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Document:(s **Kallon Appeal Brief**

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SCSL-04-15-A
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SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

Before: Justice Renate Winter, Presiding
Justice Jon M. Kamanda
Justice Emmanuel Ayoola
Justiee George Gelaga King
Justice Shireen Avis Fisher

Acting Registrar: Ms. Binta Mansaray

Date filed: 1st June 2009

THE PROSECUTOR **against** **ISSA HASSAN SESAY**
MORRIS KALLON
AUGUSTINE GBAO

Case No.SCSL-2004-15-A

Public

KALLON APPEAL BRIEF

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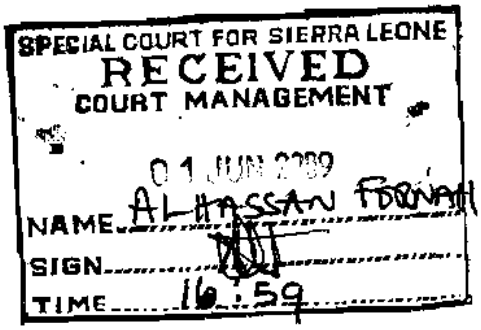

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Overview of Appellant's Appeal:

On the 18 February 2009, Trial Chamber 1 of the Special Court for Sierra Leone found the Appellant guilty of 16 counts of War crimes, Crimes against Humanity and Serious Violations of International Humanitarian Law.

On the 25 March 2009 the Accused was sentenced to serve a maximum sentenee of 40 years imprisonment. The Appellant appealed to this Honourable Appeals Chambers and filed 31 grounds of appeal.

Without in any way challenging the Pre- Appeals Judge's Decision on the Appellant's Motion to extend page and time limits for the Brief herein, the Appellant respectfully notes that he has faced serious challenges in presenting all the arguments he would have wished to present to the Honourable Appeals Chamber due to the number of pages permitted by the Honourable Pre-Appeals Judge. The Appellant is of the humble opinion that the limitations placed on him in the presentation of this brief have seriously hampered his duty to exhaustively and adequately present his case. Nevertheless, the Appellant has done his best in the difficult circumstances and respectfully presents this Brief.

The reeurring grievance by the Appellant in this Appeal first relates to the overly expansive, opaque and amorphous manner in which the theory of joint criminal enterprise has been applied to him.

The Chamber found the Appellant either absent or remotely linked to the crimes for which he was nevertheless ultimately convicted rendering this case only one of its kind. Never in the history of criminal law has individual responsibility been so liberally adjusted to justify a conviction unsupported by evidence..

The Appellant is further concerned that the entire judieial process has been unfair, unbalanced and biased against him to the extent that he was convicted as a result of selective application of the law.

The Appellant further notes that his right to a fair and credible legal process was seriously compromised at every material stage of the proceedings from pre-trial to judgment and sentencing.

The right to take a plea is one of the most basic and yet fundamental rights protected by the Statute of the Special Court as well as all civilized criminal jurisdictions the world over. In this case however, the Trial Chamber granted the Prosecutor request to file consolidated indictments, amended consolidated indictments, amended indictment and correeted amended indictment,, which profoundly extended and added new criminal allegations against the Appellant but denied him on request, the right to take a plea. Due to the persistence of the Appellant in asserting his right to be promptly informed of the case against him by providing material detail to enable him prepare the neeessary defence to confront his accuser, the Trial Chamber waited until Judgment to find that the pleading of alleged personal participation of the Appellant in criminal conduct was defective and that the Prosecutor had failed to explain why it could not provide the required material detail to give the Appellant notice. Rather than

make a finding of prejudice and sanction this egregious violation, the Trial Chamber endorsed it by abdicating its statutory role of neutral arbiter by undertaking to eure the defects in the indictment. Regrettably and to the material prejudice of the Appellant, the Trial Chamber proceeded to convict him on most allegations and counts where it failed to ascertain as promised, that the indictment had been cured.

The Chamber took the consistent and principled position at trial that incriminating co-accused evidence was inadmissible against co-accused in this joint trial because it violated Rule 82 of the Rules of Procedure and Evidence of the Special Court. The Appellant conducted his defence throughout with this assurance in mind. The Trial Chamber reneged on this finding in respect of the Appellant and unjustly relied heavily on co-accused evidence to convict him on the UNAMSIL and other counts. This violation is egregious because the said co-accused evidence did not form the basis of the prosecution case against the accused and the Appellant was never put on notice that the said evidence would be used in any manner adverse to him.

The Appellant was also confronted with a process where motions filed by him raising material fair trial issues were either rejected without sound legal justification or unfairly expunged from the record. At Judgment the Appellant's testimony was repudiated on legally untenable and unjustified grounds. The Chamber also completely disregarded all the 20-plus witnesses he presented in defence by taking refuge in its general discretionary power of evaluation of evidence. These witnesses were only referred to only when the Chamber found any of their testimonies useful in justifying the Appellant's conviction. In consequence the Appellant has been condemned unheard.

This Honourable Appeals Chamber is urged to step in and remedy the grave injustice that this improper conviction has occasioned

GROUND ONE: VIOLATION OF FAIR TRIAL RIGHTS

Sub-Ground 2.2

2. On 13 May 2004 the Prosecutor filed the Amended Consolidated Indictment.[1] On 17 May 2004, the Appellant was invited to enter a plea on Count 8 of the said indictment only. The Appellant declined, arguing his right to plea to the entire indictment, as amended, on the grounds that substantial amendments had been made with respect to, *inter alia,* the parties, modes of liability, timeframes and crime bases[2] which, it is submitted, are "readily charaeterized as new charges" and to which the Appellant was entitled to enter a new plea.

1. On 1 October 2004, the Appellant filed "Motion on Issues of Urgent Concern to the Accused Morris Kallon" in which he asserted his right to be arraigned on the Consolidated Indictment pursuant to Rule 47 of the Rules. On 9 December 2004, the Chamber delivered a Majority decision on the Motion on Issues of Urgent Concern to the Appellant, dismissing his request to plead to the new eharge.

2. The Amended Indictment introduced, *inter alia,* new alleged members of the JCE,[3] additional crimes bases[4] and timeframes[5]. The Appellant was never permitted to enter a plea in relation to the Amended Indictment. Case law requires that if charges are added, an additional appearance is necessary to enable the accused to enter a plea on the new charges.[6] The Trial Chamber's holding that the Amended Indictment only provided

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[1] *P.v.Sesay et al.,* SCSL-04-15-T-122, Amended Consolidated Indictment, ("the Amended Consolidated Indietment").

[2] See Annex B to the Trial Judgment on "Procedural History", at paras. 20-22. See also, *Prosector v. Sesay et al,* Kallon Motion for Quashing of Consolidated Indietment, 10 February 2004.

[3] At paras. 34 and 36 of the current Indictment dated 2nd August 2006, new members of the JCE like Brima Bazzy Kamara and Santigie Borbor Kanu were added to the Indictment in contrast with para. 22 of the initial Indictment dated 3rd March 2003 and filed on 7th Mareh 2003 which made no mention of them.

[4] Also, "Kailahun District", "the Western Area" and "Port Loko Distriet" were, for example, missing from the crime bases cited under Counts 3-5 of the 7th March 2003 Indictment in eontrast with the cutrent Indictment of 2nd August 2006. Considering that Kallon was convicted for crimes in Kailahun, he ought to have pled to charges alleged there.

[5] Under "Bombali District" of Counts 3-5 of the 7th March 2003 Indictment, for example, the timetrame for crimes alleged in Bombali was from "1st May 1998 to 31st July 1998", in contrast with the current Indictment wherein the timeframe for Bombali District is "1st May 1998 to 30th November 1998".

[6] *Muvunyi,* (Trial Chamber), September 12, 2006, para. 405-06 ("[T]he Prosecution cannot amend an existing charge in an indictment or introduce a new charge without following the proper procednre. Rule 50 deals with the amendment of indictments. Once the indictment is confirmed it can be amended only with leave of the Confirming Judge or the Trial Chamber, as the case may be. *If new charges are added when the accused has already made an initial appearance before a Trial Chamber, a further appearance shall be held in order to enable the accused to enter a plea on the new charges.*") (emphasis added).

greater specificity without adding any new crimes or charges[7] was accordingly erroneous; the Defence particularly notes that "forced marriage" as 'an act of sexual violence' and "other inhumane act" as 'a crime against humanity' were completely missing from the initial Indictment of 7th March 2003 (under Counts 6-8) in contrast with the current Corrected Amended Consolidated Indictment, which contains them. The Appellant submits that refusal to order a new plea occasioned prejudice and the Amended Indictment on which he was convicted is a nullity.

Sub-Ground 2.3

3. The Chamber erred in expunging the Appellant's Motion on Defects in the Indictment[8] on the strength of a request by the Prosecution to do so and without affording the Appellant the opportunity to be heard.[9] Subsequent efforts requesting the Chamber to reconsider its Decision to dismiss the Appellant's said Motion without a hearing were dismissed by the Chamber.[10] Significantly, the Kallon Defence notes that the Appellant was so aggrieved by the prejudicial conduct of the Trial Chamber that he personally had to write to the Chamber complaining about the violation of his statutory rights.[11] The Kallon Defence submits that firstly, it was erroneous for the Chamber to *expunge* the said Motion, which raised fundamental issues on the rights of the Appellant in view of the fact that the Motion did not violate any of the Rules or Orders of the Chamber. Secondly, even if it did, it was erroneous and highhanded for the Chamber to *expunge* the Motion (which formed part of the Court's Records) on the strength of a practice direction limiting page numbers and thus violating the Appellant's statutory right to effectively defend himself. Thirdly, it was improper for the Chamber to expunge the Motion from the record, thus undermining proper appellate review of the matter. This, taken together with the other violations, invalidates the Appellant's conviction.

Sub-Ground 2.4

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[7] Trial Chamber Judgment, para. 434.
[8] *Kallon Motion Challenging Defects in the Form of the Indictment and Annexes A, B & C*, 28 January 2008.
[9] See the Trial Chamber's *Order Relating to Kallon Motion Challenging Defects in the Form of the Indictment and Annexes A, B & C*, 31 January 2008. This Order was made pursuant to the *Prosecution's Urgent Public Motion for Relief in Respect of Kallon Motion Challenging Defects in the Form of the Indictment*, 29 January 2008. Of crucial note is that the said Order was made without any Response from Kallon as required by the Rules of Procedure.
[10] See *Kallon Motion on Challenges to the Form of the Indictment and for Reconsideration of Order Rejecting Filing and Imposing Sanctions*, 7 February 2008, and the attendant Decision by the Chamber dated 6 March 2008.
[11] See Exhibit 283: Letter of Protest from the Appellant, Morris Kallon dated 04/02/2008.

