofana's argument that Fofana was merely an "intermediary" between Norman and Nallo, and a "figurehead", is inconsistent with the evidence and findings of the Trial Chamber referred to in paragraphs 3.68 and 3.69 of the Prosecution Appeal Brief.[43]

3.9 As to the first three sentences of paragraph 47 of the Fofana Response Brief, for the reasons given by the Prosecution, the only conclusion open to any reasonable trier of fact is that the *actus reus* of planning was established. As to the fourth sentence, the Prosecution refers to paragraph 3.71 of the Prosecution Appeal Brief. As to the remainder of that paragraph, it is submitted that it is not necessary for the *mens rea* of "planning" to establish that Fofana knew that Norman's orders were ***always*** obeyed.[44]

(iv) Koribondo, Bo and Kenema (aiding and abetting)

3.10 As to paragraphs 49-52 of the Fofana Response Brief (concerning Fofana's knowledge that crimes would be committed in the attacks), the Prosecution refers to paragraphs 3.22 to 3.24, 3.26 to 3.29, 3.74 to 3.76 and 3.82 of the Prosecution

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[41] **Trial Chamber's Judgement**, para. 722.
[42] See especially **Prosecution Appeal Brief**, paras 3.63 to 3.77.
[43] See especially **Trial Chamber's Judgement**, paras 337-343. See also paragraph 4.3 below.
[44] The *mens rea* for planning only requires that the Accused acted "with reasonable knowledge that the crime would ***likely*** be committed in the execution of that plan" (emphasis added): **Prosecution Appeal Brief**, para. 3.55(4). It is in any event not conceded that Norman's orders were not always obeyed (see paragraph 3.4 above).

Appeal Brief. The Trial Chamber expressly found that Fofana had prior knowledge that the attack on Bo included the commission of crimes.[45] The fact that the Trial Chamber found an element of crimes against humanity not to be satisfied[46] is irrelevant to his conviction for war crimes. The statement that Fofana was "always more concerned with his drive ... to capture territories ... under Junta control"[47] is not based on any finding of the Trial Chamber.

3.11 As to paragraphs 53-59 of the Fofana Response Brief (concerning the provision of logistics by Fofana), the Prosecution relies on paragraphs 3.83 to 3.89 of the Prosecution Appeal Brief. As to paragraph 57 of the Fofana Response Brief, it is submitted that where a person commits a criminal act pursuant to a superior order, superior orders is no defence,[48] even if the accused could not have performed the act in question unless ordered to do so. "Superior orders" does not become a defence merely because the accused carrying out the order is illiterate. Fofana does not address the argument in the final sentence of paragraph 3.87 of the Prosecution Appeal Brief.

B. Reply to the Kondewa Response Brief

(i) Tongo (instigating)

3.12 As to paragraphs 2.2 and 2.6 of the Kondewa Response Brief, the Prosecution refers to paragraphs 3.1 and 3.2 above.

3.13 As to paragraphs 2.7 to 2.9 of the Kondewa Response Brief, the Trial Chamber expressly found that Norman's speech at the December 1997 Passing Out Parade was an instruction to the Kamajors to commit specific criminal acts during the attack on Tongo.[49] After Norman spoke, Kondewa made the speech referred to in paragraph 3.19 of the Prosecution Appeal Brief. The Prosecution submits that on the evidence and the findings of the Trial Chamber, the only conclusion open to any reasonable trier of fact is that Kondewa's conduct, in view of the matters

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45 **Trial Chamber's Judgement**, para. 813.
46 **Fofana Response Brief**, para. 51.
47 **Fofana Response Brief**, para. 52.
48 **Statute**, Article 6(4).
49 **Trial Chamber's Judgement**, paras. 722, 735.

referred to in paragraph 3.93 of the Prosecution Appeal Brief, and in view of the factual findings referred to in paragraphs 5.40 to 5.43 of the Prosecution Response Brief, influenced or strengthened the resolve of the Kamajors to commit the crimes in the Tongo attack, and that Kondewa was at the very least aware of the substantial likelihood that this was the case. It is immaterial that the plan to commit the crimes may not have originated with Kondewa, or that the crimes might have been committed even without Kondewa's instigation.

3.14 As to paragraph 2.9 of the Kondewa Response Brief, the Trial Chamber found on the evidence that at the December 1997 Passing Out Parade, instructions were given for the Tongo attack,[50] and that Norman addressed the Kamajors to emphasise to them the importance of the Tongo attack and to tell them what they were to do in the Tongo attack.[51] It was open to a reasonable trier of fact to conclude that these were the same Kamajors who took part in the Tongo attack.[52]

3.15 As to the final sentence of paragraph 2.9, and paragraphs 2.10 to 2.17 of the Kondewa Response Brief, the Prosecution refers to paragraphs 5.1 to 5.50 (in relevant part) of the Prosecution Response Brief, responding to Kondewa's Appeal Ground Four. In determining whether Kondewa's speech substantially contributed to the crimes, it is necessary to consider all of the circumstances of the case as a whole. The Trial Chamber found that Kondewa's act had a "substantial effect" on the commission of the crimes[53] for the purposes of the *actus reus* of aiding and abetting, and it is submitted that it therefore also "substantially contributed" to the commission of the crimes for the purposes of the *actus reus* of instigating. (See paragraphs 3.1, 3.2 and 3.13 above.)

(ii) Bo, Koribondo and Kenema

3.16 As to paragraphs 2.18 to 2.21 of the Kondewa Response Brief, the Prosecution relies on paragraphs 3.94 to 3.102 of the Prosecution Appeal Brief.

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[50] **Trial Chamber's Judgement**, para. 320.
[51] **Trial Chamber's Judgement**, para. 321.
[52] The Trial Chamber also found that the Kamajors who heard Kondewa's speech left for Tongo: **Trial Chamber's Judgement**, paras 346, and footnote 495.
[53] **Trial Chamber's Judgement**, para. 736.

4. Prosecution's *Ground 5*: Child soldiers

A. Reply to the Fofana Response Brief

4.1 As to paragraphs 62-65 of the Fofana Response Brief, the Prosecution does not argue that Fofana's liability is based on his "mere presence" or merely on his high position within the CDF at Base Zero. The Prosecution relies on all of the evidence and findings of the Trial Chamber as a whole.

4.2 As to paragraph 64 of the Fofana Response Brief, the Prosecution submits that there is abundant evidence that armed children ***under the age of 15*** were to be seen in Base Zero, where Fofana was also present.[54] The Trial Chamber found that "children who appeared to be aged less than 15 were conscripted, enlisted, or used to participate actively in hostilities" in various locations, including Base Zero.[55] The Defence accepts that "the trial record demonstrates that the CDF, as an organization, was involved in the enlistment and/or use of children under the age of 15".[56] Child soldiers were present at the January 1998 Passing Out Parade where Fofana addressed the Kamajors,[57] and Fofana was present at a meeting where Norman said that "the adult fighters were doing less than the children".[58] It is submitted that the only conclusion open to any reasonable trier of fact is that Fofana was aware of the recruitment and use of child soldiers.

4.3 As to paragraph 66 of the Fofana Response Brief, the Defence submissions have no basis in the findings of the Trial Chamber. The Trial Chamber expressly found that Fofana's duties as Director of War were to plan and execute the strategies for war operations (and that he and Nallo were the architects of the Black December Operation), to select commanders to go to battle, to act as the overall boss of the commanders who were at Base Zero, and to deal with the receipt and provision of

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[54] TF2-079 testified that he saw children between 10 and 14 present in Base Zero, "some were carrying AK-47, grenades and some were carrying machetes" (Transcript 27 May 2005, TF2-079, p. 12-13). Albert Nallo gave evidence that at Base Zero, there were Kamajors as young as 6, 8 and 12 years old and that he knew a Kamajor called Junior Spain, who he estimated to be between 12 to 15 years old (Transcript, 11 March 2005, TF2-014, p. 15-16). See also Transcript, 5 November 2004, Closed Session, p. 62-63.

[55] **Trial Chamber's Judgement**, para. 688.

[56] **Fofana Response Brief**, para. 62.

[57] **Trial Chamber's Judgement**, para. 323 (third sentence).

[58] **Trial Chamber's Judgement**, para. 332 (final sentence).

logistics for the frontline by instructing the Director of Logistics on what to make available.[59]

4.4 As to paragraphs 67, 69 and 73-74 of the Fofana Response Brief, concerning the encouraging effect of Fofana's acts, the Prosecution relies on the submissions in paragraphs 4.15 to 4.19 of the Prosecution Appeal Brief.

4.5 As to paragraph 68 of the Fofana Response Brief, the Prosecution submits that the only conclusion open to any reasonable trier of fact, on the findings of the Trial Chamber and the evidence it accepted, is that those who directly perpetrated the recruitment and use of child soldiers had the *mens rea* for this crime. The Prosecution argument does not presuppose that the direct perpetrators were necessarily subordinates of Fofana, for the purposes of Article 6(3) of the Statute. Paragraphs 4.17 and 4.18 of the Prosecution Appeal Brief merely address the manner in which the "presence of a person with superior authority at the scene of a principal crime may be probative to determining whether such person encouraged or supported the principal perpetrator."[60] The presence at the scene of a crime of a person of very high rank, even if not a superior for the purposes of Article 6(3) of the Statute, may similarly have an encouraging effect on the perpetrators.

4.6 As to paragraph 70 of the Fofana Response Brief, Fofana and Kondewa clearly were associated in the sense that they were both members of the "Holy Trinity" present at Base Zero, and in the other ways described in the Trial Judgement. This association, coupled with Kondewa's own conviction for recruitment, is relevant in determining the reasonableness of the Trial Chamber's conclusion.

B. Reply to the Kondewa Response Brief

4.7 As to paragraph 3-4.3 of the Kondewa Response Brief, the Prosecution relies on its submissions in the Prosecution Response Brief, in response to Kondewa's Appeal Ground Six.

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[59] **Trial Chamber's Judgement**, paras 340-342.
[60] **Trial Chamber's Judgement**, para. 230.

4.8 As to paragraph 3-4.4 of the Kondewa Response Brief, the Prosecution clarifies that the first sentence of paragraph 4.41 of the Prosecution Appeal Brief is intended to mean that *on the basis of the evidence in the case and the findings of the Trial Chamber as a whole, the only conclusion open to a reasonable trier of fact is that* the initiation process conducted by Kondewa in Base Zero both on adult and child fighters was a substantial contribution to the crime of enlistment and/or use of under-aged children to participate in combat activities.

4.9 In its Response Brief, the Prosecution emphasized that the initiation of young boys performed by Kondewa was found by the Trial Chamber to be, on that particular occasion described by TF2-021, "a first step in becoming fighters" and "an act analogous to enlisting them for active military service".[61] The testimony of Albert Nallo, considered by the Trial Chamber as a credible witness, indicates the importance of previous initiation in the Kamajor Society in order to be a fighter within the CDF. Notably, Albert Nallo testified the following:

> Q. At what age could a Kamajor go to the war front?
>
> A. They could be one year. As long as you have been initiated, if you can, then you would go to the war front. As long as you've joined the Kamajor society.[62]

4.10 Furthermore, the Trial Chamber found that the primary purpose of the massive initiations carried out in Base Zero was to "prepare the fighters for the war and to receive protection against bullets by immunisation".[63] The Trial Chamber found that "Kondewa's *de jure* status as High Priest of the CDF gave him the authority over all the initiators in the country as well as put him in charge of the initiations".[64] The Trial Chamber additionally found that child soldiers who were involved in the "all out offensive" attended the January 1998 Passing Out Parade,[65] at which Kondewa addressed them (as well as the adult soldiers involved in the operations), at which Kondewa told them that "I am going to give

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61 **Trial Chamber's Judgement**, para. 970.

62 Transcript, 11 March 2005, TF2-014, p. 15 (lines 23-26). See also See Transcript 16 June 2005, TF2-EW2, Closed Session, p. 91.

63 **Trial Chamber's Judgement**, para. 315.

64 **Trial Chamber's Judgement**, paras 806, 853; see also para. 316.

65 **Trial Chamber's Judgement**, para. 323.

you my blessings [... and] the medicines, which would make you to be fearless if you didn't spoil the law."[66] Given these findings, the Prosecution submits that the only conclusion open to any reasonable trier of fact is that Kondewa's actions did have a substantial encouraging effect on the enlistment and/or use of child soldiers in respect of children other than the one child TF2-021.

5. Prosecution's *Ground 6*: Terrorism

A. Reply to the Fofana Response Brief

5.1 As to paragraphs 80, 81 and 87 of the Fofana Response, the Prosecution relies on paragraphs 5.9 to 5.14 of the Prosecution Appeal Brief. As a matter of law, for the crime of terrorism, there is no requirement of an "underlying crime": the *actus reus* of the crime of terrorism need not involve an act that is otherwise criminal under international criminal law, such as *threats* of violence.[67]

5.2 Contrary to what is contended in paragraph 81 of the Response, the fact that paragraph 28 of the Indictment charged the Accused of the crime of terrorism based on the same alleged facts, or even the same alleged crimes, that formed the basis of the other counts, does not mean that the Accused had to be ***convicted*** of a crime under one of the other counts in order to be convicted of terrorism under Count 6. If *conduct* ***charged*** under another Count was ultimately found not to satisfy the elements of that other Count, it nonetheless remains conduct that was ***charged*** under Count 6.[68] The approach taken in the ***AFRC* Trial Judgement** confirms the Prosecution argument.[69] Therefore, acts of burnings should have been considered by the Trial Chamber under Count 6.

5.3 The Fofana Defence argues that the perpetrators did not possess the specific intent to commit acts of terror.[70] According to the Fofana Defence, for the crime of

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66 **Trial Chamber's Judgement**, para. 326.

67 **Trial Chamber's Judgement**, para. 170(i); **Sandoz, C. Swinarski and B. Zimmerman (eds),** *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Martinus Nijhoff, Geneva 1987, para. 1940.

68 See also **Indictment**, para. 24: "These *actions* by the CDF, largely Kamajors, which also included looting, destruction of private property, personal injury and the extorting of money from civilians, were intended to threaten and terrorize the population."

69 ***AFRC* Trial Judgement**, para. 1438.