4. The Chamber found at paragraph 399 of the Trial Judgment that the Indictment was defective and that the Prosecution had not argued that it would have been impracticable for it to have included more details in the Indictment. The Chamber was not satisfied that the Prosecution had provided the best information that it could in the indictment. The Appellant submits that the Prosecution failed to plead in the Indictment any of the crimes for which the Appellant was convicted throughout the 16 counts found against him.[12] These defects are so grave that they go beyond the narrow exception discussed in *Kupreskic* below:

> A defective indictment, in and of itself, may, in certain circumstances cause the Appeals Chamber to reverse a conviction. The Appeals Chamber, however, does not exclude the possibility that, in some instances, a defective indictment can be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her. *Nevertheless, in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of this Tribunal, there can only be a limited number of cases that fall within that category.* For the reasons that follow, the Appeal Chamber finds that this case is not one of them.[13]

5. The Appellant submits that given the scope and scale of defects in the Indictment against him as well as the Prosecutor's failure to explain the said defects, the Chamber erred by failing to find that the Appellant had been irreparably prejudiced in the preparation of his defence. In this regard, it is submitted that the convictions on all the Counts were unjustified and therefore invalid.

Sub-Ground 2.5 Adverse testimony of a Co-Accused:

6. Pursuant to Rule 82 of the Rules of Procedure and Evidence, the Chamber consistently held that it would not rely on the adverse evidence of the co-accused.[14] However, in its Trial Judgment, the Chamber adversely relied on the evidence of the co-accused and employed them on two critical issues central to the Appellant's conviction. Firstly, at paragraph 609 of the Trial Judgment, the Chamber clearly explained why it held the

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[12] This submission is made in the context of the totality of the arguments and submissions by the Appellant in this Brief relating to notice and pleading issues discussed under each Ground of Appeal herein. The Appellant contends that for each of the crimes under which he was convicted the Indictment was defective and that he was not properly and sufficiently notified of the crimes and material particulars alleged against him.

[13] *Kupreskic Appeals Chamber Judgment*, 23 October 2001, para 114. (Emphasis added).

[14] See for example, Transcript of 7 November 2005, p.23 lines 2-26; Transcript of 17 April 2008, p.51 lines 27-29 & p.52, lines 1-4; and Transcript of 13 May 2008, p.50 lines 3-22. Interestingly, the Chamber was alive to the fact that it cannot use the adverse evidence of a co-accused to incriminate an accused when it held in para. 521, p.177 of the Judgment that a statement of agreed facts can only be used if "there is no prejudice to the other".

Appellant liable for the UNAMSIL events at Makump on 1st May 2000. It stated that it believed the testimony of a co-accused's witness (DAG-111) against the Appellant, even though the Appellant had no notice of DAG-111's testimony and that the Chamber had led the Appellant to believe that such adverse evidence would not be used against him, pursuant to the Rules of Procedure and Evidence.[15] Secondly, the Chamber relied heavily on Exhibit 212 tendered by a co-accused (Sesay) and in respect of which the Appellant had no proper notice,[16] to determine the Appellant's superior responsibility for UNAMSIL events under Counts 15 and 17.[17] The Appellant submits that the use of such adverse evidence has occasioned him sufficient prejudice to warrant invalidation of the conviction. Additional submissions on these sub-grounds are made at Ground 23 herein.

Sub-Grounds 2.8, 2.12 to 2.24 (Prejudicial Evaluation of Alibi) - argued together:

7. Despite its findings that the Prosecution had not established the presence of the Appellant in many of the crime bases, the Chamber nevertheless proceeded to consider at length and dismiss in a prejudicial fashion the Appellant's alibi in respect of those crime locations. The Chamber's evaluation of the Appellant's alibi amounted to shifting the burden of proof to him:[18] The Appellant submits that the Trial Chamber's findings at paragraph 631 of the Trial Judgment not only fails to reflect the evidence available to the Court, but also attempts to shift the burden of proof to the Appellant. The Trial Chamber

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[15] See Transcript of 17 June 2008, pp.100-132. In particular, see the Chamber's ruling at p.132 of the said Transcript in which the Chamber permitted Counsel for the Third Accused to proceed with his examination of DAG 111 on the grounds that he does not "elicit incriminating evidence against the second accused". Further, on the issue of Notice, the Appellant notes that the notice he received from the Third Accused (i.e. summary of DAG 111's intended testimony/statement, Gbao-Filing of Updated And Reduced Witness List And Indictment Chart 23 January 2008) did not implicate him in any material particular and instead specified other RUF Commanders as being responsible for the UNAMSIL abductions – see Transcript of 17 June 2008, p.123.

[16] In the Transcript of 30 May 2007, at p.3, the Sesay Defence, which tendered Exhibit 212, noted that they were using the document merely as an 'exculpatory radio message' for the defence of the 1st Accused and that the said Exhibit, which was disclosed by the Prosecution only to the Sesay team, was in fact only given to that team after the close of the Prosecution's case.

[17] See paras. 2267-2292, pp.662-669 of the Trial Judgement. It was therefore improper for the Chamber to use evidence tendered by a co-accused after the close of the Prosecution's case to convict Kallon for UNAMSIL crimes.

[18] In relation to Kenema, for example, the Chamber, in a contradictory fashion, stated that the evidence concerning the presence of Kallon in Kenema at the relevant time was 'inconclusive' (para. 636), even though it had previously held that at para. 618 that Prosecution witnesses TF1-071, 125 and 367 corroborated Kallon's absence from Kenema at the time of the crimes. In respect of Masiaka, the Chamber also noted that "the evidence presented by the Prosecution and accepted by the Chamber leads us to conclude that the evidence presented by the Kallon Defense does not establish the presence of Kallon in Masiaka at the time." It is therefore unclear as to why the Chamber went further to conclude in the same paragraph that "[it will] therefore decline to address the evidence of the witnesses in support of the alibi" (see para. 637). Furthermore, the Chamber acknowledged that not all of Kallon's claims in support of the alibi constituted an alibi (para. 631), yet it proceeded to evaluate the various testimonies as alibi testimonies (see paras. 611-630, 631-645 of the Trial Judgment).

had found at paragraph 631 that: "*[f]or some of the alibi claims discussed [in the judgement], evidence was adduced that Kallon was absent from an alleged location. However, evidence was not adduced to demonstrate that he was in a different or particular location indicated with precision. In the Chamber's view, this amounts only to a denial of Kallon's presence during certain events, rather than a true claim of alibi*". It is contended that apart from the fact that the Appellant's tested testimony to the Court, supported by the evidence of his witnesses, showed where he was at all times material to the Indictment and his alibi defence,[19] the Appellant, in his plea of alibi, merely bore an evidential burden posited on a balance of probabilities standard, rather than a proof beyond reasonable doubt threshold, which the Court appeared to have used in requiring him to state every location he may have visited during the Indictment period.

8. The Chamber erred in law and fact by taking the drastic and draconian step of repudiating wholesale the Appellant's evidence based on the Chamber's misrepresentation of the Appellant's testimony thus violating his statutory rights:[20]

9. The Trial chamber used the very testimony it had purported to repudiate to prejudicially support a pre-determined finding of guilt while rejecting the same when the said testimony tended to exculpate the Appellant.[21]

10. The Chamber deliberately misinterpreted the largely corroborated testimony of the Appellant in relation to that of witness TF1-122 on the events in Kenema, thus leading to a repudiation of the Appellant's testimony.[22] Whilst it is true that witness TF1-122 testified about an incident in which he personally intervened to assist a woman who was 'disturbed' and pick-pocketed by some soldiers during a flag-raising event in Kenema,[23] it is equally true that the same witness TF1-122 also unequivocally admitted, under cross-examination, to the contents of a statement he had made to the Prosecution in which he, *inter alia*, stated that the Appellant was "actually very friendly with the civilians at the time"; that himself (the witness) saw the Appellant "stop soldiers from harassing civilians"; and in particular, that "one time when soldiers were putting up the national

[19] Which the Prosecution was unable to disprove beyond reasonable doubt under cross-examination.
[20] Para. 609 pp.201-202 of the Trial Judgment.
[21] See Para. 39 p13 - footnote 106; Para. 651 p215 - footnote 1188; Para. 656 p217 - footnote 1202; Para. 666 p220 - footnote 1226; Para. 667 p221 - footnote 1232; Para. 672 p222 - footnote 1240; Para. 741 p243 footnote – 1419 of the Trial Judgment.
[22] Para 609 pp201-202 of the Trial Judgment.
[23] Transcript of 7 July 2005, p. 65.

flag, they saw a woman passing by (...) they stopped her and took her money" and that "Kallon saw this and intervened to help the woman".[24] It is therefore inconceivable that the Trial Chamber, without perhaps evaluating the cross-examination of this witness by Counsel for the Appellant, proceeded to conclude that the Appellant consciously aligned his testimony with witness TF1-122 in order to "downplay or accentuate his role in incidents described by the Prosecution witnesses".[25] This lopsided view invalidates the Chamber's conclusion in rejecting the Appellant's alibi and should be set aside.

11. The Chamber also deliberately misinterpreted the evidence in order to arrive at the conclusion that it was "highly unlikely" that the Appellant as "Battle-Ground" commander would have been afraid of arresting Kailondo in relation to the UNAMSIL events of May 2000.[26] The Chamber erred by misrepresenting the evidence and/or ignoring its own pertinent conclusions and erroneously employing circumstantial evidence to arrive at a wrong and prejudicial conclusion as one of the bases for repudiating the Appellant Defence.[27]

12. In relation to the same UNAMSIL events, the Chamber erred by employing the accused Gbao's witness DAG-11[28] to disprove the Appellant's alibi. The Chamber had earlier rejected the entirety of the testimony of the witness save for the Appellant, decided to selectively use the witness to sustain its repudiation of the Appellant's testimony.[29] The

[24] Transcript of 8 July 2005, pp.93-94.
[25] Para 609 pp201-202 of the Trial Judgment.
[26] Para 609 p202; Paras 640 p212 of the Trial Judgment.
[27] The Chamber noted at Para 609 p202 of the Trial Judgment that the Appellant had testified that in May 2000 he had been afraid to arrest Kailondo who was acting on Sankoh's orders. The Chamber found this" highly unlikely" as Kallon was Battle Ground (sic) Commander at the time. This reasoning by the Chamber contradicts several other findings in the Judgment that would support Kallon's testimony, to wit, that Sankoh was at times authoritarian if not dictatorial – he had paramount responsibility over all activities within the RUF and determined its political and military goals (para. 658); Vanguards were powerful (para 667) and the Vanguards included Mike Lamin, Sesay, Kallon, Gbao Bockarie, Kailondo, Co Rocky etc (para. 668); that a Vanguard could not obstruct the orders or activities of a fellow Vanguard (para 667); Ranks in the RUF did not have necessarily the same meaning as ranks in a conventional army (para 670); while ranks were used and respected by the RUF, they were not strictly followed. An individual's assignment superseded rank and was the more important factor in seniority (para. 672). The Chamber illustrates this point by noting that Foday Sankoh, the RUF leader, remained a Corporal throughout the conflict (footnote 1239) (para 649); that the RUF command structure was determined by other factors than simply rank. See also para. 672 at p.222, where the Chamber concludes that while ranks were used and respected by the RUF, they were not always strictly followed.
[28] Para 609 p201 of the Trial Judgment.
[29] Para 578 p193 of the Trial Judgment.