70 **Fofana Response Brief**, paras. 83, 86, 90, 93, 96, 97, 100, 101, 108-110 and 114.

terrorism, the spreading of terror must be the ***only*** primary purpose of the perpetrators, while the primary purpose of the CDF was a military goal of gaining territory and the primary purpose of the acts of the perpetrators was to "recapture and regain control of the areas under rebel and junta control, by eliminating any form of opposition or resistance to this objective".[71]

5.4 The Prosecution submits that the intention to spread terror need not be the ***single*** predominant or ultimate aim of the acts of the perpetrator. It is clearly established that the spreading of terror among the civilian population need not be the ***only*** purpose of the acts in question, as found by the Trial Chamber itself.[72] The ICTY Appeals Chamber has said that it need only be "principal ***among the aims***", in other words, ***one*** of the principal purposes. The Prosecution submits that it cannot be the case that acts which are ***specifically intended*** to spread terror among the civilian population would be lawful, merely because such acts simultaneously also serve another purpose or goal which may be equally or more important to the perpetrator. Such an approach would amount to legitimising the use of conduct *specifically intended* to spread terror among the civilian population as a means of warfare. This would be contrary to the most fundamental goal of international humanitarian law: the protection of human dignity and the limiting of suffering in armed conflicts.[73] The Prosecution is not suggesting that any conduct committed by armed forces, that is otherwise in accordance with international humanitarian law, will be a crime under Article 3(d) of the Statute, if

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[71] **Fofana Response Brief**, para. 83, and paras 83, 86, 90, 93, 96, 97, 100, 101, 108-110 and 114.

[72] **Trial Chamber's Judgement**, para. 175: "this is not to say, ... that it needed to have been the only purpose behind the act or threat". At footnote 219 of the Trial Chamber's Judgement, the Trial Chamber refers to the ***Galić*** **Appeal Judgement**, para. 104: "... a plain reading of Article 51(2) suggests that the purpose of the unlawful acts or threats to commit such unlawful acts need not be the only purpose of the acts or threats of violence. The fact that *other purposes may have coexisted simultaneously with the purpose of spreading terror* among the civilian population would not disprove this charge, provided that the intent to spread terror among the civilian population was *principal among the aims*. Such intent can be inferred from the circumstances of the acts or threats, that is from their nature, manner, timing and duration." (Emphasis added.)

[73] **Legality of the Threat or Use of Nuclear Weapons**, Advisory Opinion, ICJ Reports 1996, p. 226, paras 78-79; Article 3 to the Geneva Convention; Article 4(1) of **Additional Protocol II**; ***Hadžihasanović Dissenting Opinion of Judge David Hunt, Interlocutory Appeal Decision***, para. 22; ***Tadić*** **Appeal Judgement**, paras 166, 190-191, 282-285; ***Aleksovski*** **Appeal Judgement**, paras 98, 152; ***Čelibići*** **Appeal Judgement**, paras 67-70, 81; ***Milošević*** **Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder**, para. 16; ***Furundžija*** **Trial Judgement**, para. 254.

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it has the ***incidental*** effect of causing terror.[74] However, where there is an ***express purpose*** to spread terror among the civilian population, international humanitarian law is violated, whether or not the purpose of spreading terror was the only purpose, and even if it coexisted with an ultimate military goal.[75]

5.5 In the present case, the Indictment itself alleged that the CDF had the ultimate aim "to defeat the RUF/AFRC forces and to gain and exercise control over the territory of Sierra Leone".[76] However, it is submitted that the only conclusion open to any reasonable trier of fact on the evidence and findings of the Trial Chamber[77] is that this ultimate aim was in the various instances charged in the Indictment pursued through acts intended to spread terror among the civilian population, in order, as conceded by the Defence, to "eliminate[e] any form of opposition or resistance".[78] The Defence also "concedes that the Kamajors's means of doing so may have been regrettably unlawful"[79] and that "the terror that was spread among the civilian population...may have been a *strategic, though unlawful, means to a necessary end*".[80] The Defence thereby concedes the Prosecution case, that the use of terror was a means to reach the ultimate goal of winning the war.[81]

5.6 As to the finding that "the evidence adduced does not prove beyond reasonable doubt that the civilian population was the primary object of the attack",[82] this finding is the subject of the Prosecution's first ground of appeal. In any event, this finding relates to the chapeau elements of crimes against humanity and not

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74 **Y. Sandoz, C. Swinarski and B. Zimmerman (eds),** Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, ICRC, Martinus Nijhoff, Geneva 1987, para. 1940.

75 ***Galić*** **Trial Judgement**, paras 576-577, 674; ***Blagogević*** **Trial Judgement**, paras 611 and 614.

76 **Indictment**, para. 19.

77 See in particular the findings in **Trial Chamber's Judgement**, paras 731, 743, 780, 824 and 879; for example: "While spreading terror may have been Norman's primary purpose in issuing the order to kill captured enemy combatants and 'collaborators', to inflict physical suffering or injury upon them and to destroy their houses ...".

78 **Fofana Response Brief**, para. 83. Compare **Indictment**, para. 19: "this included complete control over the population of Sierra Leone and the complete elimination of the RUF/AFRC, its supporters, sympathizers, and anyone who did not actively resist the RUF/AFRC occupation of Sierra Leone".

79 **Fofana Response Brief**, para. 83.

80 **Fofana Response Brief**, para. 101.

81 See also **Trial Chamber's Judgement**, para. 322: "Norman repeated that whoever took Tongo would win the war and that it should be taken ***at all costs***" (emphasis added).

82 **Trial Chamber's Judgement**, para. 693.

the war crime of terrorism, and relates to the ***subject*** of the attack conducted by the CDF, rather than to the ***purpose*** of these attacks. This finding does not negate the elements of acts of terrorism.[83]

5.7 As to the Defence argument concerning Fofana's alleged lack of knowledge of the specific intent of the perpetrators of crimes of terrorism in Tongo and Koribondo,[84] the Prosecution relies on paragraphs 5.24 to 5.31 and 5.38 to 5.58 of the Prosecution Appeal Brief. Contrary to what the Defence suggests, no reasonable trier of fact could conclude that Norman's order "to chop off the left hand of any captured 'junta' to give an indelible mark"[85] was aimed at teaching "the civilians and collaborators a lesson to practice democracy".[86]

5.8 Regarding the reporting system referred to in paragraphs 103, 104, and 112 of the Fofana Response Brief, the information available to a commander need not take "the form of specific reports submitted pursuant to a monitoring system".[87] There are numerous findings by the Trial Chamber on the basis of which the only conclusion open to any reasonable trier of fact is that Fofana, as a superior, had reason to know of the acts of terror committed, or about to be committed, by his subordinates.[88] Furthermore, there are clear findings by the Trial Chamber in respect of the superior-subordinate relationship between Fofana and the Kamajors in Koribondo.[89] Fofana has not challenged these findings in his appeal, and therefore cannot do so now.[90]

5.9 As to paragraphs 89, 90, and 100 of the Fofana Response Brief, the Prosecution refers to paragraphs 5.19 to 5.23 of its Appeal Brief and to paragraph 175 of the Trial Chamber's Judgement.[91]

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83 **Fofana Response Brief**, para. 86, footnote 130 referring to Trial Chamber's Judgement, para. 693.
84 **Fofana Response Brief**, paras 84-85, 91-95, 97-99, 102-107, 110-115.
85 **Prosecution Appeal Brief**, para. 5.26-5.29 (emphasis added).
86 **Fofana Response Brief**, para. 94.
87 **Trial Chamber's Judgement**, para. 244.
88 **Trial Chamber's Judgement**, paras 279, 340, 350, 378; see also 468.
89 **Trial Chamber's Judgement**, paras 773-783.
90 **Fofana Response Brief**, paras 104 and 105.
91 **Trial Chamber's Judgement**, para. 175: "this is not to say, however, that the intent to spread terror must be established by direct evidence."

B. Reply to the Kondewa Response Brief

5.10 As to paragraphs 5.2 to 5.17 of the Kondewa Response Brief, the Prosecution relies on paragraphs 5.9 to 5.14 of the Prosecution Appeal Brief. It is submitted that the correct interpretation of an indictment is not a matter that is within the discretion of a Trial Chamber, and the Trial Chamber does not have a discretion to adopt a narrower interpretation of the Indictment. If the Trial Chamber's interpretation of the indictment is challenged on appeal, it is submitted that the standard of review on appeal is the "error of law" standard.

5.11 The *Bizimungu* and the *Karamera* decisions cited by the Defence[92] are not on point as they relate to the discretion of the Trial Chamber to allow an amendment of the Indictment. The *Krajišnik* excerpt cited is equally irrelevant, all the more so since it is not a passage from the decision itself but from the Fundamentally Dissenting Opinion of Judge Schomburg.[93]

5.12 As a matter of law, multiple convictions for different crimes in respect of the same conduct are permissible if each of the crimes contains an element not contained in the other.[94] It is a firmly established common practice in international criminal tribunals to charge more than one criminal act under a single count, if each of those acts is charged as the same ***crime***, and to charge a single criminal act under two different counts where that criminal act is alleged to satisfy the elements of two different crimes. References to national case law and national legal systems cannot negate this firmly established practice of international criminal tribunals. In the present case, there is *no* issue of duplicity: in the Indictment, each count only charges one offence, and paragraph 28 of the Indictment only charges the Accused with the crime of terrorism. The Decisions in the *Brđanin* or the *Bizimungu* cases quoted by the Defence do not say otherwise.[95]

5.13 As to paragraphs 5.18 to 5.20 of the Kondewa Response Brief, the Prosecution relies on paragraphs 5.12 to 5.14 of the Prosecution Appeal Brief. Regarding the

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92 **Kondewa Response Brief**, para. 5.9.
93 **Kondewa Response Brief**, para. 5.9.
94 **Trial Chamber's Judgement**, para. 974 and the authorities there cited.
95 **Kondewa Response Brief**, paras 5.16 and 5.17.

issue of burning as pillage, the Prosecution refers to its Ground 7 and paragraphs 6.1 to 6.20 of the Prosecution Appeal Brief.

5.14 As to paragraphs 5.21 to 5.34 of the Kondewa Response Brief, regarding Kondewa's responsibility in Tongo, the Prosecution relies on paragraphs 5.15-5.23 and 5.32 to 5.37 of the Prosecution Appeal Brief.

5.15 As to paragraphs 5.28 to 5.29 and 5.32 of the Kondewa Response Brief, the Prosecution agrees that a reasonable doubt "is not a mere possible doubt".[96] Nor is there a reasonable doubt where the doubt is merely "fanciful",[97] or where "The evidence is so strong ... as to only leave a remote possibility in [the favour of the accused] which can be dismissed with the sentence 'of course it is possible but not in the least probable'".[98] The Prosecution submits that on the basis of the findings of the Trial Chamber and the evidence it relied upon, the only conclusion open to any reasonable trier of fact is that this standard of proof was met in relation to both the *mens rea* of the Kamajors/perpetrators of acts of terror in Tongo and Kondewa's knowledge of this intent.

5.16 As to paragraphs 5.30 to 5.31 of the Kondewa Response Brief, the Prosecution relies on the Prosecution Appeal Brief and paragraphs 5.7 to 5.14 above.

5.17 As to paragraphs 5.35-5.43 of the Kondewa Response Brief, the Prosecution relies on paragraphs 5.59-5.64 of the Prosecution Appeal Brief.

6. Prosecution's *Ground 7*: Burning as pillage

A. Reply to the Fofana Response Brief

6.1 The Prosecution relies on the submissions in the Prosecution Appeal Brief and the submissions below in reply to the Kondewa Appeal Brief.

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96 **Kondewa Response Brief**, para. 5.28.

97 **Jones and Powles**, para. 8.5.613.

98 **Jones and Powles**, para. 8.5.614, citing *Miller v. Minister of Pensions* [1947] 2 All E.R. 372, per Denning J.

A. Reply to the Kondewa Response Brief

6.2 It is noted that the Kondewa Response Brief concedes that there is "a definitional lacuna surrounding the terminology [of pillage]"[99] and that "if the word 'pillage' in Article 4(2)(g) [of Additional Protocol II] is not interpreted to include unlawful destruction of property, there would be no obvious prohibition on such acts in non-international armed conflicts under the Geneva Conventions or Additional Protocols."[100] The Kondewa Response Brief submits that the incorporation in the Statute of the Special Court of the *Malicious Damage Act* 1861 of Sierra Leone fills that lacuna for purposes of the Special Court.[101] However, this does not fill the lacuna that would otherwise exist in customary international law.

6.3 As to paragraphs 6.6 and 6.7 of the Kondewa Response Brief, it is submitted that if "pillage" includes the destruction of property, it necessarily includes the destruction of property *by burning.*

6.4 As to paragraph 6.8 of the Kondewa Response Brief, the Prosecution has never suggested that the unlawful appropriation of property is excluded from "pillage".

6.5 As to the remainder of the submissions in the Kondewa Response Brief, the Prosecution relies on the submissions in the Prosecution Appeal Brief. The authorities cited by the Defence on the definition of "pillage", while affirming that "pillage" includes the unlawful appropriation of property, do not expressly address the question of whether the term may also include destruction of property. None of the cited authorities unequivocally states that "pillage" does not include unlawful destruction of property, such as by arson, during war. The Prosecution submits that this is a question that has not been settled in international law, and is addressed at appellate level by an international criminal court for the first time in this case. Contrary to what the Defence suggests,[102] the Prosecution is not asking the Appeals Chamber to "change or amend statute law", but rather to interpret and clarify existing treaty and customary international law. The law is clarified and developed by final courts of appeal in all jurisdictions.

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[99] **Kondewa Response Brief**, para 6.4.
[100] **Kondewa Response Brief**, para 6.17.
[101] **Kondewa Response Brief**, paras 6.17 to 6.19.
[102] **Kondewa Response Brief**, para 6.19.

7. Prosecution's *Ground 8*: Denial of leave to amend the indictment

A. Reply to the Fofana Response Brief

7.1 As to paragraphs 131-132 and 134 of the Fofana Response Brief, the Prosecution relies on paragraphs 7.10 of the Prosecution Appeal Brief, and paragraphs 7-12 of the Prosecution's Main Submissions.[103] It is further submitted that paragraph 58 of the Indictment Amendment Decision[104] is based on the erroneous and fallacious reasoning that the Prosecution can, and is expected to, investigate ***simultaneously*** all cases against all accused, and all crimes which all accused may have committed, and that each of these investigations will in practice take the same amount of time, so that all of the Prosecution's investigations of all crimes will be completed at the same time. The reality is that, where an Office of the Prosecutor is investigating cases against different accused in different cases, in each of which the relevant crime scenes and witnesses may be different, investigations cannot all be undertaken simultaneously, and some investigations may take longer than others.