Chamber further erred by disregarding its stated position and consistent practice during trial on the inadmissibility of a co-accused's adverse testimony.[30]

13. The finding of the Trial Chamber at para. 633 p.210 of its Judgment that "the Kallon Defence (...) moulded its alibi to fit the case for the Prosecution as it was presented" is subjective and erroneously prejudicial: The Defence notes that Prosecution witnesses were not witnesses for Kallon and that they each independently swore on oath to speak the truth. In the case of Kenema District for example, a minimum of three Prosecution witnesses, including TF1-071, TF1-125 and TF1-367 – whose testimony the Court especially accepted as 'credible and trustworthy'[31], testified that Kallon was not in Kenema District at the material time of the Indictment.[32] The Kallon Defence thus avers that it is highly prejudicial and subjective to conclude or infer that any Defence witness, including but not limited to Kallon and DMK-047 who corroborated the Kenema account, for example, were either self-serving or incredible.

14. The Trial Chamber further mischaracterized and subjectively treated the evidence of TF1-041, a Prosecution witness who testified about events at the DDR Camp in Bombali District in early May 2000 and was corroborated by the Appellant. The repudiation of the Appellant's testimony on the basis of this misrepresentation and the wrong conclusion drawn therefrom have occasioned a miscarriage of justice. In particular, the Trial Chamber's conclusion that the said account of TF1-041 and the Appellant did not occur on 1st May 2000 as suggested by the Appellant but on 28 April 2008 "in the light of other [unknown and unsubstantiated] evidence"[33] is factually erroneous. In not stating what the other evidence is, which according to the Court contradicts the evidence of TF1-041 and the Appellant, the chamber sufficiently confirms, albeit unwittingly, that there was no basis for disbelieving the Appellant's alibi.

15. Furthermore, the conclusion of the Trial Chamber in its evaluation of the Appellant's alibi defence regarding Bo District at paragraph 635 pp.210-211 of the Trial Judgment is also prejudicial. The Chamber failed to substantiate its finding that "there is no evidence to support an alibi for the Accused in Bo". The Trial Chamber had repeatedly stated in its

[30] See the submissions on Sub-Ground 2.5 "Adverse testimony of a Co-Accused", *supra*.
[31] Paras. 550-552 of the Trial Judgment.
[32] Para. 618, ibid.
[33] Para. 633 p210 of the Trial Judgment.

Trial Judgment that the Appellant only went to Bo in early August 1997,[34] after the crimes found to have been committed in Bo District had occurred. At paragraph 768 p.251 of the Trial Judgment, the Trial Chamber found that "it was not until August 1997 when Bockarie assigned Kallon to Bo as the senior RUF Commander that an RUF contingent was based there. Kallon remained in Bo until February 1998".

16. The Trial Chamber's finding on the Appellant's alibi for Masiaka is also prejudicial and inconsistent with the Trial Chamber's holding that 'Kallon's claim of alibi relevant to Masiaka is "false"'. The Trial Chamber found that "the evidence presented by the Prosecution and accepted by the Chamber, leads [the Chamber] to conclude that the evidenee presented by the Kallon Defence does not establish the presence of Kallon in Masiaka at this particular time".[35] In relation to Five-Five Spot and Tombodu,[36] the Chamber fails to support its findings.

17. Additionally, the finding of the Trial Chamber at paragraph 639 p.211 of the Trial Judgment on Gold Town, is irrelevant, prejudicial and erroneous to the extent that the Chamber concluded that the Appellant was present at Gold Town in Kono District at the time of his alibi claim on the basis that Sesay had ordered him to attack the town in mid-December 1998, which period is outside the timeframe for Joint Criminal Enterprise (hereinafter referred to as "JCE") in Kono District as found by the Court.

18. The Chamber further erred in law and fact by failing to rely on the Statement of Agreed Facts between the Appellant and the Prosecutor, which in a fundamental manner impacted on the Appellant's criminal responsibility, identity and alibi and without ascribing any reasons for it.[37] It is crucial to note that on 30th October 2006, it was the Trial Chamber itself that ordered the Prosecution and the respective Defence Teams to submit, by 16th February 2007, a 'joint statement of agreed facts and matters which are

[34] See paras. 741 p 243 and 768 p 251 of the Trial Judgment. See also para. 614 pp 203-204 of the said Judgment, ref. to Kallon's Notification of Alibi and his testimony on alibi to the Court, Transcript of 11 April, 2008, pp. 100-102.
[35] Para. 637 p 211 of the Trial Judgment.
[36] Para. 638 p 211 of the Trial Judgment.
[37] This is despite the Chamber's holding that it would rely on those facts agreed upon if there is no prejudice to the other Accused, para. 521 p.177), and by holding that there was no provision in the Rules pertaining to agreed facts (para. 521 p.177).

not in dispute' as well as a 'joint statement of contested matters of fact and law';[38] and the respective Parties to the trial complied on 5th March 2007. Moreover, contrary to paragraph 521 of the Judgment, rule 73*ter* (B) of the Rules of Procedure and Evidence provides that after the close of the Prosecution's case, the Trial Chamber or Judge may order the Defence to file, *inter alia*, "admissions by the parties and a statement of other matters which are not in dispute" and a "statement of contested matters of fact and law". One of the prejudiees suffered by the Appellant through the Trial Chamber's failure to rely on the statemcnt of agreed facts is that the Prosecution had, in that Statement conceded to the fact that"during the peace proeess after the Lome Peaee Agreement, the War Council was transformed into the Peaee Council", implying the end of the eonflict and absence of an armed conflict after the Lome Peace Agreement.[39]This clear concession by the Prosecutor negatives the existence of an armed conflict that would support any war erimes under Counts 15-18 of the indictment. As the Appellant argues elsewhere in this Brief, the Chamber's reliance on judicial notice of "a conflict" to establish the requisite element of an "armed eonflict" is erroneous.

Sub-ground 2.9: argned together with Ground 7 (assessment of evidence): Sub-ground 2.10

19. The Appellant relies on the explanations provided at paragraph 2.10 of the Amended Notice of Appeal and the references therein and further makes the submission that the Chamber erred by relying on alleged evidence of consistent pattern of conduet. This evidence had never been disclosed to the Appellant in accordance with the Rule 93 of the Rules of Procedure and Evidence, which Chamber acknowledges but surprisingly fails to apply.[40] This violation has occasioned prejudice to the Appellant as he has been convicted on the basis of presumptions not proven beyond a reasonable doubt. In relation to sexual offences in Kono, the Chamber relied on a consistent pattern of forcing "women into conjugal relationships."[41] This finding is critical in the Chamber's conviction of the Appellant for the crime of forced marriage.[42] Also, the Chamber relies on a consistent

[38] See the Scheduling Order Concerning the Preparation and Commencement of the Defence Case, 30 October 2006, para 3. This Order was even further extended to 5th March 2007 by virtue of an another order of the Court dated 7 February 2007. Consequently, on 5 March 2007, the joint statement of agreed facts and law was filed by the Parties.
[39] See *Confidential Kallon Defence Filing in Compliance with Scheduling Order Concerning the Preparation and Commencement of the Defence Case*, 5 March 2007 – Annex H, para. 12 in particular.
[40] Para 482 p165 of the Trial Judgement.
[41] Paras 1293-1294 pp 390-391 of the Trial Judgement.
[42] Para 2148 p633 of the Trial Judgment.

pattern of conduct to support its conviction of the Appellant for use of child soldiers.[43] This has violated the Appellant's right to a fair trial and thus invalidates his conviction.

Sub-ground 2.11- shall be argued together with Ground 18 (Counts 6-9).

Also, Sub-ground 2.25 shall be argued together with Ground 7.

Sub-grounds 2.26 and 2.29 – Discriminatory approach in the application of JCE and Bias:

20. The Appellant notes that the expansive and amorphous manner in which the Prosecution pleaded, and to that extent failed to limit, the concept of JCE formed the subject-matter of both the Separate Concurring Opinion of Justice Bankole Thompson[44] and the Dissenting Opinion of Justice Pierre Boutet[45]. Whilst Justice Boutet opined that "the broadly pleaded joint criminal enterprise" failed to closely connect the goals of the common design with the contribution of each accused, Justice Thompson was categorical about its fluid and amorphous nature, noting especially thus: "*I opine strongly that the present uncritical adoption and application of the doctrine of joint criminal enterprise, in its threefold dimension, unquestionably compounds not only the opaqueness and amorphous character of some of its conceptual elements but also the degree of fluctuation of its doctrinal contours*".[46] The learned Judges failed to apply their opinions to the Appellant. The Appellant's glaring absence from, and lack of connection with, crime bases including Bo, Kenema and Kailahun Districts, as shall be illustrated in this Brief under Ground 2, shows that he should not have been convicted for any crimes in those areas through a broad and expansive JCE mode of liability as recognized by the two Judges above. In the case of Kono District, whilst the Appellant's presence in the District during the Indictment period is not denied, it is contended in this Brief that the Appellant had clearly distanced himself from any JCE between the AFRC and RUF, in addition to the fact that he had no discrete units of command under him to use in the JCE. Also, the conviction of Kallon for the crimes of Rocky CO, Savage and Staff Alhaji, whom the Chamber held were not members of the JCE but were used by JCE members (without indicating which member of the JCE used them),[47] represents an expansive and broad application of JCE.

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[43] Paras 1707 p508, 1745, p518 of the Trial Judgement. See also para 2231-2233 of the Trial Judgment.
[44] At Paras. 22 and 23, especially regarding the nature and expanse of the foreseeability form of the JCE.
[45] At Para. 16.
[46] Para. 23, Separate Concurring Opinion of Justice Bankole Thompson.
[47] See para. 2080 of the Trial Judgment.

21. The Appellant submits that 'it is a fundamental right of all persons facing criminal charges to be tried before an independent and impartial tribunal."[48] "Article 20 of the Statute guarantees a 'fair and public hearing', and Article 12 requires judges to be 'persons of...impartiality'."[49] A touchstone of a fair trial is the impartial tribunal, which neeessarily demands the "quintessential values of the judicial eulture, namely, impartiality, objectivity and dispassionateness as enshrined in the judicial oath."[50] While "judieial rulings alone almost never constitute a valid basis for a bias or partiality motion ... [a]lmost invariably, they are proper grounds for appeal."[51] In this trial, the Honorable Justice Bankole Thompson makes eertain statements that raise a specter of bias and create an appearance of impartiality that has prejudiced the rights of the Appellant. Thus, although the Appeals Chamber had dismissed the Appellant's request for the recusal of the Hon. Justice Bankole Thompson, the learned Trial Judge persisted in his bias as exhibited in his Separate Concurring Opinion where he criminalizes the RUF, and hence the Appellant, by concluding that they were involved in an unjust war.[52] The Appellant submits that by eontinuing to express strong anti-RUF sentiments and imputing them to the Appellant and further failing to apply to this case his reservations about the general applicability of JCE as a mode of liability, the Honorable Justice Bankole Thompson has exhibited an appearance of bias thus denying the Appellant the opportunity of a trial by impartial judges.[53] The Appellant thus urges the Appeals Chamber to review and/or reconsider its Decision on the recusal of the Hon Justice Bankole Thompson,[54] and to reverse the conviction of the Appellant on grounds of bias as well.

22. It is submitted that "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings ...

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[48] *Prosecutor v. Kordic*, Case No. IT-95-14/2, Bureau Decision, (May 4, 1998).
[49] *Prosecutor v. Karemera*, Case No. ICTR-98-44-T, Decision on Motion by Karemera for Disqualification of Trial Judges , para. 7, (May 17, 2004).
[50] Judgement, *P v. Norman et al* Case No SCSL-04-14-J, pg C-1, para 1
[51] *Prosecutor v. Karemera*, Case No. ICTR-98-44-T, Decision on Motion by Nzirorera for Disqualification of Trial Judges, para. 13 (May 17, 2004) (emphasis added).
[52] Paras 79-82 pp.721-722 of the Separate Concurring Opinion of Justice Bankole Thompson.
[53] Para 20-23 of the Honorable Judge's Separate and concurring opinion. It would seem that the only element in relation to JCE that the Honorable Justice Bankole agrees with is that "it requires essentially a plurality of persons" See Paragraph 19 of the the Separate Concurring Opinion of Justice Bankole Thompson.
[54] See the Appeals Chamber *Decision on Sesay, Kallon and Gbao Appeal Against Deeision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case*, 24 January 2008.

constitute a basis for a bias or partiality motion [if] they display a deep-seated favoritism or antagonism that would make fair judgement impossible."[55] "Whether in a given case there is a legitimate reason to fear that a particular Judge lacks impartiality the standpoint of the accused is important but not decisive.... *[W]hat is decisive is whether this fear can be held objectively justified.* Thus, one must ascertain, apart from whether a judge has shown actual bias, whether one can apprehend an appearance of bias."[56] The test for determining appearance of bias issues is: whether a "fair-minded observer, with sufficient knowledge of the circumstances of this case to make a reasonable judgement, would conclude that the Trial Chamber might not bring an impartial and unprejudiced mind to the issues arising in this case."[57]

GROUND 2: GENERAL ERRORS RELATING TO THE APPLICATION OF JOINT CRIMINAL ENTEPRISE:

Sub-grounds 3.1-3.14 of this Ground have been argued together.

23. The thrust of the Appellant's submissions is that the application of JCE to this case and conviction of the Appellant is erroneous and thus invalidates the judgement.

24. In this case, the Trial Chamber alleges a massive criminal enterprise that includes each direct perpetrator (however nameless) for every crime alleged, and imputes liability to the Appellant based on a perceived JCE. It is submitted that an imputation of individual criminal responsibility to the Appellant unfairly attributes criminal liability to him.

25. Furthermore, the Chamber fails to identify, much less connect, the direct perpetrators with respect to the Appellant or even include them as members of the enterprise. Such a failure omits the essential component of JCE liability—the commonality of intention or act—eliminates the requirement for a guilty mind, and violates the fundamental principle of *nulla poena sine culpa*, causing serious prejudice to the Appellant.

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[55] *Prosecutor v. Karemera*, Case No. ICTR-98-44-T, Decision on Motion by Nzirorera for Disqualification of Trial Judges, para. 13 (May 17, 2004) (emphasis added).
[56] *Prosecutor v. Furundzija*, Case No. IT-95-17/1-A, Judgement, para. 182, (July 21, 2000).
[57] *Prosecutor v. Brdjanin*, Case No. IT-99-36-R.77, Decision on Application for Disqualification, para. 35 (June 11, 2004).

Error Relating to the Principle of *nulla poena sine culpa*:

26. This principle holds that nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated."[58] Since the Nuremberg trials, international criminal jurisprudence has included a similar principle—that "criminal guilt is personal, and that mass punishments should be avoided."[59] This principle, of "no punishment without guilt" is anchored in the guarantee of human dignity and individual responsibility and forbids the infliction of punishment for an act in respect of which the perpetrator is not responsible.[60] This principle is inherent in the statutes of the international criminal tribunals. [61] A related cornerstone of the *nulla poena sine culpa* principle is the presumption of innocence, which requires the proof of individual guilt, and is regarded as fundamental.[62] The Trial Chamber recognizes this principle.[63] However, the Trial Judgment has forgotten the required connection between criminal responsibility and personal culpability, and has therefore abandoned the fundamental requirement of fairness.

27. Although over the past ten years, the theory of JCE has seen significant expansion, much of which has been controversial, the Trial Judgment herein has further stretched JCE liability to limits that far exceed the bounds of individual culpability. The Chamber holds that to prove a JCE, the plurality of persons need not be defined,[64] the common purpose need neither be fixed[65] nor criminal,[66] and the acts of the Appellant, which render him

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[58] *prosecutor v. tadic,* case no. it-94-1-a, judgement, para. 186 (July 15, 1999) http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf ("*tadic* appeals judgement"), *as quoted in prosecutor v. brima et al,* case no. scsl-scsl-2004-16-a, judgement, para.72 (feb. 22, 2008); *see olso prosecutor v. mpambara,* case no. ictr-01-65-t, judgement para. 26 (sept. 11, 2006) http://69.94.11.53/english/cases/mpambara/judgement/120906.pdf ; juridical status and human rights of the child, advisory opinion, oc-17/02, inter-am. ct. h.r. (ser. a) no. 17 (aug. 28, 2002), available at: http://www1.umn.edu/humanrts/iachr/series_a_oc-17.html; unesco brief introduction of the penal code of macao, available at: http://www.unesco.org.mo/eng/law/6penal.html;

[59] International Military Tribunal, Judgement, in Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg, 14 November 1945-1 October 1946, 256 (1947).

[60] Bundesverfassungsgericht [BVerfG], [Federal Constitutional Court], 2 BvR 564/95, (Jan. 14, 2004) http://www.bundesverfassungsgericht.de/en/decisions/rs20040114_2bvr056495.html ("2 BvR 564/95").

[61] *Tadic Appeals Judgement*, para.186.

[62] Protocol I Geneva art. 56(b); Protocol II art 6(2)(b); *Coffin v United States*, 156 U.S. 432 (1895) http://bulk.resource.org/courts.gov/c/US/156/156.US.432.741.html ; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Sept. 3, 1953, 213 U.N.T.S. 222.

[63] *Prosecutor v. Sesay, Brima, Kallon, Gbao, Kamara & Kanu*, Case No. SCSL-2003-07-PT, Decision and Order on Prosecution Motions for Joinder para. 22, (Jan. 27, 2004).

[64] *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Judgement ¶262 (March 2, 2009) ("Judgement").

[65] Trial Judgement, para.259

criminally responsible for the acts of others, may be limited in scope and geography, so long as he is aware of the wider (admittedly non-criminal)[67] common purpose.[68] This theory accepted by the Chamber (albeit with expressed hesitancy) has exceeded the boundaries initially established under *Tadic* and universally accepted in criminal law.

28. As noted in Ground 1, the tenuous connection between individual culpability and the expansive theory of JCE liability advanced by the Prosecution is specifically, and justifiably so, questioned by both Justices Boutet and Thompson.[69] It is however puzzling that the learned Justices nevertheless proceed to convict the Appellant as though they were under some unstated obligation to do so.

29. The Appellant submits that, as illustrated in Grounds 8 to 15 of this Brief, he was found *individually* criminally liable for a number of massive crimes, with which (a) he was not personally involved, (b) he did not share the intention to commit, (c) he did not "command" for the purposes of command responsibility, (d) he did not aid or abet, (e) he did not instigate, (f) he did not order, he did not (g) commit, by any understanding of the word, and (h) the perpetration of which he may not even have been aware. Accordingly, the fundamental requirement of *nulla poena sine culpa* was violated, and the convictions entered under the flawed theory should be withdrawn.

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[66] Trial Judgement, para.260.
[67] Trial Judgement, para.1979
[68] Trial Judgement, para.262.
[69] In his Separate Concurring Opinion to the Trial Chamber's Judgement, Justice Bankole Thompson "question[s] ... the legal justification for category (c) [of joint criminal enterprise liability], from the perspective of the principle of legality in its proscriptive and penological contexts, given the logical pitfalls latent in them." (para. 18 of the Separate Concurring Opinion). Indeed, he questions just "how expansive ... the scope of liability envisaged by the third category" of JCE liability should be, especially concerning the "principle that the attribution of criminal responsibility to a person charged with violation of a proscriptive norm can only be predicated upon his or her own individual conduct, and ... the principle that a person found guilty of criminal wrongdoing can only be penally sanctioned for his individual choice to engage in such conduct." (para. 22 of the Separate Concurring Opinion) Justice Thompson's own opinion indicates the tenuous interplay between *nulla poena sine culpa* and the theory of JCE liability and the hesitancy of Justice Thompson to accede to the Prosecution's expansive theory. In the case of Justice Pierre Boutet, his Dissenting Opinion similarly expresses a hesitancy to accede to an overly-expansive understanding of JCE liability. (paras. 16-17, Dissenting Opinion of Justice Boutet) In particular, Justice Boutet seeks to require that especially in "such a broadly pleaded joint criminal enterprise," courts should "require a close connection between the goals of the common design, as pleaded, and the contribution of each of the Accused. This is even more important when the purpose is such that is not even reflective of a crime which would fall under the jurisdiction of this Court." (para. 16, Dissenting Opinion of Justice Boutet). This language expresses the caution of a *majority* of the Trial Chamber in accepting a non-criminal common purpose and a consideration that liability, in this case, may have been "attributed expansively and [therefore] inappropriately." (para. 16, Dissenting Opinion of Justice Boutet). The failure of the two learned Judges to apply their reservations in respect of the Appellant Kallon for the crimes with which they convict him constitutes a legal error that invalidates the Chamber's verdict