7.2 By way of comparison, in the *Haradinaj* case before the ICTY, on 25 October 2006, the Trial Chamber granted a Prosecution motion to add two new counts, and to incorporate additional factual allegations to some of the existing counts.[105] That motion was filed on 26 April 2006,[106] over ***two years*** after the date of the initial indictment in that case (24 February 2005[107]), over ***two years*** after the accused in that case had been transferred to the ICTY,[108] and nearly ***twelve years*** after the ICTY was established on 25 May 1993.[109] There was no suggestion in that case that a prosecutor exercising "expected professional diligence" should

[103] **Annex to Prosecution Appeal Against Refusal of Leave to Appeal,** SCSL-04-14-T-177, Registry page nos. 9127-9140 (included as Appendix A to the Prosecution Appeal Brief).

[104] **Indictment Amendment Decision** SCSL-04-14-PT-113, Registry page Nos 7001-7040.

[105] *Prosecutor v. Haradinaj et al.*, IT-04-84-PT, "Decision on Motion to Amend the Indictment and on Challenges to the Form of the Amended Indictment", Trial Chamber, 25 October 2006, para. 2 ("***Haradinaj*** **Decision**").

[106] *Ibid.*, preamble.

[107] *Prosecutor v. Haradinaj et al.*, IT-04-84-PT, "[Original] Indictment", 25 February 2005 <http://www.un.org/icty/indictment/english/har-ii050224e.htm>.

[108] All three accused in the *Haradinaj* case were transferred to the ICTY on 9 March 2005.

[109] The ICTY was established by United Nations Security Council resolution 827 (1993), 25 March 1993.

have been able to fully investigate all charges against the accused in this case in the ***10 year*** period between the establishment of the ICTY and the date of the initial indictment in that case.[110] The Prosecutor of the Special Court brought indictments against 13 accused for large scale crimes over a wide geographic area, and conducted investigations into other potential perpetrators. It was not open to a reasonable trier of fact in the CDF case to consider that a diligent prosecutor should necessarily have been able to do this in the much shorter period between the establishment of the Special Court and the date of the initial indictments in the CDF case.

7.3 As to paragraphs 135-136 and 141 of the Fofana Response Brief, the Prosecution submits that it is not the case that the proceedings would "inevitably have to be stayed" until the Indictment Amendment Motion had been decided, or that the Trial Chamber would have "in its wisdom ... stayed the proceedings out of caution". In the *Haradinaj* case, proceedings were not "stayed" by the Trial Chamber pending a decision on the motions that formed the basis of the *Haradinaj* Decision and *Haradinaj* Second Decision.[111] In the *Akayesu* case an amendment to the indictment was allowed after trial had commenced,[112] and (as far as the Prosecution is aware) no stay of proceedings was ordered.

7.4 As to paragraphs 137 and 138 of the Fofana Response Brief, the Prosecution acknowledges that the Trial Chamber has a discretion whether to allow an amendment to the indictment, and that in exercising the discretion, it must balance factors such as the interests of justice, delay and possible prejudice to the accused.[113] However, the Prosecution submits that the Trial Chamber erred in the exercise of that discretion, for the reasons given in the Prosecution Appeal Brief.

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110 It is noted that it is also significant that in the Haradinaj case, the Indictment had already been amended by the Trial Chamber (*Prosecutor v. Haradinaj et al.*, IT-04-84-PT, "Decision on Motion to Amend the Amended Indictment", Trial Chamber, 12 January 2007 ("***Haradinaj* Second Decision**"), paras. 1-3), and after the *Haradinaj* Decision it was subsequently amended again to add "a considerable number of new charges" (*ibid.*, para. 18 and disposition).

111 Trial in the *Haradinaj* case ultimately commenced on 5 March 2007, less than two months after the *Haradinaj* Second Decision.

112 See Prosecution's Main Submissions, para. 15.

113 See Prosecution Appeal Brief, para. 7.14. Compare *Prosecutor v. Halilović*, IT-48-34-PT, "Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment", Trial Chamber, 17 December 2004, para. 22 ("the test for whether leave to amend [an Indictment] will be granted is whether

7.5 As to paragraph 139 of the Fofana Response Brief, the Prosecution submits that the comment made by the Trial Chamber in paragraph 48 of the Motion Amendment Decision *does* suggest that the Trial Chamber considered that there was a "cut off" point.

7.6 As to paragraph 140 of the Fofana Response Brief, it is submitted that no reasonable trier of fact could conclude that because two years elapsed between the signing of the Special Court Agreement establishing the Special Court and the filing of the Indictment Amendment Motion, it would take the Defence two years to investigate the new charges that the Prosecution sought to add. Clearly, the Defence had not been investigating the existing charges from the date that the Special Court Agreement was signed. Fofana and Kondewa were both arrested on 29 May 2003, and Defence counsel were not appointed until after their arrest.

B. Reply to the Kondewa Response Brief

7.7 Contrary to what is suggested in paragraphs 7.12 to 7.20 of the Kondewa Appeal Brief, the Prosecution submits that it ***is*** possible for interlocutory decisions to be appealed in an appeal following the final trial judgement.

7.8 Numerous appeals before the ICTR and ICTY have involved grounds of appeal that challenged interlocutory decisions that were given during the course of the trial proceedings.[114]

7.9 The ICTY Appeals Chamber has held that where an accused could have sought the leave of the Trial Chamber to bring an interlocutory appeal against an interlocutory decision of the Trial Chamber, but refrained from doing so, the

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allowing the amendments would cause unfair prejudice to the accused") and *Prosecutor v. Brđanin and Talić*, IT-99-36-PT, "Decision on Filing Replies", Trial Chamber, 7 June 2001, para. 3 ("an amendment will not be refused merely because it assists the prosecution quite fairly to obtain a conviction.").

[114] See, for instance, ***Blagojević*** **Appeal Judgement**, paras 12-16 (post-judgement appeal against an interlocutary decision not to remove assigned defence counsel); ***Simić*** **Appeal Judgement**, paras 192-196 (post-judgement appeal against an oral interlocutory decision not to lift the confidentiality of a medical report and against an Appeals Chamber Decision denying a motion for disclosure); ***Naletilić and Martinović*** **Appeal Judgement**, paras 19-22 (post judgement appeal against two Trial Chamber Decisions denying preliminary motions on the form of the Initial Indictment); ***Brđanin*** **Appeal Judgement**, paras 34-35 (post-judgement appeal against a Trial Chamber Decision rejecting allegations of illegal intercept evidence); ***Galić*** **Appeal Judgement**, paras 47-50 (post-judgement appeal against a Trial Chamber decision not to travel to Sarajevo and allow an on-site visit of the alleged crime sites). See also the ***Jelisić*** **Appeal Judgement**, referred to in paragraph 7.15 below.

accused does not thereby waive the right to challenge the interlocutory decision in the final post-judgement appeal.[115] The general principle is that where a party has not raised an objection before the Trial Chamber, that party will have waived its right to raise that objection for the first time on appeal.[116] However, where a party has raised an objection before the Trial Chamber, and the Trial Chamber has dismissed that objection, that party does not waive the right to raise the issue on post-judgement appeal by failing to seek to appeal at the interlocutory stage.

7.10 The Kondewa Appeal Brief suggests that interlocutory decisions of Trial Chambers are without any appellate remedy, except in accordance with Rule 73(B) (or Rule 72(B), where applicable). This would mean that a party would have no recourse at all against an interlocutory decision of the Trial Chamber, even if it affected the outcome of the case, in cases where there is no right of appeal under Rule 72(B) and in cases where leave to bring an interlocutory appeal is not granted by the Trial Chamber. The Prosecution submits that this cannot be correct, as the cases cited above demonstrate. The purpose of Rule 73(B), which allows interlocutory appeals with the leave of the Trial Chamber, is intended to promote the efficiency of proceedings before the Special Court. It is intended to ensure that on the one hand, trials are not constantly disrupted by interlocutory appeals, many of which may be on issues that turn out to be moot, depending on the course that the proceedings subsequently take. On the other hand, Rule 73(B) allows a situation to be avoided where the verdict in a complex case is overturned on appeal, and a costly retrial is ordered with consequent delays, as a result of an error in an interlocutory decision that could have been efficiently corrected during the trial proceedings by an interlocutory appeal.[117]

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115 ***Naletilić and Martinović*** **Appeal Judgement**, paras 21-22.

116 ***Čelebići*** **Appeal Judgement**, para. 640 (referring to earlier case law) (and see at para. 351). See also ***Kunarac*** **Appeal Judgement**, para. 61; ***Naletilić and Martinović*** **Appeal Judgement**, paras. 21-22; ***Kambanda*** **Appeal Judgement**, paras. 25–28, 55; ***Kayishema*** **Appeal Judgement**, para. 91; ***Musema*** **Appeal Judgement**, paras. 127, 341; ***Bagilishema*** **Appeal Judgement**, para. 71.

117 See **Appeals Chamber Decision**, SCSL-04-14-T-319, Registry page Nos 11429-11445, para. 29: "The underlying rationale for permitting such [interlocutory] appeals is that certain matters cannot be cured or resolved by final appeal against judgement. However, most interlocutory decisions of a Trial Chamber will be capable of effective remedy in a final appeal where the parties would not be forbidden to challenge the correctness of interlocutory decisions which were not otherwise susceptible to interlocutory appeal except in accordance with the Rules". Thus, Rule 73(B) of the

7.11 In this case, the Prosecution did everything possible to have its objection resolved by the Appeals Chamber during the trial proceedings. Having failed to do so, it is not now prevented from raising this objection in the post-judgement appeal. In the Appeals Chamber Decision,[118] the Appeals Chamber found that it had no jurisdiction to grant leave to the Prosecution to appeal from a refusal to grant leave under Rule 73(B), and no jurisdiction to entertain an ***interlocutory*** appeal without the leave of the Trial Chamber. It did not find that the issue could not be raised on post-judgement appeal.[119]

7.12 As to paragraph 7.29 of the Kondewa Response Brief, it is submitted that a Trial Chamber has a discretion whether or not to grant an amendment to the Indictment, and an erroneous exercise of that discretion is a procedural error.[120]

7.13 As to paragraphs 7.25 to 7.28 of the Kondewa Response Brief, the Prosecution submits that the Indictment Amendment Decision did affect the verdict in the case, in that the verdict might have included convictions for sexual crimes if the Indictment Amendment Decision might have been decided otherwise. The situation in this case is analogous to that in the *Jelisić* case.[121]

7.14 As to paragraphs 7.29 to 7.32 of the Kondewa Response Brief, this is a case where the interlocutory decision affected the verdict, for the reasons just given. That the Prosecution seeks no remedy other than a finding that the Trial Chamber erred in dismissing the Indictment Amendment Motion does not alter this fact. It is therefore not necessary to show that this ground of appeal raises an issue of general importance. In any event, it is submitted that various of the issues raised

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ICTY Rules is expressed to allow interlocutory appeals where "***immediate*** resolution by the Appeals Chamber [as opposed to a resolution in a post-judgement appeal] may materially advance the proceedings" (emphasis added).

118 **Appeals Chamber Decision,** SCSL-04-14-T-319, Registry page Nos 11429-11445, especially para. 44.

119 See **Appeals Chamber Decision,** para. 29, quoted above.

120 See **Prosecution Response Brief,** paras 1.16 to 1.19.

121 In the *Jelisić* case, the Trial Chamber dismissed a count (genocide) at the Rule 98 stage. This interlocutory decision was reversed by the Appeals Chamber in the post-judgement appeal, on the ground that the interlocutory decision was tainted by a procedural error, in that the Trial Chamber had failed first to afford the Prosecution an opportunity to be heard: ***Jelisić* Appeal Judgement,** paras. 22-29.

by the Prosecution in this ground of appeal are of general importance,[122] namely the scope of the Trial Chamber's discretion to amend indictments.

7.15 As to paragraphs 7.29 to 7.49 of the Kondewa Response Brief, the Appeals Chamber Decision made ***no*** finding that this issue could not be raised on post-judgement appeal (see paragraph 7.13 above). The principles of issue estoppel and *res judicata* are therefore inapplicable and irrelevant. There is no basis for the Defence submission that this ground of appeal is an abuse of process.[123]

8. Prosecution's *Ground 9*: Preclusion of evidence of sexual crimes

A. Reply to the Fofana Response Brief

8.1 As to paragraph 143 of the Fofana Response Brief, there is no basis for the argument that the evidence to be adduced was not "directly connected to the facts" and thus not "relevant to the issue at stake". In any event, the Trial Chamber did not preclude the evidence on the ground that it was irrelevant to Counts 3-4 of the Indictment, but rather, on the ground that the Trial Chamber considered that it would in principle prejudice the rights of the accused to permit the adduction of evidence relevant to sexual crimes in support of Counts 3-4. In this ground of appeal, the Prosecution challenges that finding and ruling of the Trial Chamber. Since the Prosecution was wrongly precluded from presenting this evidence in the first place, the Trial Chamber never assessed its relevance to Counts 3 and 4.

8.2 As to paragraph 144 of the Fofana Response Brief, the Prosecution submits that this was not a case of bringing in evidence "through the back door". Because the Prosecution was denied leave to amend the indictment to add counts of sexual violence, it is accepted that the Prosecution could not adduce this evidence for the purpose of proving the guilt of the accused on those excluded counts. However, the Accused ***were*** charged on Counts 3 and 4, and to adduce evidence of sexual

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122 For the proposition that Appeals Chamber may examine alleged errors which will not affect the verdict but which do, however, raise an issue of general importance for the case-law or functioning of the Tribunal, see, in addition to the authorities cited in footnote 506 of the Prosecution Appeal Brief, ***Blagojević and Jokić*** **Appeal Judgement** para. 6; ***Kupreškić*** **Appeal Judgement** para. 22; ***Kunarac*** **Appeal Judgement** para. 36; ***Akayesu*** **Appeal Judgement** paras 18-23.