Error Relating to Over-Expansive Joint Criminal Enterprise:

30. The United States, in its interpretation of the conspiracy mode of liability (which is analogous, if not identical, to the theory of JCE),[70] has considered the theory of individual criminal responsibility for a considerable time and has established significant limitations on the applicability of the theory, especially as the conspiracies become excessively large. In the landmark case of *Kotteakos et al., v. United States*,[71] the Supreme Court rejected the lower court's determination that "all of the defendants were parties to a single common plan, design and scheme, where none was shown by the proof," and found that it was erroneous to "impute to each defendant the acts and statements of the others without reference to whether they related to one of the schemes proven or another, and to find an overt act affecting all in conduct which admittedly could only have affected some."[72] As liability is broadened to include more and more, in varying degrees of attachment to the confederation, the possibilities for miscarriage of justice to particular individuals become greater and greater.[73] Indeed, as the scope of the enterprise becomes larger, more inclusive, and less criminal, it is inevitable that more individuals get caught (perhaps unfairly) in the ever-growing web of liability. While it may be clear that, at some point, there is a limit to how large the enterprise may become before it is unfair to assign all-encompassing liability to one Aecused person, it is less clear where this boundary may lie. Although not conclusive, United States jurisprudence involving diverse and complex conspiracy litigation may be helpful in charting this boundary or in considering the eontours of fairness and individual culpability.[74]

31. As in the *Kotteakos* case above, this case has a grave potential for prejudice. Indeed, the criminal enterprise alleged, and for which guilt was assigned, is massive in scope, geography, participation and purpose, just like the conflict itself. The massive criminal enterprise accepted by the Chamber involves potentially *thousands* of direct perpetrators, and creates too many possibilities for transferences of guilt, shortcuts, and unfairness. In addition, there is absolutely no evidence that suggests the existence of one massive JCE.

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[70] *Tadic Appeals Judgement*, para. 224, ftn. 289.
[71] *Kotteakos et al v. United States*. 328 US 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (S. Ct., June. 10, 1946).
[72] *Kotteakos*.
[73] *Kotteakos*.
[74] *See, inter alia*, ICJ Statute, Article 38, acknowledging that the general principles of law recognized by civilized nations, international custom, and judicial decisions may be considered as sources of international law.

Rather, there existed such gulf of disparity and imbalance between the AFRC and RUF regarding positions and authority respectively held by them in Government and the Military that the Trial Chamber found that "by early September 1997, Bockarie had (...) become disillusioned with the RUF's limited role in the AFRC government"[75] and that "the failure to integrate the two military organizations into the military command structure led to misunderstandings and conflicts".[76] The command and control structure was in disarray and the Chamber further found that "while some AFRC fighters obeyed orders from RUF Commanders, others would not. [Also,] lower-ranking RUF fighters disobeyed orders from their senior officers".[77] Government positions were divided unequally between the AFRC and RUF, "with the AFRC receiving the more senior positions";[78] this situation led Sam Bockarie, who was the acting Leader of the RUF then, to relocate from Freetown to Kenema in August 1997 as "he was dissatisfied with Johnny Paul Koroma's management of the government" and also feared for his life.[79]

32. Consequently, the Trial Chamber's holding that "a joint criminal enterprise is divisible as to participants, time and location [as well as]... the crimes charged as being within or the foreseeable consequence of the purpose of the joint enterprise"[80] is entirely too vast, ephemeral and imprecise, as the foundation of criminal responsibility as well as the imputation of guilt runs foul of the fundamental guarantees of justice and fairness.

33. In rejecting the imputation of guilt for involvement in a massive conspiracy, the Supreme Court of the United States indicated that it was fundamentally unfair to find guilt on the basis of a perceived larger conspiracy by defendants "who join together with only a few, *though many others may be doing the same and though some of them may line up with more than one group.*"[81] In this case, while the Trial Chamber attempts to discuss the membership in the common enterprise (of which the Appellant is said to be part) in most general terms, it does very little, if anything, to indicate why the Appellant should carry the burden of non-members who are the direct perpetrators of the vast majority of the crimes. Most importantly, it conflates similarity of action with commonality of purpose.

[75] Para. 764 of the Trial Judgment.
[76] Para. 763 of the Trial Judgment.
[77] Para. 763 of the Trial Judgment.
[78] Para. 22 of the Trial Judgment.
[79] Para. 24 of the Trial Judgment.
[80] Para. 354 of the Trial Judgement.
[81] *Kotteakos*. (emphasis added).

While the direct perpetrators may have been committing acts that could be conceived of as consistent with the common purpose advanced by the Prosecutor, there is no proof that the direct perpetrators shared any common purpose with the Appellant or were in any way affiliated with the Appellant.

34. Where no evidence is found that binds "the separate conspiracies together and make them one (...) it is improper to try the members of many separate conspiracies en masse."[82] Indeed, for a "wheel"-type "conspiracy to exist those people who form the wheel's spokes must have been aware of each other and must do something in furtherance of some single, illegal enterprise. Otherwise, the conspiracy lacks 'the rim of the wheel to enclose the spokes.' If there is not some interaction between those conspirators who form the spokes of the wheel as to at least one common illegal object, the "wheel" is incomplete, and two conspiracies rather than one are charged."[83] As a result, Appellant should not have been tried (and convicted) under a theory of massive joint criminal enterprise.

Extended theory as applied omits the fundamental requirement of a guilty mind (mens rea):

35. The application of type III JCE eliminated the foundational requirement of a guilty, culpable mind. Accordingly, no conviction should be properly entered in this case on the basis of participation under the "extended" theory of JCE in this case. In *Morissette v. United States,* the Supreme Court of the United States held that the principle that "an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."[84] Indeed, the "existence of a *mens rea* [requirement] is the rule

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[82] *United States v. Brito*, 721 F.2d 743 (11th Cir. 1983) http://bulk.resource.org/courts.gov/c/F2/721/721.F2d.743.82-5168.html ("*Brito*"); *see also U.S. v. Tarantino*, 846 F.2d 1384 (D.C. Cir. 1988) http://bulk.resource.org/courts.gov/c/F2/846/846.F2d.1384.85-5846.85-5810.85-5808.html ("*Tarantino*") ("Without a rim to enclose the spokes, however, the evidence made out multiple conspiracies, not the single one alleged.")

[83] *U.S. v. Levine*, 546 F.2d 658 (5th Cir. 1977) http://bulk.resource.org/courts.gov/c/F2/546/546.F2d.658.76-1543.html ("*Levine*") (internal citations omitted).

[84] *Morissette v. United States* 342 U.S. 246, 250 (1952) http://bulk.resource.org/courts.gov/c/US/342/342.US.246.12.html (*"Morissette"); as quoted in Prosecutor v. Delalic et al,* Case No. IT-96-21-T, Judgement, ftn. 433 (Nov. 16, 1998) http://www.un.org/icty/celebici/trialc2/judgement/ ("*Delalic*") ("While the terminology utilised varies, these two elements [of *mens rea* and *actus reus*] have been described as "universal and persistent in mature systems of law");

of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."[85] As a fundamental rule of "utmost importance for the protection of the liberty of the subject,"[86] the principle of *mens rea* require that a "Court should not find a man guilty of an offence against the criminal law unless he has a guilty mind."[87] A crime is committed in the nexus of "an evil-meaning mind with an evil-doing hand."[88]

36. The Trial Chamber indicated that in the extended theory of liability, the requisite *mens rea* is as follows. First, the "Accused must have had the intention to take part in and contribute to the common purpose."[89] Second, the Prosecution must prove that the "Accused had sufficient knowledge that the additional crime was a natural and foreseeable consequence to him in particular" and "must also know that the crime which was not part of the common purpose, but which was nevertheless a natural and foreseeable consequence of it, *might* be perpetrated by a member of the group" and "willingly take the risk that the crime might occur by joining or continuing to participate in the enterprise."[90] This standard appears benign when, in fact, the criminal purpose is supposed to be ***inherently*** criminal as required in the JCE jurisprudence[91]. In this case, the Accused is said to be personally culpable for the foreseeable crimes that may be committed by his co-perpetrators. Thus, where the purpose is not *inherently* criminal (as recognized by the Trial Chamber)[92], the underlying intention of the Appellant to take part in and contribute to the common purpose must not be culpable. Indeed, the aim to gain control over a country is merely the exercise of political ambition, not criminal intention.[93] The second prong of the analysis requires only that the Appellant has

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see also Liparota v. United States, 471 U.S. 419 (1985) http://bulk.resource.org/courts.gov/c/US/471/471.US.419.84-5108.html ("*Liparota*").

[85] *United States v. Freed*, 401 U.S. 601 (1971) http://bulk.resource.org/courts.gov/c/US/401/401.US.601.345.html ("*Freed*").

[86] *Brend v Wood* (1946) 62 TLR 462, 463 (Lord Goddard) CJ ("Brend"), as quoted in B v. Director of Public Prosecutions [2000] UKHL 13, http://www.bailii.org/uk/cases/UKHL/2000/13.html

[87] *Brend v Wood* (1946) 62 TLR 462, 463 (Lord Goddard) CJ.

[88] *Morissette*.

[89] Trial Judgement, para. 266.

[90] Trial Judgement, para. 266.

[91] *Prosecutor v. Brima et al*, Case No. SCSL-04-16-T, Judgement paras. 67, 778 (June 20, 2007).

[92] Trial Judgement, para. 2013. It was, for example, held by the Chamber that the holding of a revolutionary idea or ideology does not constitute a crime.

[93] The Chamber makes a troubling admission concerning the fitting of JCE liability to the adherents of a revolutionary ideology. Although the Court is explicit that the RUF itself is not on trial, (para. 4 of the Trial Judgement) and accepts that a revolutionary ideology is not inherently criminal as such, (para. 2013 of the Trial Judgement)[93] the Court insists that where a "criminal nexus between such an ideology and the crimes charged and

knowledge that a crime might be committed by others sharing such an intention, and willingly take the risk that the crime might occur by participating in the common enterprise. In such a scenario, there is no intention to engage in criminal behavior. On the contrary, there is only awareness that others may become criminals. Accordingly, the use of the extended theory of JCE liability in cases where the common purpose is not inherently criminal runs afoul of the fundamental requirement of a guilty mind (*mens rea*), and is therefore inconsistent with and contravenes the established international jurisprudence. As a result, any conviction entered against the Appellant under a theory of extended JCE liability for the inherently non-criminal purpose ought to be withdrawn.

37. Holding otherwise would render mere membership in a group, organization, or collective that shares some common goal (however general and non-criminal) a culpable act, as soon as any member thereof commits a crime that may be foreseeable) - an outcome that would "amount to a flagrant infringement of the principle of *nullum crimen sine lege.*"[94] All members of the enterprise would be liable for all crimes committed by any and all members, regardless of the individual intention of, or participation by, the Appellant. Such a conclusion conflates group membership with individual criminality.

38. Moreover, the Appellant notes that in coming to the conclusion that liability via JCE is appropriate, the Chamber made a number of determinations. First, the Chamber finds that the RUF's objective to topple the government with the use of arms "necessarily implies the resolve and determination to shed blood and commit the crimes for which the Accused are indicted."[95] Next, the Chamber "considers that the RUF's military ideology provided a degree of specialization and organization, which in turn allowed the RUF to engage in a joint criminal enterprise that utilized the commission of crimes under the Statute in order to take power and control in Sierra Leone, in particular its diamond mining areas.[96] The Chamber concludes, with Justice Boutet dissenting, that "there is convincing evidence to warrant the inference that without the ideology there would have been no joint criminal enterprise and that the revolution, of which the joint criminal

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alleged to have been committed, the perpetrators of those crimes *should be held criminally accountable* under the rubric of a joint criminal enterprise for the crimes so alleged in the Indictment." (para. 2013 of the Trial Judgment).

[94] *see Prosecutor v. Stakic*, Case No. IT-97-24-T, Judgement para. 432 (July 31, 2003), http://www.icty.org/x/cases/stakic/tjug/en/stak-tj030731e.pdf.

[95] Trial Judgement, para. 2016.

[96] Trial Judgement, para. 2025

enterprise was a key element, is a product of the ideology [and that] (...) the revolution was the ideology in aetion."[97] Such a judicial conclusion defies logie and appears to conflate the legal theory of *individual* criminal responsibility of JCE with a judgment on the moral propriety (and even legality) of an entire organization or struggle. This determination is *ultra vires* and "inapposite as a basis for a theory of individual criminal responsibility";[98] it runs the risk of abandoning the legitimacy of the institution by placing pervasive blame that applies to an entire organization to a few persons, without taking time to substantiate the affirmative actions of the Appellant within the institution.

39. In addition, the inherently non-criminal common purpose (which the member of any political or religious group in Sierra Leone may share) necessarily includes many individuals involved with the civil war, including collaborators who were pardoned under the Lome Peace Agreement of 1999[99]. In addition, by accepting a common purpose that was not inherently criminal, the Chamber made the "significant contribution" element of JCE liability excessively lax, such that any contribution (however non-criminal) of an individual to effect a non-criminal purpose, could essentially make that individual personally criminally liable for all of the criminal acts of others, regardless of the lack of affiliation between the two.[100] In effect, mere membership of the RUF and participation in the civil war would make an individual liable for any acts committed by any other RUF member (or agent thereof). This theory accepted by the Chamber, which constituted the grounds for most of the convictions of the Appellant, unfairly attributes criminal liability to him, and should be rejected. The ICTY Appeals Chamber has declared that "criminal liability pursuant to a joint criminal enterprise is not liability for mere membership or for conspiring to commit crimes, but a form of liability concerned with the participation in the commission of a crime as part of a joint criminal enterprise, a different matter."[101] Accordingly, "joint criminal enterprise cannot be viewed as

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[97] Trial Judgement, para. 2032

[98] *Prosecutor v. Brdjanin*, Case No. IT-99-36-A, Judgement para. 42 (April 3, 2007) ("*Brdanin*").

[99] See Article ix of the Lome Peace Agreement 1999 (Exhibit 304). Ex-combatants, exiles and civilian collaborators who were granted 'absolute pardon' for their conduet can be tried and convicted for associating with the factions.

[100] For instance, the Chamber attributes culpability to the Appellant merely for membership in the Supreme Council without showing that the Council was inherently criminal and that the Appellant participated in any criminal decisions by the AFRC or Supreme Council.

[101] *Prosecutor v. Multinovic et al.* Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction - Joint Criminal Enterprise, Appeals Chamber, Case No. IT-99-37-AR72 para. 26 (May 21, 2003)

membership in an organization because this would constitute a new crime not foreseen under the Statute and therefore [would] amount to a flagrant infringement of the principle *nullum crimen sine lege*."[102]

Mens Rea: Common Purpose:

40. The Prosecution submitted that, even though the common purpose was not inherently criminal, it nevertheless became criminal because it was perpetrated by criminal means.[103] However enticing this proposition, the criminality of means adopted to effect a non-criminal goal does not alter the relevant *mens rea*, only the *actus reus* involved. Accordingly, because the common purpose is not inherently criminal,[104] there is no culpable *mens rea* involved, and accordingly, no JCE liability can be predicated upon such a purpose and the Appellant's convictions under this theory should be withdrawn.

"Fluid" Theory of Joint Criminal Enterprise:

41. Moreover, the "fluid"[105] theory of JCE as applied by the Chamber, impermissibly eliminates the requirement of any static common purpose, and instead indicates that the common objective can change over time, "when leading members of the joint criminal enterprise are made aware of . . . new types of crimes committed, take no measures to prevent these crimes and persist in the implementation of the common objective."[106] In essence, the Chamber accepted that the nature, scope, and purpose of the JCE could be amended by any actor within the JCE and then subsequently "ratified"[107] by the others. This theory begs the question of how concrete and how truly shared the purpose must be to impute liability via a theory of JCE. In addition, it necessitates an inquiry into the timing of the acts of "significant contribution" for the purposes of imputing liability. Thus, if the Appellant's contribution took place prior to the change in the common purpose, could he be held liable for the JCE, as amended? This legal formulation criminalizes omissions (failure to withdraw from, or prevent the commission of, the common objective) and thereby substitutes a theory of *complicity* with a theory of

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[102] *Prosecutor v. Stakić*, Judgement, Case No. IT-97-24-T ¶ 433 (July 31, 2003) http://www.icty.org/x/cases/stakic/tjug/en/030731_Stakic_summary_en.pdf (*Stakic Trial Chamber Judgement*)..
[103] Trial Judgement paras. 1979, 1982 and 1984-5; see also *Prosecutor v. Brima et al*, Case No. SCSL-04-16-A, Judgement para. 76 (Feb. 22, 2008).
[104] Trial Judgement, para. 1985.
[105] Trial Judgement, para. 259.
[106] Trial Judgement, para. 259.
[107] Trial Judgement, para. 259, ftn. 456.

commission, both of which are fundamental elements in positing a standard for JCE responsibility.

"Significant Contribution" Theory:[108]

42. Similarly, the Trial Chamber's finding that the Appellant's acts constituted a "significant contribution" that rendered him liable for all the crimes for which he was convicted oversteps the boundaries of the *nulla poena sine culpa* principle by unfairly imputing to him liability without participation. Indeed, the Trial Chamber's imputation of guilt upon the Appellant is a legal and factual error, as his positive acts known to the Chamber did not constitute a significant contribution.[109] Little wonder that in his Dissenting Judgment, Hon. Justice Boutet stated that in "such a broadly pleaded joint criminal enterprise, it is necessary (...) to require a close connection between the goals of the common design, as pleaded, and the contribution each of the Aecused. This is even more important when the purpose is such that it is not even reflective of a crime which would fall under the jurisdiction of this Court."[110] Regrettably, he failed to apply this thinking to the Appellant and thus wrongfully convicted him. This error invalidates the conviction on JCE liability.

43. The Trial Chamber's conclusion—that an "accused may be found criminally responsible for his participation in the [JCE], even if his significant contributions to the enterprise occurred only in a much smaller geographical area, provided that he had knowledge of the wider purpose of the common design"[111] is also erroneous. Mere "knowledge" is inconsistent with the requirement that the Appellant "shar[es] the purpose of the joint criminal enterprise ... as opposed to merely knowing about it."[112] Indeed, it runs contrary

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[108] Trial Judgement, paras. 261 and 2007.

[109] Being a key requirement of JCE pursuant to para. 261 of the Trial Judgment. At para. 1231 of the Trial Judgment, the Chamber found that Kallon visited Kaidu and *advised* Rocky CO that the rebels should not be hostile with the civilians. Also, as noted earlier in this Brief, witness TF1-122 unequivocally admitted, under cross-examination, to the contents of a statement he had made to the Prosecution in which he, *inter alia*, stated that the Appellant Kallon was "actually very friendly with the civilians at the time"; that himself (the witness) saw the Appellant "stop soldiers from harassing civilians"; and in particular, that "one time when soldiers were putting up the national flag, they saw a woman passing by (...) they stopped her and took her money" and that it was the Appellant] that helped the lady. (Transcript of 8 July 2005, pp.93-94). Also, the Chamber found in its Trial Judgment that Kallon was not personally liable for the events in Bo (para. 1976), Kenema (para. 2053), Kono (para. 2066) and Kailahun (para. 2157).

[110] Justice Boutet's Dissenting Opinion, para.16.

[111] Trial Judgement, para. 262.

[112] *Prosecutor v. Fofana*, Case No. SCSL-04-14-J, Judgement para. 208 (Aug. 2, 2007).

to the established jurisprudence surrounding JCE liability that distinguishes it from a theory of aiding-and-abetting liability.[113]

The Application of the "Tool/Agency" Theory of JCE: Legal and Factual Errors:

44. The Trial Chamber also erred in its finding that the Appellant was liable under category one theory of JCE liability for acts of perpetrators who were not members of the enterprise, but mere agents or tools of members.[114] This holding eliminates the "plurality of persons" requirement that the direct perpetrator be a member of the enterprise as well and erodes the requirement that both the prineipal perpetrator and the accused person share a common intention. As a result, this application constitutes legal error, and any convictions predicated upon this improper theory must be reversed. The "tool" or "agency" theory of JCE was established in *Brdjanin*, which held that "where the principal perpetrator is not shown to belong to the JCE, the trier of fact must further establish that the crime can be imputed to at least one member of the joint criminal enterprise, and that this member – when using the principal perpetrator – acted in accordance with the common plan."[115] The Trial Chamber does not demonstrate this linkage and in particular, fails to establish that perpetrators of crimes, such as Rocky CO, RUF Rambo, AFRC Savage and his Deputy Staff Alhaji - who were not found to have been members of the JCE but were said by the Chambers to have been used by unidentified members of the JCE[116] – had any affiliation with or were used by the Appellant to commit crimes.