123 As alleged in **Kondewa Appeal Brief**, para. 7.45.

crimes that is relevant to Counts 3 and 4, in order to establish the guilt of the Accused on Counts 3 and 4, is to bring evidence through the front door, not through the back door.

8.3 Contrary to what paragraph 144 of the Fofana Response Brief suggests, crimes of a sexual nature can constitute the war crime of violence to life, health and physical or mental well-being of persons, in particular cruel treatment.[124]

8.4 As to paragraph 145 of the Fofana Response Brief, the issue is whether the excluded evidence was relevant to Counts 3-4. Evidence that is relevant to an existing count does not become irrelevant to that existing count merely because it would also have been relevant to another count which the Prosecution was not permitted to add to the indictment. The argument that Counts 3-4 did not specifically mention sexual crimes is addressed in paragraphs 8.12 to 8.16 of the Prosecution Appeal Brief.

8.5 As to the argument in paragraph 145 of the Fofana Response Brief that "the Prosecution should not have sought to amend the Indictment to include the four new sexual offences" if it wanted to adduce the new evidence to prove Counts 3 and 4, it is submitted that, for the reasons given in the Prosecution Appeal Brief and above, the Prosecution did not *need* to amend the Indictment to add the new counts of sexual crimes in order to adduce this evidence for the purposes of Counts 3 and 4. As Justice Boutet held in his dissenting opinion "it is important to draw a distinction between the material facts which must be plead in an indictment, and the evidence by which those material facts will be proved".[125]

8.6 As to paragraph 146 of the Fofana Response Brief, the Prosecution relies on paragraphs 8.11 to 8.16 of the Prosecution Appeal Brief. The Majority of the

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[124] See **Prosecution Appeal Brief**, para. 8.10, referring in footnotes 536 and 537 to the Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, 24 May 2005, SCSL-14-434, Registry page Nos. 13034-13085 ("**Admissibility of Evidence Decision**") and the case law of international tribunals in this regard, e.g. ***Akayesu*** **Trial Judgement**, paras 706-707 and 731-734 and ***Kayishema and Ruzindana*** **Trial Judgement**, para 108 (both reasoning that rape amounted to a form of genocide in "causing serious bodily or mental harm to members of the group"); ***Kunarac*** **Appeal Judgement**, paras 180-185 and 189; ***Čelebići*** **Trial Judgement**, paras 475-496, ***Musema*** **Trial Judgement**, para 156; ***Kordić*** **Trial Judgement**, paras 260, 265; ***Blaškic*** **Trial Judgement**, para. 182.

[125] Dissenting Opinion of Justice Pierre Boutet on Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, 24 May 2005, SCSL-04-14-T, Registry page Nos 13074 – 13085, para. 10 ("**Judge Boutet's Dissent**").

Trial Chamber effectively found that the failure to plead these acts specifically in relation to Counts 3 and 4 ***automatically*** meant that they could not be taken into account in relation to those counts. For the reasons given in the Prosecution Appeal Brief, that is not correct.[126] The exercise of the Trial Chamber's discretion not to allow the evidence to be admitted was therefore based on erroneous legal principles and, as such, constituted a procedural error.

8.7 In paragraphs 147 to 149 of the Fofana Response Brief, the Defence claims that the adduction of evidence after the dismissal of the Indictment Amendment Motion would have violated the rights of the accused to a fair trial. First, because it would have caused undue delay in the proceedings, second, because it would have been "contrary to the doctrine of Fundamental Fairness and the respect for Judicial Decision", and thirdly, because it would have violated the presumption of innocence of the Accused.

8.8 As to the first argument, the Prosecution relies on the submissions in paragraphs 8.12 to 8.16 of the Prosecution Appeal Brief.[127] As to the second argument, the Prosecution relies on paragraphs 8.4 to 8.6 above and corresponding paragraphs of the Prosecution Appeal Brief. As to the third argument, the question whether or not the Prosecution should have been able to seek to prove sexual crimes in relation to Counts 3 and 4 has nothing to do with the presumption of innocence. The accused would always be presumed innocent of those criminal acts unless the Prosecution established guilt beyond a reasonable doubt.

8.9 As to paragraph 155 of the Fofana Response Brief, the Prosecution submits even if Rule 47(C) of the Rules of the Special Court, unlike Rule 47(C) of the Rules of the ICTY or ICTR, does not require an indictment to contain "a concise statement of the facts", it is difficult to see how this means that the case law of the ICTY and ICTR on the curing of defective indictments is inapplicable to the Special Court. The Fofana Response Brief contains no argument in support of this bare

[126] It is settled that a deficiently pleaded indictment can be deemed cured, and prejudice found to be non-existent, where there has been timely, clear and consistent information provided to the accused detailing the factual basis of the charges against him: ***Ntagerura*** **Appeal Judgement**, para 28; ***Ntakirutimana*** **Appeal Judgement**, para 27; ***Kupreškić*** **Appeal Judgement**, para 114; and ***Kvočka*** **Appeal Judgement**, para 43.

[127] See also **Judge Boutet's Dissent**, paras 29-30.

assertion. The fact that Rule 47(C) of the Special Court's Rules does not require an indictment to contain a "concise statement of facts" suggests, according to the principle *in maiore minus*, "even greater acceptance at the Special Court of providing notice of factual specifics outside of the texts of indictments", as argued in the Prosecution Appeal Brief.[128]

A. Reply to the Kondewa Response Brief

8.10 The Kondewa Response Brief argues that the Prosecution cannot challenge an interlocutory decision of the Trial Chamber in a post-judgement appeal.[129] In reply, the Prosecution relies on paragraphs 7.9 to 7.13 above. For the reasons there given, the Prosecution submits that it is entitled to appeal against the Admissibility of Evidence Decision in this post-judgement appeal.

8.11 Kondewa also seems to claim that the Prosecution failed to show that the Trial Chamber Decision was invalidated by an error of law, fact and/or procedure and that thus no ground for appeal under Article 20(1) of the Statute exists. However, the Prosecution reiterates its submission that the Trial Chamber erred in law in reaching the conclusion that notice of the facts supporting a charge can only be given in the indictment and nowhere else,[130] and that it committed a procedural error, in exercising its discretion when dismissing the Admissibility of Evidence Motion ***based on wrong legal principles***.[131] A ground of appeal therefore exists pursuant to Article 20(1)(a) and/or (b) of the Statute.[132]

8.12 As to paragraphs 7.29 to 7.31 of the Kondewa Response Brief (arguing that the Prosecution has not identified an issue of law of general importance), the Prosecution relies on paragraphs 7.13 and 7.14 above. The Prosecution submits that the Admissibility of Evidence Decision ***affected the verdict*** in the case, in that the verdict might have included convictions for sexual crimes if the Admissibility of Evidence Decision had been decided otherwise. That the Prosecution seeks no remedy other than a finding that the Trial Chamber erred in

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128 **Prosecution Appeal Brief**, footnote 534.
129 Referring *mutatis mutandis* to its submissions in response to the Prosecution's Ground 8.
130 **Admissibility of Evidence Decision**, para. 19.
131 See **Prosecution Appeal Brief**, para. 8.7 to 8.9.,
132 See **Prosecution Appeal Brief**, paras 8.8 to 8.9.

dismissing the Admissibility of Evidence Motion does not alter this fact. It is therefore not necessary to show that this ground of appeal raises an issue of general importance. In any event, it is submitted that various of the issues raised by the Prosecution in this ground of appeal are of general importance, namely whether the mere fact that the Prosecution has unsuccessfully sought to amend the indictment to add new counts means that evidence that would have been relevant to those excluded counts cannot be adduced in relation to existing counts in the indictment, and the scope of the principles on the curing of defects in the indictment.[133]

9. Prosecution's *Ground 10*: Sentencing

9.1 As to paragraphs 157 to 165 of the Fofana Response Brief, and paragraphs 9.1 to 9.10 of the Kondewa Response Brief, the Prosecution does not suggest that the Trial Chamber was bound to ***follow*** the sentencing practices of the national courts in Sierra Leone, or that this is the only factor to be considered by the Trial Chamber in sentencing. However, it is submitted that under Article 19(1) of the Statute, the Trial Chamber is bound, "***as appropriate***, [to] have ***recourse*** to" Sierra Leonean sentencing practices. The Prosecution submits that the Trial Chamber erred in law and procedure when it decided, ***for the reasons that it did***, that it was "inappropriate" for the purposes of Article 19 to rely on such practices. If the Trial Chamber's reasoning was valid, the Special Court would never have regard to sentencing practices in Sierra Leone, other than for convictions under Article 5 of the Statute. As a result of this error, the Trial Chamber also erroneously failed to have regard to the matters referred to in paragraphs 9.11 to 9.14 of the Prosecution Appeal Brief. The Fofana Defence agrees that the Trial Chamber is bound to "give due consideration" to sentencing practices in Sierra

[133] "The Appeals Chamber also exceptionally hears arguments where a party has raised a legal issue that would not lead to the invalidation of the judgement but that is of general significance to the International Tribunal's jurisprudence" ***Blagojević and Jokić*** **Appeal Judgement** para. 6, also, ***Simić*** **Appeal Judgement**, para. 7; ***Stakić*** **Appeal Judgement**, para. 7, ***Kupreškić*** **Appeal** Judgement para 22, ***Kunarac*** **Appeal Judgement** para. 36, ***Akayesu*** **Appeal Judgement** paras 18-23.

Leone.[134] In this case the Trial Chamber gave no consideration at all to such practices.[135]

9.2 As to paragraph 163 of the Fofana Response Brief, the Defence provides no basis at all for the suggestion that courts of Sierra Leone might have imposed similar sentences for analogous crimes under Sierra Leonean law.

9.3 As to paragraphs 166-174 of the Fofana Response Brief and paragraphs 9.11 to 9.18 of the Kondewa Response Brief, the Prosecution submits that while the Statute and Rules do not exhaustively enumerate the matters that a Trial Chamber may take into account as mitigating factors, the Trial Chamber does not have a completely unfettered discretion in this respect. For instance, in the *Knojelac* Appeal Judgement, the ICTY Appeals Chamber held that the Trial Chamber erred, in taking into account as a mitigating factor, defence counsel's co-operation with the Trial Chamber and the prosecution in the efficient conduct of the trial.[136] The Prosecution submits that it is not open to a Trial Chamber to give any significant weight in mitigation to mere ***expressions*** of empathy, as opposed to ***genuine*** remorse.[137] Otherwise any convicted person could obtain a reduced sentence merely by saying that he was sorry at the sentencing hearing, or merely by having his defence counsel state on his behalf that he was sorry.[138]

9.4 As to paragraphs 175-182 of the Fofana Response Brief, and paragraphs 9.19 to 9.25 of the Kondewa Response Brief, the Prosecution relies on paragraphs 9.22 to 9.26 of the Prosecution Appeal Brief. As submitted in the previous paragraph, there are limits on the factors that the Trial Chamber can take into account in

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[134] **Fofana Response Brief**, para. 160.

[135] **Fofana Response Brief**, paras 160 (final two sentences) and 164 (second sentence) suggests that the Trial Chamber did have regard to sentencing practices in Sierra Leone. It is submitted that paragraph 43 of the Sentencing Judgement makes clear that it did not. **Kondewa Response Brief**, para. 9.9 appears to concede that the Trial Chamber disregarded Sierra Leonean sentencing practices.

[136] ***Krnojelac* Appeal Judgement**, paras 261-263.

[137] See the authorities referred to in Prosecution Appeal Brief, para. 9.16. Paragraph 177 of the ***Vasiljević* Appeal Judgement**, referred to in paragraph 170 of the Fofana Response Brief and paragraphs 9.13 and 9.14, states that "an accused can express ***sincere*** regrets without admitting his participation in a crime" (emphasis added). It does not state that any ***expression*** of regret will suffice. In the present case, it is submitted that the Trial Chamber did not address its mind as to the sincerity or genuineness of any regret or remorse on the part of the accused.

[138] Contrary to what is suggested in paragraph 167 of the Fofana Response Brief, the Trial Chamber could not assess the extent of Fofana's empathy with victims from his demeanour, since Fofana's statement was read by his counsel.

sentencing. While lack of adequate training may be treated as a mitigating factor where the circumstances so warrant (for instance, where a commander in the field has to take numerous split-second decisions in the heat of battle), it is not open to a Trial Chamber to automatically treat lack of training as a mitigating factor. In this case, the Trial Chamber identified no circumstances justifying taking this into account as a mitigating factor, and it is submitted that there were none.[139]

9.5 As to paragraph 183, 188 and 202 of the Fofana Response Brief, the Prosecution submits that paragraphs 9.27 to 9.29, 9.30 to 9.31 and 9.46 to 9.52 of the Prosecution Appeal Brief are not "sub-grounds" of appeal that were required to be included expressly in the Prosecution's Notice of Appeal. Rule 108(A) of the Rules requires a Notice of Appeal to set out the "grounds of appeal". The Prosecution's Ground 10, as stated in paragraphs 32 and 33 of the Prosecution Notice of Appeal, is that the Trial Chamber "erred in law and in fact, and committed a procedural error (in that there has been a discernible error in the exercise of the Trial Chamber's sentencing discretion)" in imposing the sentences that it did. The Prosecution submits that under Rule 108 of the Special Court Rules, the Notice of Appeal is required to state no more than this for the Prosecution to advance all of the arguments that it has advanced in the Prosecution Appeal Brief. Paragraphs 34-36 of the Prosecution Notice of Appeal go further than Rule 108(A) requires, by additionally giving some of the ***substance*** of this ground of appeal, but this substance is stated in a non-exhaustive way, as indicated by the words "In particular" at the beginning of paragraph 34.[140] The fact that the Prosecution Notice of Appeal, paragraphs 34-36, goes further than required, and gives in a non-exhaustive way some of the substance of the ground of appeal, does not preclude the Prosecution from

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139 It requires no military training to realize, for instance, that women and children should not be hacked to death. The Prosecution also submits that the submission in paragraph 9.23 of the Kondewa Response Brief, that Kondewa was "forced without choice" to play the role that he did, has no basis in the findings of the Trial Chamber, and is mere assertion by the Kondewa Defence.