45. In addition, the Appeals Chamber in *Brdjanin* held that the Trial Chamber must (a) identify the plurality of persons belonging to the JCE; (b) specify the common criminal purpose in terms of both the criminal goal intended and its scope (for example, the temporal and geographic limits of this goal, and the general identities of the intended victims; (c) make a finding that this criminal purpose is not merely the same, but also

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[113] *See Prosecutor vk Stakic*, Case No. IT-97-24-T, Judgement para. 432 (July 31, 2003). ("In the *Ojdanic* Decision, the Appeals Chamber held unequivocally that joint criminal enterprise is to be regarded as a form of "commission" pursuant to Article 7(1) of the Statute and not as a form of accomplice liability. Since it constitutes a form of "commission" in the sense that, insofar as a participant shares the purpose of the joint criminal enterprise as opposed to merely knowing about it, he cannot be regarded as a mere aider and abettor to the crime contemplated . . . *[J]oint criminal enterprise can not be viewed as membership in an organisation because this would constitute a new* crime not foreseen under the Statute and therefore amount to a flagrant infringement of the principle nullum crimen sine lege. This must always be borne in mind when working with this definition of the term "commission").

[114] Trial Judgement, paras. 263, 266; footnote 464, para. 1992.

[115] *Brdjanin*, para. 430; *see also Prosecutor v. Martic*, Case No. IT-95-11-A, *Judgement* paras. 168, 171 (Oct. 8, 2008) http://www.icty.org/x/cases/martic/acjug/en/mar-aj081008e.pdf (*"Martic Appeals Judgement"*).

[116] Trial Judgement, paras. 2080.

common to all of the persons acting together within a joint criminal enterprise; and (d) characterize the contribution of the accused in this common plan, which must be significant.[117] Although the Appellant disputes the propriety of the "agency" theory of JCE because it undermines the requirement for a plurality of persons and commonality of intention, the Appellant asserts that the Appeals Chamber, in establishing this theory, clearly required that the common purpose be inherently criminal. Indeed, the Appeals Chamber, in requiring the elements listed above, indicated that an Appellant convicted under such a theory would have "done far more than merely associate with criminal persons. He has the intent to commit a crime, he has joined with others to achieve this goal, and he has made a significant contribution to the crime's commission."[118] Such a holding would ensure that both the principal perpetrator and the person to whom the liability is imputed had a culpable *mens rea*, which would render criminal liability appropriate. In light of the fact that the common purpose alleged and accepted in this case is not inherently criminal, the Appellant respectfully asserts that the "agency" theory of JCE is inappropriate. The "agency" theory of conspiracy liability (the American legal equivalent of JCE liability), has been soundly and repeatedly rejected by the Supreme Court of the United States. In the landmark *Kotteakos* case, discussed *supra*, the Supreme Court rejected the theory that mere involvement by one person in otherwise-unrelated enterprises renders the sum of the persons liable under a theory of conspiracy *per se*.

46. In the "traditional" form of JCE liability, there is a clear unity of criminal intention and culpable act. Indeed, co-perpetrators intend to participate in a joint enterprise that has a criminal objective. Accordingly, there is a culpable, criminal intention that is punishable. In addition, there is a positive act in furtherance of the criminal objective, and therefore there is consummated criminal intention. For conspiracy, the "essence" of the crime "is an agreement to commit an unlawful act," which is punishable because a "conspiracy poses distinct dangers quite apart from those of the substantive offense."[119]

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[117] *Brdjanin*, para. 430.
[118] *Brdjanin*, para. 431.
[119] *Iannelli v. United States*, 420 U.S. 770 (1975) http://bulk.resource.org/courts.gov/c/US/420/420.US.770.73-64.html ("*Iannelli*"); *see also Salinas v. United States*, 522 U.S. 52 (1997) http://bulk.resource.org/courts.gov/c/US/522/522.US.52.96-738.html ("*Salinas*").

47. Where, however, as in this case, the common purpose is *not* inherently criminal, and where, as in this case, the positive acts are themselves not necessarily criminal, the culpable conduct and intention may be lacking (ultimately in contravention of the requirements of the *nulla poena sine culpa* principle). It is submitted that there is a glaring lack of connection between the perpetrators (the non-JCE members) of crimes and the Appellant, which would have would rendered imputation of guilt appropriate, as in "wheel" conspiracies discussed *supra*. Indeed, holding the Appellant liable for actions of persons with whom he was in no way criminally affiliated and with whom he did not share any common objective or design, runs counter both to fundamental fairness and the established international criminal jurisprudence.[120] Accordingly, any convictions based upon the "agency" theory of JCE liability are a legal error and should be withdrawn.

Continuation of Agency Theory: Actus reus:

48. In a Separate Opinion, Judge Iain Bonomy conducted a review of domestic laws concerning the imputation of guilt through agents to principals in a JCE, and determined that "the world's major legal systems recognize the imposition of liability on an accused for the 'commission' of a crime, even where he does not perform the *actus reus*, as long as his actions in some way *cause* an element of the *actus reus*."[121] At a minimum, this JCE/agency hybrid form of individual criminal liability should *only* fairly exist where the accused (principal) has participated *causally* in the commission of at least one element of the *actus reus* by the agent (perpetrator). Here, the Trial Chamber did not find any causal relationship between the Appellant and the direct perpetrators of the various crimes for which he was convicted under the theory of JCE liability. Accordingly, this application constitutes legal and factual error and for that reason the conviction should be withdrawn.

Specific Findings of the Trial Chamber:

1. Errors as to the "Common Plan":

49. Firstly, in its analysis of the "common plan," the Trial Chamber acknowledges that "the Prosecution has alleged [in the Indictment] that *a joint criminal enterprise between the RUF and the AFRC* commenced about 25 May 1997".[122] This sharply contrasts with the

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[120] See *Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Judgement, para. 100 (Feb. 25, 2004).
[121] *Prosecutor v. Milutinovic*, Case No. IT-05-87-PT, Decision on Ojdanic's Motion Challenging Jurisdiction: Indirect Co-Perpetration, Separate Opinion of Judge Iain Bonomy, (March 22, 2006) (emphasis added).
[122] Trial Judgment, para. 1977. (emphasis added).

Trial Chamber's findings and pronouncement that it was not trying RUF as an institution or organization, but that it was trying the three Accused.[123] One may want to ask and know: if the Chamber was not trying the RUF on an indictment that alleges a JCE between "the RUF" and "the AFRC", then what was it trying? This fiction of a trial involving the Appellant who, as the findings of the Trial Chamber shows, was on trial for the conduct of the RUF as an organization becomes glaring when consistent attempts are made by the Chamber to convict the Appellant for conduct associated with combatants of the RUF and AFRC. The Chamber found that "there is sufficient evidence to conclude that Kallon by his membership in the Supreme Council was involved in decisions or policy-making by the Supreme Council".[124]

50. Besides the arguments in Ground 8 of this Brief - illustrating that the Appellant was an inactive and insignificant member of the AFRC Council, which was different from the Supreme Council, there is no finding by the Court to the effect that the Supreme Council was itself a criminal body or that it planned criminal policies and/or executed criminal programs/directives to the knowledge, and with the participation, of the Appellant. In fact, to the contrary, the only documentary evidence available to the Court and showing the Appellant's participation in an AFRC meeting (Exhibit 224)[125] makes no reference to criminal policies, plans or designs to undertake the events outlined in the Indictment. Rather, Exhibit 224 contains decisions on, *inter alia*, controlling subordinates of AFRC Council members, regulating the use of fuel, Chinese aid to the Junta and, interestingly, *disciplining* of AFRC Honourables. This is in addition to the fact that at the time of the meeting, the Appellant was not officially a member of the AFRC Council.[126] Therefore, if the RUF and the Junta Supreme/AFRC Council were not on trial and were not inherently criminal in nature, how could mere membership of these bodies by the Appellant be held criminal?[127]

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[123] See para. 4 of the Trial Judgment as well as the opening paragraph of the Oral Judgment delivered in the RUF trial in February 2009.
[124] Para. 2004 of the Trial Judgment.
[125] Minutes of an Emergency AFRC Meeting dated 16th August 1997.
[126] By virtue of Exhibit 6, Kallon only officially became AFRC member on 18th September 1997.
[127] This conflates with the Chamber's finding that although the leadership of the AFRC and RUF agreed to form a joint government in order to control Sierra Leone, "such an objective in and of itself is not criminal and therefore does not amount to a common purpose within the meaning of the law of JCE" (para. 1979). It also harmonizes with the fact that at the time of taking/seizing power over Sierra Leone, the RUF had not joined the AFRC (para. 22).

51. The Appellant avers further that whilst the Trial Chamber correctly held that the purpose of the common plan of a JCE must be "either inherently criminal" or "contemplate the realization of an objective through conduct constituting crimes within the Statute,"[128] it, as already noted, failed to apply that standard to its assessment/determination of the case. Thus, in addition to the errors outlined above, it is submitted that there are a number of other errors in the Court's findings as to JCE, any one of which would render the Chamber's conclusions and therefore its verdict defective.

52. Firstly, the evidence presented at the trial made clear that there was no common plan between senior RUF and Senior AFRC leaders.[129] The Chamber itself acknowledges that "[t]he common purpose ceased to exist in April 1998."[130] Even prior to then, the frequent infighting between the RUF and AFRC and lack of recognition of each others' authority shows there was no shared intent and no common plan. The groups were *not* acting in concert. For example, the Trial Chamber found that SAJ Musa (of the AFRC) withdrew from the JCE,[131] but an equally reasonable inference is that such disagreements show that there was no JCE. There existed such gulf of disparity and imbalance between the AFRC and RUF regarding positions and authority respectively held by them in Government and the Military that the Trial Chamber found that "by early September 1997, Bockarie had (...) become disillusioned with the RUF's limited role in the AFRC government"[132] and that "the failure to integrate the two military organizations into the military command structure led to misunderstandings and conflicts".[133] The command and control structure was in disarray and the Chamber further found that "while some AFRC fighters obeyed orders from RUF Commanders, others would not. [Also,] lower-ranking RUF fighters disobeyed orders from their senior officers".[134] Government positions were divided unequally between the AFRC and RUF, "with the AFRC receiving the more senior positions";[135] this situation led Sam Bockarie, who was the acting Leader of the RUF

[128] Trial Judgment, Para. 1978.
[129] See for example Prosecution Witness TFI- 367: Transcript of 26 June 2006 pp.70-72; TFI-361: Transcript of 14 July 2005 p.75.
[130] Trial Judgment, Para. 2077.
[131] Trial Judgment, Paras. 2077-79.
[132] Para. 764 of the Trial Judgment.
[133] Para. 763 of the Trial Judgment.
[134] Para. 763 of the Trial Judgment.
[135] Para. 22 of the Trial Judgment.

then, to relocate from Freetown to Kenema in August 1997 as "he was dissatisfied with Johnny Paul Koroma's management of the government" and also feared for his life.[136] It is submitted that "in order to draw [an] inference [of a JCE] (...), it must be the only reasonable inference available from the evidence."[137] Consequently, the Chamber has erred in inferring the existence of a single JCE when an equally reasonable inference could have been that there was no single common plan, if was any common plan at all.