140 Rule 108(A) can be compared with the equivalent provision of the ICTY Rules, which, following various amendments over the years, now requires not only that the notice of appeal must set forth the "grounds", but "also" that it must indicate "the ***substance*** of the alleged errors and the relief sought" (emphasis added). Rule 108(A) of the Special Court Rules does not require the ***substance*** of the alleged error to be stated in the Notice of Appeal.

advancing additional substance in its Appeal Brief.[141] All of the arguments raised by the Prosecution in respect of the Prosecution's Ground 10 are in any event encompassed within the additional general contention that the sentences were unreasonable in that they were "manifestly inadequate".[142]

9.6 Furthermore, even if the Appeals Chamber were to decide that the Prosecution arguments referred to in paragraph 183, 188 and 202 of the Fofana Response Brief do fall outside the Prosecution's Notice of Appeal, it is submitted that the Appeals Chamber has the power to consider these issues *proprio motu*,[143] and should do so, given that the Prosecution has argued them in its Appeal Brief, and the Defence has responded to them in their Response Briefs, and given that they raise issues of general importance.[144]

9.7 As to paragraphs 184-187 of the Fofana Response Brief, the Prosecution notes that in the *Plavsić* case,[145] the Trial Chamber found that the accused "was instrumental in ensuring that the Dayton Agreement was accepted and implemented in Republika Srpska".[146] Even then, the Trial Chamber expressly stated that: "Nonetheless, undue leniency would be misplaced. No sentence which the Trial Chamber passes can fully reflect the horror of what occurred or the terrible impact on thousands of victims."[147] Plavsić was a member of the Presidency of Republika Srpska at the time of the Dayton Agreement, and her commitment to the Dayton Agreement resulted in her loss of the Presidency of the Republika Srpska to a hard-line, nationalist candidate.[148] It is submitted that the post-conflict conduct of Fofana and Kondewa does not rise to this level.[149]

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141 Compare the wording generally of the grounds of appeal as set forth in the Kondewa Notice of Appeal and the Notices of Appeal in the AFRC Case, which do not in any way state the ***substance*** of the Defence grounds of appeal, and give no more detail than that given in paragraphs 32 and 33 of the Prosecution Notice of Appeal.

142 **Prosecution Notice of Appeal**, para. 36. The fact that the Prosecution presented its arguments in the Appeal Brief under different headings does not mean that each heading becomes a separate ground of appeal that must be specifically included in the Notice of Appeal.

143 ***Erdemović*** **Appeal Judgement**, para. 16.

144 See ***Simba*** **Appeal Judgement**, paras. 319-320.

145 ***Plavsić*** **Sentencing Judgement**, relied upon in Fofana Response Brief, para. 186.

146 ***Plavsić*** **Sentencing Judgement**, para. 94.

147 ***Plavsić*** **Sentencing Judgement**, para. 132.

148 ***Plavsić*** **Sentencing Judgement**, para. 86.

149 The submission that after the conflict, Kondewa was "a farmer and an herbalist" (Kondewa Response Brief, paras 9.26 to 9.29), and that he was "going to harvest palm nuts" at the time of his

9.8 As to paragraphs 188-191 of the Fofana Response Brief and paragraphs 9.30 to 9.32 of the Kondewa Appeal Brief, the Prosecution relies on the submissions in paragraphs 9.30 to 9.31 of the Prosecution Appeal Brief.[150]

9.9 As to paragraphs 192-198 of the Fofana Response Brief and paragraphs 9.33 to 9.40 of the Kondewa Response Brief, the Prosecution notes that the Defence argues that the Trial Chamber did not take into account as a mitigating factor that Fofana and Kondewa were fighting on the "right" side of the conflict, but rather, that the Trial Chamber took into account that the Accused "had a good motive".[151] The Prosecution submits that the Defence seeks to draw a distinction which does not exist. If Fofana had a "good motive", it was only because he was on the side of a cause that he considered to be "good" or "just". As submitted in the Prosecution Appeal Brief, in many armed conflicts, both sides to the conflict may consider themselves to be fighting on the "good" or "just" side. That cannot be a defence to the commission of crimes, or a factor in mitigation in the case of a person convicted of crimes. In any event, it is submitted that it is clear from paragraph 87 of the Sentencing Judgement that what the Trial Chamber took into account was the "justness" of the cause which Fofana and Kondewa supported, and not their "good motive". The Trial Chamber's Judgement itself in fact does not contain findings as to Fofana and Kondewa's precise motives.[152] Furthermore, and in any event, the fact that an evil motive may be an aggravating factor does not mean that absence of an evil motive, or a belief of the accused that his cause is good and in the public benefit, must be a mitigating factor.[153]

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arrest (Transcript, 19 September 2007, p. 94 (lines 11-12) certainly does not rise to this level. After any conflict, most former combatants return to their former lives and occupations and positions in their communities.

150 See in particular ***Blagojević and Jokić* Trial Judgement**, para. 853: "The Trial Chamber finds that generally the character of an Accused before the crimes were committed is not a factor to be taken into consideration in mitigation of the sentence in crimes of this nature". See also ***Imanishimwe* Trial Judgement**, para. 820, referred to in paragraph 9.60 of the **Kondewa Response Brief**.

151 See in particular **Fofana Response Brief**, para. 195 (final sentence).

152 The Trial Chamber found that "Kondewa was in charge of the initiations at Base Zero; ... The initiation fee was about 10,000 leones and was paid directly to Kondewa" (**Trial Chamber's Judgement**, para. 316, and see also para. 668), leaving open the possibility that there was a financial motive.

153 Compare **Kondewa Response Brief**, paras 9.38 and 9.39, and **Prosecution Appeal Brief**, para. 9.45.

9.10 As to paragraphs 188-191 of the Fofana Response Brief, it is submitted that the Trial Chamber's finding that Fofana acted from a sense of "civic duty" was based on its finding that (1) he was fighting on the "right" side in the conflict,[154] and (2) that he did not act for selfish reasons.[155] As to the former, see paragraphs 9.32 to 9.41 and 9.43 to 9.44 of the Prosecution Appeal Brief and paragraph 9.9 above. As to the latter, see paragraph 9.45 of the Prosecution Appeal Brief. Contrary to what is suggested in paragraph 200 of the Fofana Response Brief, the Trial Chamber did not find that Fofana was reluctantly drawn into a maelstrom of violence, and on the basis of the Trial Chamber's findings there is no basis for so suggesting.[156]

9.11 As to paragraphs 202-208 of the Fofana Response Brief, and paragraphs 9.41 to 9.50 of the Kondewa Response Brief, the Prosecution relies on paragraphs 9.46 to 9.52 of the Prosecution Appeal Brief. It is submitted for the reasons there given that while international criminal tribunals are established on the basis that they will contribute to reconciliation, this does not mean that reconciliation is a factor to be taken into account in adjusting downwards the sentence that would otherwise be imposed. It is submitted that it is obvious that a Trial Chamber should not impose a harsher sentence than it would otherwise consider appropriate merely because it considered that a more severe sentence would contribute more to reconciliation. It is submitted that the converse is equally the case. It is further noted that paragraph 207 of the Fofana Response Brief and paragraphs 9.47 to 9.48 of the Kondewa Response Brief, again appear to rely inappropriately on the "justness" of the accused's cause in support of the Defence argument that the objectives of reconciliation should lead to a lower sentence.

9.12 As to paragraphs 209-212 of the Fofana Response Brief and paragraphs 9.51 to 9.54 of the Kondewa Response Brief, the Prosecution does not dispute that the Trial Chamber has the discretion to impose a global sentence that reflects the

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[154] See **Sentencing Judgement**, para. 92.

[155] See **Sentencing Judgement**, para. 94.

[156] Also contrary to what is suggested in paragraph 200 of the **Fofana Response Brief** and paragraph 96 of the **Sentencing Judgement**, it is submitted that the Sentencing Judgement sends a message to future armed forces that crimes that they may commit will be dealt with ***more leniently*** if their cause is "just".

totality of the criminal conduct and the overall culpability of the accused. What the Prosecution submits is that in this case, having imposed separate sentences in respect of each count (and not a global sentence), the Trial Chamber ordered all sentences to be served concurrently without giving adequate consideration (or any consideration at all) as to whether the actual sentence that would be served as a result of this ***would*** reflect the totality of the criminal conduct and the overall culpability of the accused. The Prosecution denies that its submissions are "wrong and misleading".[157]

9.13 As to paragraphs 213-224 of the Fofana Response Brief and paragraphs 9.55 to 9.71 of the Kondewa Appeal Brief, the Prosecution relies on paragraphs 9.62 to 9.72 of the Prosecution Appeal Brief. The Prosecution acknowledges the standards of review in an appeal against sentence. The Prosecution submits that for the reasons given in the Prosecution Appeal Brief and above, the Sentencing Judgement contained a number of errors. However, even apart from these errors, the Prosecution submission is that the sentence imposed by the Trial Chamber "was so unreasonable and plainly unjust, in that it underestimated the gravity of the ... [convicted person's] criminal conduct, that it [the Appeals Chamber] is able to infer that the Trial Chamber failed to exercise its discretion properly".[158]

9.14 It is further submitted that paragraph 9.58 of the Kondewa Response Brief raises an alleged sentencing consideration that was not taken into account by the Trial Chamber, and cannot now be considered for the first time on appeal.

9.15 It is further submitted in respect of paragraphs 9.61 to 9.69 of the Kondewa Appeal Brief that the Prosecution agrees that comparisons with sentences imposed in other cases are of limited utility.[159] The Prosecution submits that the

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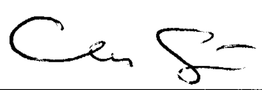
157 **Kondewa Response Brief**, para. 9.53.

158 See ***Babić*** **Appeal Judgement on Sentencing**, para. 44; ***Semanza*** **Appeal Judgement**, paras. 312, 374; ***Galić*** **Appeal Judgement**, para. 455.

159 **Kondewa Response Brief**, para. 9.61, quoting ***Čelebići*** **Appeal Judgement**, para. 719. See also ***Kamuhanda*** **Appeal Judgement**, para. 361. See also, in particular, See ***Jelisić*** **Appeal Judgement**, para. 96: "The cross-appellant argues that the Trial Chamber failed to have regard to a tariff of sentences discernible in the practice of this Tribunal and of the International Criminal Tribunal for Rwanda ("the ICTR"). The Appeals Chamber understands that what is being referred to is not a legally binding tariff of sentences but a pattern which emerges from individual cases, and that the argument is that a Trial Chamber has a duty to take that pattern into account. Whether the practice of the Tribunal is far enough advanced to disclose a pattern is not clear. The Appeals Chamber agrees

comparisons made in paragraphs 9.63 to 9.68 of the Kondewa Appeal Brief do not answer the Prosecution's argument.

Filed in Freetown,
28 January 2008
For the Prosecution,



Christopher Staker
Deputy Prosecutor

that a sentence should not be capricious or excessive, and that, in principle, it may be thought to be capricious or excessive if it is out of reasonable proportion with ***a line of sentences passed in similar circumstances for the same offences*** ... But it is difficult and unhelpful to lay down a hard and fast rule on the point; there are a number of variable factors to be considered in each case". (Footnote omitted, emphasis added.) It is submitted that the Defence Appeal Brief does not demonstrate how the ICTY and ICTR cases they refer to constitute ***a line of sentences passed in similar circumstances for the same offences***.

APPENDIX A

LIST OF CITED AUTHORITIES AND DOCUMENTS

I. Authorities and documents for which abbreviated citations are used

1. Documents in this Case

(i) Decisions, Orders and Judgements

Trial Chamber's Judgement	*Prosecutor v. Fofana and Kondewa,* SCSL-14-785, "Judgement", Trial Chamber, 3 August 2007 (see also Annex C "**Separate Concurring and Partially Dissenting Opinion of Justice Thompson**", Registry Pages 21399-21436) and ("**Separate and Partially Dissenting Opinion Only on Count 8 of Hon. Justice Benjamin Mutanga Itoe**"
Sentencing Judgement	*Prosecutor v. Fofana and Kondewa,* SCSL-14-796, "Judgement on the Sentencing of Moinina Fofana and Allieu Kondewa", Trial Chamber, 9 October 2007
Indictment Amendment Decision	*Prosecutor v. Fofana and Kondewa,* SCSL-14-PT-113, "Decision on Prosecution Request for Leave to Amend the Indictment" 20 May 2004
Judge Boutet's Dissent	*Prosecutor v. Fofana and Kondewa,* SCSL-14-PT-113 "Dissenting Opinion of Judge Pierre Boutet on the Decision on Prosecution Request for Leave to Amend the Indictment", 20 May 2004
Appeals Chamber Decision	*Prosecutor v. Fofana and Kondewa,* SCSL-04-14-T-319, "Decision on the Prosecution Appeal Against the Trial Chamber's Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal"
Admissibility of Evidence Decision	*Prosecutor v. Fofana and Kondewa,* SCSL-04-14-403, "Decision on the Urgent Prosecution Motion filed on the 15th of February 2005 for Ruling on the Admissibility of the Evidence", Trial Chamber, 23 May 2005 (See also **Dissenting Opinion of Justice Pierre Boutet)**

Dissenting Opinion of Justice Boutet on Admissibility of Evidence Decision	*Prosecutor v. Fofana and Kondewa,* SCSL-04-14-434, "Dissenting Opinion of Justice Pierre Boutet on Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence", 24 May 2005, Registry pages 13074 – 13085
	(ii) Other documents
Indictment	*Prosecutor v. Fofana and Kondewa,* SCSL-14-PT-003, "Indictment", 5 February 2004
Annex to Prosecution Appeal Against Refusal of Leave to Appeal	*Prosecutor v. Fofana and Kondewa,* SCSL-14-T-177, "Annex to the Prosecution Appeal Against the Trial Chamber's Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal: Prosecution Submissions on Appeal Against the Trial Chamber's Decision of 20 May 2004", 30 August 2004
Fofana Response Brief	*Prosecutor v. Fofana and Kondewa,* SCSL-14-816, "Fofana Response to Prosecution Appeal Brief", 21 January 2008
Kondewa Appeal Brief	*Prosecutor v. Fofana and Kondewa,* SCSL-14A-811, "Kondewa Appeal Brief" 11 December 2007
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AFRC Trial	*Prosecutor v. Brima, Kamara, Kanu,* SCSL-04-16-T-613, "Judgement",

Judgement	Trial Chamber, 20 June 2007, as revised pursuant to the Corrigendum issued by the Trial Chamber on 19 July 2007 (SCSL-16-T-628)
Special Court Statute	Statute of the Special Court, annexed to the Agreement (16 January 2002).

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***Aleksovski* Appeal Judgement**	*Prosecutor v. Aleksovski*, IT-95-14/1-A, "Judgement", Appeals Chamber, 24 March 2000 http://www.un.org/icty/aleksovski/appeal/judgement/index.htm
***Babić* Appeal Judgment on Sentencing**	*Prosecutor v. Babić*, IT-03-72, "Judgement on Sentencing Appeal", Appeals Chamber, 18 July 2005 http://www.un.org/icty/babic/appeal/judgement/index.htm
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Form of the Amended Indictment", Trial Chamber, 25 October 2006
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Judgement	Judgement", Appeals Chamber, 23 October 2001 http://www.un.org/icty/kupreskic/appeal/judgement/index.htm
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***Akayesu* Trial Judgement**	*Prosecutor v. Akayesu*, ICTR-94-4-T, "Judgement", Trial Chamber, 2 September 1998 http://69.94.11.53/ENGLISH/cases/Akayesu/judgement/akay001.htm
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***Gacumbitsi* Appeal Judgement**	*Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, "Judgement", Appeals Chamber, 7 July 2006 http://69.94.11.53/ENGLISH/cases/Gachumbitsi/judgement/judgement_appeals_070706.pdf
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II. Other authorities and documents

1. Books, Articles and Commentaries

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John R.W.D. **Jones** and Steven **Powles**, *International Criminal Practice*, Oxford University Press, 2003 **(extract attached in Appendix B)**

2. Other International Cases

International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996 **(extract attached in Appendix B)**
http://www.icj-cij.org/docket/files/95/7495.pdf

3. Other documents

ICC Elements of Crime (extract attached in Appendix B)
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APPENDIX B

Books, Articles and Commentaries

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Y. Sandoz, C. Swinarski and B. Zimmerman (eds),
Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949

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Document printed from the ICRC web site on the 28.01.2008

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

Commentary

Part IV : Civilian population #Section I -- General protection against effects of hostilities #Chapter II -- Civilians and civilian population

Art. 51 - Protection of the civilian population

[p.613] Article 51 -- Protection of the civilian population

[p.615] General remarks

1923 Article 51 is one of the most important articles in the Protocol. It explicitly confirms the customary rule that innocent civilians must be kept outside hostilities as far as possible and enjoy general protection against danger arising from hostilities. This general rule is accompanied by rules of application.

1924 Committee III of the Diplomatic Conference began examining this article in 1974 and referred it, with the ten amendments which had been submitted, to a Working Group. Committee III adopted the text of this article by consensus. Voting took place in a plenary meeting in 1977 and the article was adopted with 77 votes in favour, 1 against and 16 abstentions. (1)

1925 The delegation which voted against justified its vote by arguing that the article could seriously hinder the conduct of military operations against an invader and compromise the exercise of the right to self-defence recognized in Article 51 of the Charter of the United Nations. According to this delegation, the provisions relating to indiscriminate attacks should not be such as to prevent a State from defending its territory against an invader, even if this were to entail losses in its own population. Several delegations made similar statements. (2)

1926 Such fears do not seem justified. Article 51 of the Charter of the United Nations reads as follows:

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security [...]"

1927 However, it seems clear that the right of self-defence does not include the use of measures which would be contrary to international humanitarian law, even in a case where aggression has been established and recognized as such by the Security Council. The Geneva Conventions of 1949 and this Protocol must be applied in accordance with their Article 1 "in all circumstances"; the Preamble of the Protocol reaffirms that their application must be "without any adverse [p.616] distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict".

1928 It is true that in the preparatory work and during the discussions in the Diplomatic Conference the possibility was referred to of making a distinction between the rules applicable by an aggressor, on the one hand, and by the victim of the aggression, on the other. (3) However, several delegations opposed this point of view. (4) In any case, the Conference did not adopt this suggestion; on the contrary, in the above-mentioned paragraph of the Preamble of the Protocol it confirmed the equality of the Parties to the conflict with regard to the obligations laid down by humanitarian law. This is wholly reasonable, as the distinction between ' jus ad bellum ' and ' jus in bello ' is fundamental and should always be respected.

1929 Several delegations made spoken or written statements, during the final debate, on the meaning to be given to some of the provisions contained in this article. They will be examined with regard to the paragraphs concerned.

1930 In the draft the ICRC had provided that Article 51 (46 of the draft) would be among the provisions to which no reservations could be made. Finally the Conference deleted all provisions relating to reservations, but in the discussions Article 51 had been included in the list of articles to which reservations were prohibited. (5) In the absence of a specific provision it is therefore general international law that applies, in particular the Vienna Convention on the Law of Treaties

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(Articles 19-23). It may be recalled that that Convention prohibits reservations which are incompatible with the object and purpose of the treaty. (6)

1931 During the course of the discussions and in the written statements some delegations indicated that in their view reservations to this article would be incompatible with the object and purpose of the treaty. (7) There is no doubt that, as stated above, Article 51 is a key article in the Protocol. It constitutes a reasonable balance which was achieved with difficulty between the divergent views that emerged in the Diplomatic Conference. That is why reservations, even partial ones, could jeopardize this balance and in this way go against the object and purpose of this indispensable provision.

1932 The importance attached by the Diplomatic Conference to this article is corroborated by the fact that violation of several of its provisions is qualified as a grave breach. In fact Article 85 ' (Repression of breaches of this Protocol), ' paragraph 3, qualifies as a grave breach the act of wilfully making the civilian population or individual civilians the object of attack if this causes death or serious injury to body or health.

1933 The same applies for wilful indiscriminate attacks affecting the civilian population or civilian objects (or against installations containing dangerous [p.617] forces in the knowledge that such an attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57 ' (Precautions in attack), ' paragraph 2(a)(iii).

1934 Thus in relation to criminal law the Protocol requires intent and, moreover, with regard to indiscriminate attacks, the element of prior knowledge of the predictable result.

Paragraph 1

1935 This is an introductory paragraph which confirms the principle of the general protection of civilians against dangers arising from military operations. There is no doubt that armed conflicts entail dangers for the civilian population, but these should be reduced to a minimum. Such is the aim of the following paragraphs.

1936 According to dictionaries, the term "military operations", which is also used in several other articles in the Protocol, means all the movements and activities carried out by armed forces related to hostilities. (8) A mixed group of the Diplomatic Conference gave the following definition of the expression "zone of military operations": "in an armed conflict, the territory where the armed forces of the adverse Parties taking a direct or an indirect part in current military operations, are located". (9)

1937 The second sentence refers to the "other applicable rules of international law": (10) apart from some customary rules and, of course, the other relevant provisions of the Protocol, these are mainly the Hague Regulations annexed to Hague Convention IV of 1907 and the fourth Geneva Convention of 1949. In addition, mention could be made of the rules contained in the Geneva Protocol of 1925 for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, as well as the Hague Convention of 1954 for the Protection of Cultural Property. Although they are not aimed directly at the protection of the civilian population, these two treaties can have a positive influence on the fate of the civilian population in time of armed conflict. The Convention concluded in 1980 on the Prohibition or Restrictions on the Use of Certain Conventional Weapons contains corresponding provisions with respect to the civilian population. (11)

[p.618] Paragraph 2

1938 The first sentence gives substance to the principle of general immunity formulated in the preceding paragraph by explicitly prohibiting attacks directed against the civilian population as such, as well as against individual civilians. By using the words "directed" and "as such" it emphasizes that the population must never be used as a target or as a tactical objective.

1939 It should be noted that "attacks" are defined in Article 49 ' (Definition of attacks and scope of application), ' paragraph 1.

1940 In the second sentence the Conference wished to indicate that the prohibition covers acts intended to spread terror; there is no doubt that acts of violence related to a state of war almost always give rise to some degree of terror among the population and sometimes also among the armed forces. It also happens that attacks on armed forces are purposely conducted brutally in order to intimidate the enemy soldiers and persuade them to surrender. This is not the sort of terror envisaged here. (12) This provision is intended to prohibit acts of violence the primary purpose of which is to spread terror among the civilian population without offering substantial military advantage. It is interesting to note that threats of such acts are also prohibited. This calls to mind some of the proclamations made in the past threatening the annihilation of civilian

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populations.

1941 Finally, it is worthy of note that Article 85 ' (Repression of breaches of this Protocol), ' paragraph 3(a), defines the act of making the civilian population or individual civilians the object of attack as a grave breach, when it results in death or serious injury to body or health.

Paragraph 3

1942 The immunity afforded individual civilians is subject to an overriding condition, namely, on their abstaining from all hostile acts. Hostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces. Thus a civilian who takes part in armed combat, either individually or as part of a group, thereby becomes a legitimate target, though only for as long as he takes part in hostilities. If the civilian is captured while he is committing hostile acts, the rules governing his fate are laid down in Article 45 ' (Protection of persons who have taken part in hostilities). '

1943 During the course of the discussions several delegations indicated that the expression "hostilities" used in this article included preparations for combat and the return from combat. (13) Similar problems arose in Article 44 ' (Combatants and prisoners of war) ' with regard to the expression "military deployment preceding the launching of an attack". It seems that the word "hostilities" covers not only the time that the civilian actually makes use of a weapon, but also, for example, [p.619] the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon. If a civilian is captured or arrested in such circumstances, he may have recourse to paragraph 1 of Article 45 ' (Protection of persons who have taken part in hostilities) ' and claim prisoner-of-war status; he must be treated as such pending determination of his status by a competent tribunal.

1944 What is the exact meaning of the term "direct" in the expression "take a direct part in hostilities"? A similar expression is already used in paragraph 2 of Article 43 ' (Armed forces). ' In general the immunity afforded civilians is subject to a very stringent condition: that they do not participate directly in hostilities, i.e., that they do not become combatants, on pain of losing their protection. Thus "direct" participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces. It is only during such participation that a civilian loses his immunity and becomes a legitimate target. Once he ceases to participate, the civilian regains his right to the protection under this Section, i.e., against the effects of hostilities, and he may no longer be attacked. However, there is nothing to prevent the authorities, capturing him in the act or arresting him at a later stage, from taking repressive or punitive security measures with regard to him in accordance with the provisions of Article 45 ' (Protection of persons who have taken part in hostilities) ' or on the basis of the provisions of the fourth Convention (assigned residence, internment etc.) if his civilian status is recognized. Further it may be noted that members of the armed forces feigning civilian non-combatant status are guilty of perfidy under Article 37 ' (Prohibition of perfidy), ' paragraph 1(c).

1945 There should be a clear distinction between direct participation in hostilities and participation in the war effort. The latter is often required from the population as a whole to various degrees. Without such a distinction the efforts made to reaffirm and develop international humanitarian law could become meaningless. In fact, in modern conflicts, many activities of the nation contribute to the conduct of hostilities, directly or indirectly; even the morale of the population plays a role in this context.

Paragraph 4

1946 This provision is very important; it confirms the unlawful character of certain regrettable practices during the Second World War and subsequent armed conflicts. Far too often the purpose of attacks was to destroy all life in a particular area or to raze a town to the ground without this resulting, in most cases, in any substantial military advantages.

1947 On this subject the general rule was formulated in Article 48 ' (Basic rule): ' belligerents may direct their operations only against military objectives. The first specification is added in paragraph 2 of the present Article 51: attacks against the civilian population as such and against individual civilians are prohibited.

1948 Up to now the matter is fairly clear in theory, but it is less so in practice. In fact, civilians may be inside or in the immediate proximity of military objectives, whether these consist of persons or objects; moreover, purely civilian objects may in combat conditions become military objectives, thereby endangering the [p.620] persons near them. Paragraphs 4 and 5 attempt to cover such situations. The need to achieve a consensus has led those drafting these provisions to formulate them in a way that is sometimes ambiguous. Several delegates remarked on this when the article was adopted. (14)

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1949 At a more general level, other delegations pointed out that, like the whole of the Section, this provision should not be such as to inhibit the capacity for defence of a State which has to counter aggression. Yet it is well-known how difficult it is in armed conflict to determine objectively who is the aggressor. Moreover, it should be recalled that the State which is a victim of aggression is in no way exempted from the obligations incumbent upon it under treaty or customary rules of law.

1950 The provision begins with a general prohibition on indiscriminate attacks, i.e., attacks in which no distinction is made. Some may think that this general rule should have sufficed, but the Conference considered that it should define the three types of attack covered by the general expression "indiscriminate attacks".

' Sub-paragraph (a) '

1951 This refers in the first place to attacks which are not directed at a specific military objective. Article 52 ' (General protection of civilian objects), ' paragraph 2, defines military objectives, as far as objects are concerned, limiting them

"to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage".

Obviously military objectives also include, indeed principally so, the armed forces, their members, installations, equipment and transports.

1952 The military character of an objective can sometimes be recognized visually, but most frequently those who give the order or take the decision to attack will do so on information provided by the competent services of the army. In the majority of cases they will not themselves have the opportunity to check the accuracy of such information; they should at least make sure that the information is precise and recent, and that the precautions and restrictions laid down in Article 57 ' (Precautions in attack) ' are observed. In case of doubt, additional information must be requested.

1953 The armed forces and their installations are objectives that may be attacked wherever they are, except when the attack could incidentally result in loss of human life among the civilian population, injuries to civilians, and damage to civilian objects which would be excessive in relation to the expected direct and specific military advantage. In combat areas (15) it often happens that purely civilian [p.621] buildings or installations are occupied or used by the armed forces and such objectives may be attacked, provided that this does not result in excessive losses among the civilian population. For example, it is clear that if fighting between armed forces takes place in a town which is defended house by house, these buildings -- for which Article 52 ' (General protection of civilian objects), ' paragraph 3, lays down a presumption regarding their civilian use -- will inevitably become military objectives because they offer a definite contribution to the military action. However, this is still subject to the prohibition of an attack causing excessive civilian losses.

1954 Outside the combat area the military character of objectives that are to be attacked must be clearly established and verified. Similarly the limits of such objectives must be precisely determined.

1955 The question arose what the situation would be if a belligerent in a combat area wished to prevent the enemy army from establishing itself in a particular area or from passing through that area, for example, by means of barrage fire. There can be little doubt in such a case that the area must be considered as a military objective and treated as such. Yet, during the Diplomatic Conference several delegations insisted on confirming this interpretation in their statements. (16) Of course, such a situation could only concern limited areas and not vast stretches of territory. It applies primarily to narrow passages, bridgeheads or strategic points such as hills or mountain passes.

' Sub-paragraph (b) '

1956 This concerns attacks which employ a method or means of combat which cannot be directed at a specific military objective. (17)

1957 The term "means of combat" or "means of warfare" (cf. Article 35 -- ' Basic rules ') generally refers to the weapons being used, while the expression "methods of combat" generally refers to the way in which such weapons are used.

1958 As regards the weapons, those relevant here are primarily long-range missiles which cannot be aimed exactly at the objective. The V2 rockets used at the end of the Second World War are

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an example of this. It should be noted that most armies endeavour to use accurate weapons as attacks which do not strike the intended objective result in a loss of time and equipment without giving a corresponding advantage. Thereby the margin of error of missiles is gradually reduced. Here, military interests and humanitarian requirements coincide.

1959 From the point of view of the protection of civilians, the use of land or sea mines raises some problems. There were lengthy discussions in the Ad Hoc Committee on Conventional Weapons of the Conference. The work of this Committee (18) served as a basis for the Conference convened by the United [p.622] Nations in 1979 and 1980. That Conference adopted a Convention (10 October 1980) and three Protocols, one of which was on the prohibition or restrictions on the use of mines, booby-traps and other devices. (19) Briefly, this Protocol requires Parties to take measures to keep adequate records and to give proper warning when minefields are laid, so that the population is not endangered. As regards mine-laying by aircraft or remotely-delivered mines, such operations are prohibited in principle unless such mines are only used in an area that constitutes a military objective or that contains military objectives; even in that situation the location of mines that are laid must be recorded, or the mines must be equipped with a remotely-controlled mechanism to detonate then or must self-destruct when they have lost their military value. (20)

1960 However, the question may arise at what point the use of mines constitutes an attack in the sense of this provision. Is it when the mine is laid, when it is armed, when a person is endangered by it, or when it finally explodes? The participants at the meeting of the International Society of Military Law and the Law of War (Lausanne, 1982) conceded that from the legal point of view the use of mines constituted an attack in the sense of the Protocol when a person was directly endangered by such a mine. (21) It may be considered that mines also come within the scope of sub-paragraph (c) discussed below.

' Sub-paragraph (c) '

1961 This sub-paragraph concerns attacks which employ a method or means of combat the effects of which cannot be limited as required by this Protocol. Like sub-paragraph (b) this provision was not contained in such a precise manner in the ICRC draft; the Working Group of Committee III presented a more elaborate text which was referred back to the Working Group, and finally Committee III adopted an article which contains all the elements of the present article (22) although the wording has been revised and modified reasonably successfully by the Drafting Committee of the Conference.

1962 On this provision the report of Committee III contains the following passage:

"The main problem was that of defining the term ' indiscriminate attacks '. There was general agreement that a proper definition would include the act of not directing an attack at a military objective, the use of means or methods of combat which cannot be directed at a specific military objective, and the use of means or methods of combat the effects of which cannot be limited as required by the Protocol. Many but not all of those who commented were of the view that the definition was not intended to mean that there are means [p.623] or methods of combat whose use would involve an indiscriminate attack in all circumstances. Rather it was intended to take account of the fact that means or methods of combat which can be used perfectly legitimately in some situations could, in other circumstances, have effects that would be contrary to some limitations contained in the Protocol, in which event their use in those circumstances would involve an indiscriminate attack." (23)

1963 However, there are some means of warfare of which the effects cannot be limited in any circumstances. It is different with regard to other means, such as fire (24) or water (25) which, depending on the circumstances of their use, can have either a restricted effect or, on the contrary, be completely out of the control of those using them, causing significant losses among the civilian population and extensive damage to civilian objects. The nature of the means used is not the only criterion: the power of the weapons used can have the same consequences. For example, if a 10 ton bomb is used to destroy a single building, it is inevitable that the effects will be very extensive and will annihilate or damage neighbouring buildings, while a less powerful missile would suffice to destroy the building. There are also methods which by their very nature have an indiscriminate character, such as poisoning wells.

1964 Several delegations considered that it was necessary to confirm the views expressed by the Rapporteur (26) in their explanations of vote. According to these delegations the provision does not mean that there are means of combat of which the use would constitute an indiscriminate attack in all circumstances.

1965 This point was discussed above; it is true that in most cases the indiscriminate character of an attack does not depend on the nature of the weapons concerned, but on the way in which they are used. However, as stated above, there are some weapons which by their very nature have an indiscriminate effect. The example of bacteriological means of warfare is an obvious illustration of

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this point. There are also other weapons which have similar indiscriminate effects, such as poisoning sources of drinking water. Of course, bacteriological means of warfare have been prohibited since 1925, and the use of poison was prohibited in 1899 by the Hague Regulations.

1966 Nevertheless, States in making such statements were more concerned with nuclear weapons. A thorough analysis of the connection between the Protocol and the use that may be made of nuclear weapons is included in the introduction to this Section, and we refer the reader to that text. (27)

Paragraph 5

1967 The attacks which form the subject of this paragraph fall under the general prohibition of indiscriminate attacks laid down at the beginning of paragraph 4. Two types of attack in particular are envisaged here.

[p.624] 1968 The ' first type ' includes area bombardment, sometimes known as carpet bombing or saturation bombing. It is characteristic of such bombing that it destroys all life in a specific area and razes to the ground all buildings situated there. There were many examples of such bombing during the Second World War, and also during some more recent conflicts. Such types of attack have given rise to strong public criticism in many countries, and it is understandable that the drafters of the Protocol wished to mention it specifically, even though such attacks already fall under the general prohibition contained in paragraph 4. According to the report of Committee III, the expression "bombardment by any method or means" means all attacks by fire-arms or projectiles (except for direct fire by small arms) and the use of any type of projectile. (28)

1969 This paragraph was adopted with some difficulty; the expression "clearly separated and distinct" in particular led to lengthy discussions. In their first report the Working Group had given Committee III a choice between various proposals: "widely separated", "distinct"; or alternatively the introduction of a final phrase, "unless the objectives are too close together to be capable of being attacked separately". (29)

1970 Rather than going on to vote on these various proposals, Committee III decided to refer the subject back to the Working Group and requested it to try and come up with an expression that might meet with general approval. The Group presented the Committee with a new draft which had been accepted by consensus within the Group. (30) Committee III adopted this proposal without further discussion and it forms the present text of paragraph 5.

1971 It will be noted that the Conference adopted a wording very similar to that which the ICRC had proposed, namely, "at some distance from each other". It was decided not to add the phrase cited above, no doubt through fear of encouraging area bombardment, for in such a case the attacking forces could use their own judgment, taking into account the weapons available and the circumstances, as to whether the individual objectives were too close together to be attacked separately.

1972 Having said that, the interpretation of the words "clearly separated and distinct" leaves some degree of latitude to those mounting an attack; in case of doubt they can refer to sub-paragraph (b) and assess whether the attack is of a nature to cause losses and damage which would be excessive in relation to the military advantage anticipated.

1973 The question may also arise whether the prohibition formulated here is not already covered by paragraph 4(a), which prohibits attacks not directed at a specific military objective. In fact, areas of land between military objectives are not themselves military objectives. It must be accepted that in open areas which are sparsely populated, such as forests, attacks may be mounted against the whole of the area if it has been established that enemy armed forces are present. On the other hand, in a town, village or any other area where there is a similar [p.625] concentration of civilian persons and objects, the military objectives in that area may only be attacked separately without leading to civilian losses outside the military objectives themselves. This also applies for temporary concentrations of civilians, such as refugee camps.

1974 As stated above, the size of the area over which military objectives are spread and the distance separating them are relatively subjective notions. In case of doubt, the general rule of respect for the civilian population must always be observed.

1975 When the distance separating two military objectives is sufficient for them to be attacked separately, taking into account the means available, the rule should be fully applied. However, even if the distance is insufficient, excessive losses that might result from the attack should be taken into account.

1976 The ' second type of attack ' envisaged in paragraph 5 includes those which have excessive effects in relation to the concrete and direct military advantage anticipated. Once again there were long discussions in the Diplomatic Conference and it was difficult to come to an agreement. The

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formula that was adopted is very similar to that proposed by the ICRC. (31) It is based on the wording of Article 57 ' (Precautions in attack) ' relating to precautionary measures. Committee III had suggested either a straightforward reference to Article 57 ' (Precautions in attack) ' or reproducing the formula used in that article. Finally, the Drafting Committee, which was requested to resolve the question, opted for the second solution. Thus reference may be made to Article 57 ' (Precautions in attack) ' for further details.

1977 Paragraphs 4 and 5 were criticized in the Diplomatic Conference and subsequently. The criticism was directed particularly at the imprecise wording and terminology. For example, according to some, the Protocol fails to specify the size of the area over which military objectives may be spread and the distance which must separate them. It was also pointed out that modern electronic means made it possible to locate military objectives, but that they did not provide information on the presence of civilian elements within or in the vicinity of such objectives.

1978 Such criticisms are justified, at least to some extent. Putting these provisions into practice, or, for that matter, any others in Part IV, will require complete good faith on the part of the belligerents, as well as the desire to conform with the general principle of respect for the civilian population.

1979 Comments were also made in various quarters that paragraph 5(b) authorized any type of attack, provided that this did not result in losses or damage which were excessive in relation to the military advantage anticipated. This theory is manifestly incorrect. In order to comply with the conditions, the attack must be directed against a military objective with means which are not disproportionate in relation to the objective, but are suited to destroying only that objective, and the effects of the attacks must be limited in the way required by the Protocol; ' moreover, ' even after those conditions are fulfilled, the incidental civilian losses [p.626] and damages must not be excessive. Of course, the disproportion between losses and damages caused and the military advantages anticipated raises a delicate problem; in some situations there will be no room for doubt, while in other situations there may be reason for hesitation. In such situations the interests of the civilian population should prevail, as stated above.

1980 The idea has also been put forward that even if they are very high, civilian losses and damages may be justified if the military advantage at stake is of great importance. This idea is contrary to the fundamental rules of the Protocol; in particular it conflicts with Article 48 ' (Basic rule) ' and with paragraphs 1 and 2 of the present Article 51. The Protocol does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be extensive.

1981 This clearly shows the importance attached by the drafters of the Protocol to this article; these provisions should therefore lead those responsible for such attacks to take all necessary precautions before making their decision, even in the difficult constraints of battle conditions.

Paragraph 6

1982 This provision is very important. In fact, the belligerents in the Second World War recognized in their public declarations that attacks may be directed only at military objectives, but on the pretext that their own population had been hit by attacks carried out by the adversary, they went so far, by way of reprisals, as to wage war almost indiscriminately, and this resulted in countless civilian victims. (32)

1983 The text is that proposed by the ICRC. During the discussions in the Conference the question of reprisals was examined with regard to several articles and in each of these a clause prohibiting reprisals was included (see also Articles 20 -- ' Prohibition of reprisals; ' 52, ' General protection of civilian objects; ' 53 -- ' Protection of cultural objects and of places of worship; ' 54 -- ' Protection of objects indispensable to the survival of the civilian population; ' 55 -- ' Protection of the natural environment ' and 56 -- ' Protection of works and installations containing dangerous forces). ' This is why several delegates raised the question during the discussions whether a single general provision might not suffice, while others considered that it was not very realistic to prohibit all reprisals, and that it was better to try and restrain them by laying down specific rules. Finally Committee I was charged with examining the general problem. (33) It decided to leave the specific clauses prohibiting reprisals in the articles where they occured, and not to draft a general prohibition. (34)

1984 The prohibition contained in this article is not subject to any conditions and it therefore has a peremptory character; in particular it leaves out the possibility of derogating from this rule by invoking military necessity. As in the 1949 [p.627] Conventions, this provision confirms the right of an individual not to be punished for acts which he has not himself committed.

1985 This prohibition of attacks by way of reprisals and other prohibitions of the same type

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contained in the Protocol and in the Conventions have considerably reduced the scope for reprisals in time of war. At most, such measures could now be envisaged in the choice of weapons and in methods of combat used against military objectives.

Paragraph 7

1986 This provision affords measures of protection to the whole of the civilian population and all civilians, thus extending to them measures which already exist for two categories of persons: prisoners of war and civilians protected by the fourth Convention. In fact, according to Article 23 of the Third Convention, prisoners of war may not be used to render certain points or areas immune from military operations.

1987 As regards persons protected by the fourth Convention, Article 28 of the latter provides that they may not be used to render certain points or areas immune from military operations. Article 19 of the first Convention and Article 12 of the present Protocol ' (Protection of medical units) ' contain a similar rule with regard to medical units. For its part, Article 58 of the Protocol ' (Precautions against the effects of attack) ' also deals with measures to be taken to remove the population from the vicinity of military objectives, and we refer the reader to the commentary thereon.

1988 This paragraph develops and clarifies these various rules. The term "movements" in particular is a new one; this is intended to cover cases where the civilian population moves of its own accord. The second sentence concerns cases where the movement of the population takes place in accordance with instructions from the competent authorities, and is particularly concerned with movements ordered by an Occupying Power, although it certainly also applies to transfers of prisoners of war, and civilian enemy subjects ordered by the authorities of a belligerent Power to move within its own territory.

Paragraph 8

1989 The ICRC had proposed in its draft the following provision which related to the provision contained in paragraph 7:

"If a Party to the conflict, in violation of the foregoing provision, uses civilians with the aim of shielding military objectives from attack, the other Party to the conflict shall take the precautionary measures provided for in Article 50." (35)

[p.628] 1990 It is fairly clear from the deliberations and the report of Committee III (36) that the prohibitions referred to in paragraph 8 are those contained in paragraph 7. Military objectives are defined as far as objects are concerned in Article 52 ' (General protection of civilian objects), ' paragraph 2. Thus, even if civilians were intentionally brought or kept in the vicinity of military objectives, the attacker should take the measures provided for in Article 57 ' (Precautions in attack), ' especially those set out in paragraph 2 (a)(ii) and (iii) and (c). It is clear that in such cases a warning to the population is particularly appropriate as civilians are themselves rarely capable of assessing the danger in which they are placed.

1991 This provision is concerned with the situation in which other provisions of the Protocol are not complied with. It is an attempt to safeguard the population even when the appropriate authorities do not take the required measures of protection with regard to them.

1992 Article 60 of the Vienna Convention on the Law of Treaties provides that a material breach of a multilateral treaty entitles a Party especially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State. Without even going into the question whether non-compliance with paragraph 7 constitutes a material breach of the Protocol, it is pleasing to note the tenor of the last paragraph of the same Article 60:

"5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties." (37)

1993 Thus, in the case of this Protocol, it is compulsory to apply it, even if another Party has committed a violation. It should be noted that provisions protecting the human person now bear the stamp of customary law.

' C.P./J.P. '

NOTES

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(1) [(1) p.615] O.R. VI, pp. 165-166, CDDH/SR.41, para. 118;

(2) [(2) p.615] Ibid., p. 162. One delegation emphasized that the Charter of the United Nations recognizes the right of individual or collective self-defence in the case of armed attack and that international 1aw cannot restrict the legitimate right of a victim of aggression and occupation to defend itself (ibid., p. 196, Annex (Romania));

(3) [(3) p.616] See, for example, O.R. V, pp. 119-121, CDDH/SR.12, paras. 13-21, and O.R. VI, p. 196, CDDH/SR.41, Annex (Romania);

(4) [(4) p.616] See, for example, O.R. V, pp. 109-110, CDDH/SR.11, paras. 44-50; pp. 137-138, CDDH/SR.13, paras.51-57;

(5) [(5) p.616] O.R. X, p. 251, CDDH/405/Rev.1;

(6) [(6) p.616] Cf. introduction to Part VI, infra, p. 1061;

(7) [(7) p.616] O.R. VI, p. 167, CDDH/SR.41, paras. 135-137; p. 187, ibid., Annex (GDR); pp. 192-193 (Mexico);

(8) [(8) p.617] Cf. the definitions given supra, commentary Art. 48, note 13, p. 600;

(9) [(9) p.617] O.R. XV, p. 338, CDDH/II/266-CDDH/III/255, Annex A;

(10) [(10) p.617] We also refer to the commentary Art. 49, para. 4, supra, p. 606, and Art. 2, sub-para. (b), supra, p. 60;

(11) [(11) p.617] Convention of 10 October 1980 on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects.
- Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), Art. 3, paras. 2, 3(c) and 4; Art. 4, para. 2; Art. 5, para. 2; Art. 7, para. 3(a)(i).
- Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Art. 2. For participation in this Convention, cf. infra, p. 1549;

(12) [(12) p.618] O.R. XV, p. 274, CDDH/215/Rev.1, para. 51;

(13) [(13) p.618] Ibid., p. 330, CDDH /III/224;

(14) [(14) p.620] See, for example, O.R. VI, pp. 164-165, CDDH/SR.41, para. 122;

(15) [(15) p.620] The Mixed Group defined this concept as follows: "In an armed conflict, that area where the armed forces of the adverse Parties actually engaged in combat, and those directly supporting them, are located". O.R. XV, p. 338, CDDH/II/266-CDDH/III/255, Annex A;

(16) [(16) p.621] See commentary Art. 52, para. 2, infra, p. 635;

(17) [(17) p.621] A note on the drafting of the French text: the use of the pronoun "on" is unusual in French legal draftsmanship as it is rather indeterminate. This is avoided in the English wording where the word "attacks" is the subject of the sentence;

(18) [(18) p.621] See O.R. XVI;

(19) [(19) p.622] Cf. supra, note 11;

(20) [(20) p.622] Art. 5 of the above-mentioned Protocol II. Also see Y. Sandoz, "A New Step Forward in International Law -- Prohibition and Restrictions on the Use of Certain Conventional Weapons", ' IRRC, ' January-February 1981, p. 3 (offprint available with the text of the Final Act of the said United Nations Conference, originally published ibid., pp. 41-55);

(21) [(21) p.622] See "Forces armées et développement du droit de la guerre", op.cit., p. 303;

(22) [(22) p.622] O.R. XV pp. 304-305, CDDH/215/Rev.1, Annex;

(23) [(23) p.623] Ibid., p. 274, para. 55;

(24) [(24) p.623] Cf. the Protocol II referred to supra, note 11;

(25) [(25) p.623] On this subject reference may be made to Article 56 of this Protocol;

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(26) [(26) p.623] See O.R. VI, pp. 168-172, CDDH/SR.41;

(27) [(27) p.623] See supra, p. 589;

(28) [(28) p.624] Cf. O.R. XV, p. 275, CDDH/215/Rev.1, para. 56;

(29) [(29) p.624] Ibid, p. 329, CDDH/III/224;

(30) [(30) p.624] O.R. XIV, p. 30, CDDH/III/SR.31, para. 5;

(31) [(31) p.625] "to launch attacks which may be expected to entail incidental losses among the civilian population and cause the destruction of civilian objects to an extent disproportionate to the direct and substantial military advantage anticipated" (draft, Art. 46, para. 3 (b));

(32) [(32) p.626] Cf. G. Best, ' Humanity in Warfare, ' London, 1980, pp. 273-277;

(33) [(33) p.626] O.R. XIV, p. 414, CDDH/III/SR.38, para. 65; O.R. V, p. 375, CDDH/SR.31, paras. 20-23; O.R. X, pp. 184-185, CDDH/405/Rev.1, paras. 21-30;

(34) [(34) p.626] On the general question of reprisals, cf. infra, p. 981, introduction to Part V, Section II;

(35) [(35) p.627] Now Art. 57 of the Protocol;

(36) [(36) p.628] O.R. XV, p. 275, CDDH/215/Rev.1, para. 59;

(37) [(37) p.628] For more details, see commentary Art. 1, para. 1, supra p. 34, and the introduction to Part V, Section II (section concerning reprisals), infra, p. 981;

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THIRD EDITION
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been adopted by Chambers: individual sentences for each finding of guilt indicating whether the sentences shall be served consecutively or concurrently (the approach taken, e.g., in *Tadić*) or a global sentence (the approach taken, e.g., in *Blaškić*).

History of ICTR Rule 87

8.5.611 This Rule was amended at the ICTR fifth plenary session on 8 June 1998. Para. (A) was modified and para. (C) added.

Proof of Guilt Beyond a Reasonable Doubt

8.5.612 The standard of proof beyond a reasonable doubt is, at least in common law jurisdictions, a universal standard of guilt in a criminal trial. It is widely considered to equate to the civil law standard expressed by the phrase, "*intime conviction*" (the intimate conviction which the judge must feel before pronouncing the accused guilty). For the meaning of "proof beyond a reasonable doubt," see, *inter alia*, the *Jelisić Trial Judgement*, para. 108; *Kunarac, Decision on Motion for Acquittal* para. 3; *Kvočka, Decision on Defence Motions for Acquittal*, para. 12; *Delalić et al. Appeals Judgement* para. 434; and *Jelisić Appeals Judgement* paras. 34–37.

8.5.613 In this regard, it is very important to point out that the standard of proof beyond a reasonable doubt is *not* a "probabilistic standard." An accused should not be convicted where it is merely "more probable than not" that the committed the crime, nor even where it is "extremely probable" that he committed the crime. The test is whether there is a reasonable doubt, that is a doubt to which a reason which is not fanciful can be assigned; in which case the accused deserves to be acquitted.

8.5.614 See the exposition of the standard of proof in the English case of *Miller v. Minister of Pensions* [1947] 2 All E.R. 372 per Denning J.:

> the degree of cogency as is required in a criminal case before an accused person is found guilty . . . is well settled. . . . Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice.

See also *Worthington v. DPP* [1935] A.C. 462 H.L.

8.5.615 The standard of proof beyond a reasonable doubt is the standard set for the International Criminal Court. See Article 66 ("Presumption of Innocence"), para. 3: "In order to convict an accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt." That this is the standard adopted for the ICC would seem to indicate that the standard of proof beyond a reasonable doubt has become the customary standard of proof in international criminal trials.

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INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS

ADVISORY OPINION OF 8 JULY 1996

1996

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

LICÉITÉ DE LA MENACE OU DE L'EMPLOI D'ARMES NUCLÉAIRES

AVIS CONSULTATIF DU 8 JUILLET 1996

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74. The Court not having found a conventional rule of general scope, nor a customary rule specifically proscribing the threat or use of nuclear weapons *per se*, it will now deal with the question whether recourse to nuclear weapons must be considered as illegal in the light of the principles and rules of international humanitarian law applicable in armed conflict and of the law of neutrality.

75. A large number of customary rules have been developed by the practice of States and are an integral part of the international law relevant to the question posed. The "laws and customs of war" — as they were traditionally called — were the subject of efforts at codification undertaken in The Hague (including the Conventions of 1899 and 1907), and were based partly upon the St. Petersburg Declaration of 1868 as well as the results of the Brussels Conference of 1874. This "Hague Law" and, more particularly, the Regulations Respecting the Laws and Customs of War on Land, fixed the rights and duties of belligerents in their conduct of operations and limited the choice of methods and means of injuring the enemy in an international armed conflict. One should add to this the "Geneva Law" (the Conventions of 1864, 1906, 1929 and 1949), which protects the victims of war and aims to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities. These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law. The provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law.

76. Since the turn of the century, the appearance of new means of combat has — without calling into question the longstanding principles and rules of international law — rendered necessary some specific prohibitions of the use of certain weapons, such as explosive projectiles under 400 grammes, dum-dum bullets and asphyxiating gases. Chemical and bacteriological weapons were then prohibited by the 1925 Geneva Protocol. More recently, the use of weapons producing "non-detectable fragments", of other types of "mines, booby traps and other devices", and of "incendiary weapons", was either prohibited or limited, depending on the case, by the Convention of 10 October 1980 on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects. The provisions of the Convention on "mines, booby traps and other devices" have just been amended, on 3 May 1996, and now regulate in greater detail, for example, the use of anti-personnel land mines.

77. All this shows that the conduct of military operations is governed by a body of legal prescriptions. This is so because "the right of belligerents to adopt means of injuring the enemy is not unlimited" as stated in Article 22 of the 1907 Hague Regulations relating to the laws and customs of war on land. The St. Petersburg Declaration had already condemned the use of weapons "which uselessly aggravate the suffering of

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disabled men or make their death inevitable". The aforementioned Regulations relating to the laws and customs of war on land, annexed to the Hague Convention IV of 1907, prohibit the use of "arms, projectiles, or material calculated to cause unnecessary suffering" (Art. 23).

78. The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.

The Court would likewise refer, in relation to these principles, to the Martens Clause, which was first included in the Hague Convention II with Respect to the Laws and Customs of War on Land of 1899 and which has proved to be an effective means of addressing the rapid evolution of military technology. A modern version of that clause is to be found in Article 1, paragraph 2, of Additional Protocol I of 1977, which reads as follows:

> "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."

In conformity with the aforementioned principles, humanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives. If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law.

79. It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" as the Court put it in its Judgment of 9 April 1949 in the *Corfu Channel* case (*I.C.J. Reports 1949*, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.

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80. The Nuremberg International Military Tribunal had already found in 1945 that the humanitarian rules included in the Regulations annexed to the Hague Convention IV of 1907 "were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war" (*Trial of the Major War Criminals, 14 November 1945-1 October 1946*, Nuremberg, 1947, Vol. 1, p. 254).

81. The Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), with which he introduced the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, and which was unanimously approved by the Security Council (resolution 827 (1993)), stated:

> "In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law . . .
>
> The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945."

82. The extensive codification of humanitarian law and the extent of the accession to the resultant treaties, as well as the fact that the denunciation clauses that existed in the codification instruments have never been used, have provided the international community with a corpus of treaty rules the great majority of which had already become customary and which reflected the most universally recognized humanitarian principles. These rules indicate the normal conduct and behaviour expected of States.

83. It has been maintained in these proceedings that these principles and rules of humanitarian law are part of *jus cogens* as defined in Article 53 of the Vienna Convention on the Law of Treaties of 23 May 1969. The question whether a norm is part of the *jus cogens* relates to the legal character of the norm. The request addressed to the Court by the General Assembly raises the question of the applicability of the principles and rules of humanitarian law in cases of recourse to nuclear weapons and the consequences of that applicability for the legality of recourse to these weapons. But it does not raise the question of the character of the humanitarian law which would apply to the use of nuclear weapons. There is, therefore, no need for the Court to pronounce on this matter.

Other Documents

ICC ELEMENTS OF CRIMES

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Elements of Crimes*

* Explanatory note:
The structure of the elements of the crimes of genocide, crimes against humanity and war crimes follows the structure of the corresponding provisions of articles 6, 7 and 8 of the Rome Statute. Some paragraphs of those articles of the Rome Statute list multiple crimes. In those instances, the elements of crimes appear in separate paragraphs which correspond to each of those crimes to facilitate the identification of the respective elements.

Article 7
Crimes against humanity

Introduction

1. Since article 7 pertains to international criminal law, its provisions, consistent with article 22, must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world.

2. The last two elements for each crime against humanity describe the context in which the conduct must take place. These elements clarify the requisite participation in and knowledge of a widespread or systematic attack against a civilian population. However, the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.

3. 'Attack directed against a civilian population' in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that 'policy to commit such attack' requires that the State or organization actively promote or encourage such an attack against a civilian population.[6]

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

Elements

1. The perpetrator killed[7] one or more persons.

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

3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

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6 A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.

7 The term 'killed' is interchangeable with the term 'caused death'. This footnote applies to all elements which use either of these concepts.

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

4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xxv)
War crime of starvation as a method of warfare

Elements

1. The perpetrator deprived civilians of objects indispensable to their survival.

2. The perpetrator intended to starve civilians as a method of warfare.

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

4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

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

Elements

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

2. Such person or persons were under the age of 15 years.

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

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

5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (c)

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

Elements

1. The perpetrator killed one or more persons.

2. Such person or persons were either *hors de combat*, or were civilians, medical personnel, or religious personnel[56] taking no active part in the hostilities.

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56 The term 'religious personnel' includes those non-confessional non-combatant military personnel carrying out a similar function.

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3. The perpetrator was aware of the factual circumstances that established this status.

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

5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

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

Elements

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

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

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

4. The perpetrator was aware of the factual circumstances that established this status.

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

6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (c) (i)-3
War crime of cruel treatment

Elements

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.

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

3. The perpetrator was aware of the factual circumstances that established this status.

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

5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.