53. Secondly, the Trial Chamber essentially admits that the common plan *changed* mid-way through the JCE. The Trial Chamber finds that following the 2/14/98 ECOMOG intervention, "the status of the AFRC/RUF alliance dramatically changed." [138] It had to "reorganize" and was "now focused on regaining power and control over the territory of Sierra Leone."[139] It had a "*new plan* to achieve that purpose."[140] This also makes clear that there was *not* in fact one JCE at all, and that the Trial Chamber's own conclusions are internally inconsistent.[141] Indeed, it is hard to imagine that every single event at issue was all part of one single plan: that the rebels who had lost control of Freetown and were being chased by ECOMOG would have formulated a new plan to retake Freetown and *regain* power and control of Sierra Leone, in lieu of the more rational endeavor of escaping to Kailahun, following ECOMOG's hot pursuit.[142] It followed that by the time of ECOMOG's intervention and control of Freetown, any semblance of a political alliance between the AFRC and RUF had collapsed to the extent that subsequent rifts between the two groups and mistreatment of the Leaders of the AFRC by the RUF, became manifestations of the break in their relationship rather than the cause of it.[143] The Appellant's conduct in executing two AFRC soldiers and preventing them from holding muster parades in Kono District[144] was also a clear portrayal of his subsisting lack of intention to participate in a JCE with the AFRC. It belies common sense that all these

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[136] Para. 24 of the Trial Judgment.
[137] *Brdjanin*, (ICTY Trial Chamber), September 1, 2004, para. 353.
[138] Trial Chamber Judgment, Para. 2067.
[139] Trial Chamber Judgment, Para.2067.
[140] Trial Chamber Judgment, Para. 2067 (emphasis added).
[141] *See* Kono District analysis below.
[142] See paras. 29 and 31 of the Trial Judgment (the Junta's withdrawal from Freetown "chaotic and disorganised").
[143] Paras. 801-804 of the Trial Judgment.
[144] Para. 817 of the Trial Judgment.

events were part of one joint plan.[145] An equally reasonable inferenee is that events on the ground were largely an ad hoe reaetion to how the fighting was going between the rebels and govemment forees. Again, it is impermissible to draw an inferenee unless it is the only reasonable inferenee available.[146]

2. Impermissible findings in the alternative; failure to decide whether there was a type #1 or type #3 JCE:

54. The Chamber's analysis is additionally defeetive for failure to determine whether there was a "type #1" or "type #3" JCE, and entering findings in the alternative. Specifically, the Trial Chamber found that "mid- and lower-level RUF and AFRC Commanders" were not part of the JCE agreement, but these individuals were "used by" the "members of the [JCE] to commit crimes that were *either* intended by the members to further the eommon purpose, *or* were a natural and foreseeable eonsequenee of the implementation of the eommon purpose."[147] This is an impermissible finding in the alternative. The Chamber has not deeided whether it found a type #1 JCE (where there was shared intent to further the common purpose) or a type #3 JCE (where the crimes were a natural and foreseeable consequence).[148] Thus, all JCE findings are defective for failure to find a type of JCE. As the ICTR makes clear: "While an accused can be convicted for a single crime on the basis of several modes of [responsibility], *alternative convictions for several modes of [responsibility] are, in general, incompatible with the principle that a judgement has to express unambiguously the scope of the convicted person's criminal responsibility*."[149]

3. Erroneous imputation of crimes of non-JCE members to the JCE absent proper findings:

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[145] The errors committed seem to parallel those in the conspiracy findings in the judgement of the International Military Tribunal for the Far East (Tokyo) (as to which many criticisms have been leveled). As explained by one author, commenting on the view of dissenting Justice Pal:
[A]ccording to [Justice] Pal, "adopting the conspiracy method of proof [not entirely dissimilar to JCE] implied an (...) astounding amount of forcsight on the part of the Japanese leaders. Pal found it difficult to believe that none of the events which occurred during this fourteen year period [at issue] happened by accident; every event was duly calculated, planned for and put into execution (...) though the accused from time to time differed among themselves, at no time during the entire course of the conspiracy did any of the accused differ with the others on the fundamental object of the conspiracy itself". In Pal's view, this use of the notion of a broad web of conspiracy as an explanation for a wide variety of events over an extended period of time was simplistic and completely illegitimate. Thus, it is obvious that the RUF/AFRC's actions were a response to how the eivil war unfolded, and not part of a single plan.
[146] *Brdjanin*, (ICTY Trial Chamber), September 1, 2004, para. 353.
[147] TCJ, para. 1992 (emphasis added).
[148] Elsewhere, though, the Trial Chamber appears to find a type #1 JCE. *See* para. 1985 ("The Chamber finds that the erimes were contemplated by the participants of the [JCE] to be within the common purpose."). If that is the case, then anything that should have been characterized as a type #3 JCE should be stricken.
[149] *Ndindabahizi*, (Appeals Chamber), January 16, 2007, para.122 (emphasis added).

55. As noted earlier, the language of the Judgment shows that the Trial Chamber erroneously imputed crimes of *non-JCE members* to the JCE without the appropriate criteria being satisfied. The Chamber found that mid- and lower-level RUF and AFRC Commanders were not part of the JCE agreement, but were "used by" the members of the JCE to commit crimes, and attributes their crimes to the JCE.[150] It held: "the Chamber is satisfied that the non-members who committed crimes were sufficiently closely connected to one or more members of the joint criminal enterprise acting in furtherance of the common purpose that such crimes can properly be *imputed* to all members of the [JCE] *when the other conditions for liability are fulfilled.*"[151] The Trial Chamber does not elaborate on the meaning of "when the other conditions for liability are fulfilled." However, under the case law, such imputation requires specific evidence of "control or influence" as to each incident and group of non-JCE members at issue.

56. Thus, for example, in *Prosecutor v. Martić*,[152] the Appeals Chamber observed that "in relation to some armed structures and paramilitary units, including those referred to as 'Martić's men' or 'Martić's police' (*Martićevci*), the Trial Chamber did not reach any definitive finding on their link with Martić."[153] The Appeals Chamber went on to detail all of the factual findings of the Trial Chamber and how a reasonable fact finder could or could not conclude that they supported a finding that Martić controlled the non-member's conduct.[154] With regard to the defendant's control over one particular set of atrocities - "the acts of destruction perpetrated by armed Serbs from Živaja led by Nikola Begović" - the Appeals Chamber held that the evidence at trial "only suggests that the armed men under Begović *had received weapons from the JNA, without any evidence of additional control or influence* by Martić or other members of the JCE."[155] Therefore, the Appeals Chamber concluded that "[w]ithout any further elaboration on the link between these forces and the JNA, no reasonable trier of fact could have held that the only reasonable conclusion in the circumstances was that these crimes could be imputed to a member of the JCE. The link between the principal perpetrators or these crimes and members of the

[150] Trial Chamber Judgment, Para. 1992 (emphasis added).
[151] Trial Chamber Judgment, Para. 1992 (emphasis added).
[152] Case No. IT-95-11-A (Appeals Chamber), October 8, 2008.
[153] *Id.* at para.181.
[154] *Id.* at paras.182-213.
[155] *Id.* at para.192 (emphasis added).

JCE is therefore too tenuous to support Martić's conviction."[156] The Appeals Chamber ultimately held that several other convictions also had to be overturned for insufficient evidence to support imputing those acts to the JCE.[157]

4. Type #1 JCE is Defective:

57. A typical type #1 JCE consists of a plurality of persons who share the same intent,[158] and JCE responsibility extends to all *participants*, regardless of the role played by each.[159] Under this "imputation" theory, the crimes of mid- and lower-level RUF and AFRC could only be imputed to the JCE if there was evidence of control or influence by the Appellant as to each crime and group of non-JCE participants.[160] This is notably lacking from the Trial Chamber's Judgment, and as to various non-JCE members, the Appellant clearly had no such control or influence.

5. Type #3 JCE is Defective:

58. Similarly, a typical type #3 JCE applies to crimes committed *by members of the JCE* that go beyond the original common plan, but which were a natural and foreseeable

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[156] *Id.*

[157] *Id.* at para. 213. A similar result was reached in the *Krajišnik* case, where the Appeals Chamber held that "in relation to a large number of principal perpetrators, the Trial Chamber did not reach any definite finding on their link with one of the JCE members." *Prosecutor v. Krajišnik*, Case No. IT-00-39-A (Appeals Chamber), March 17, 2009, para. 237. As a result, various convictions were quashed. *Id.* at para. 284. So too here, the RUF Trial Chamber has simply not made the type of detailed inquiry required to ascertain the Appellant's (or the other JCE members') link to each non-JCE member that would be required for imputation of their crimes to the JCE.

[158] *See Kvocka et al.*, (Appeals Chamber), February 28, 2005, para. 82 ("In the first form of joint criminal enterprise, all of the co-perpetrators possess the same intent to effect the common purpose."); *Vasiljevic*, (Appeals Chamber), February 25, 2004, para. 97 ("The first category is a 'basic' form of joint criminal enterprise. It is represented by cases where all co-perpetrators, acting pursuant to a common purpose, possess the same criminal intention.").

[159] *See Vasiljevic*, (Appeals Chamber), February 25, 2004, para. 111: ("all of the participants in the joint criminal enterprise [are] equally guilty of the crime regardless of the part played by each in its commission.") (emphasis added); *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para.702 ("Regardless of the role each played in its commission, all of the participants in the enterprise are guilty of the same crime.") (emphasis added); *Vasiljevic*, (Trial Chamber), November 29, 2002, para. 67 ("If the agreed crime is committed by one or other of the participants in a joint criminal enterprise . . ., all of the participants in that enterprise are equally guilty of the crime regardless of the part played by each in its commission.") (emphasis added).

[160] Alternatively, the Trial Chamber in *Brdjanin* looked to whether there was "close[] cooperat[ion]" in determining whether imputation was appropriate. *See Prosecutor v. Radoslav Brdjanin*, Case No. IT-99-36-A (Appeals Chamber), April 3, 2007, at para. 410 ("In cases where the principal perpetrator of a particular crime is not a member of the JCE, this essential requirement [for imputation] may be inferred from various circumstances, including the fact that the accused or any other member of the JCE closely cooperated with the principal perpetrator in order to further the common criminal purpose.") The RUF Trial Chamber, by contrast, has made no findings of "close cooperation" between the non-JCE members and Kallon or any other circumstances that would justify imputation. *See also Prosecutor v. Krajišnik*, Case No. IT-00-39-A (Appeals Chamber) para. 226, March 17, 2009 (listing factors relevant to imputation of non-members' actions to the JCE, including: "that the JCE member explicitly or implicitly requested the non-JCE member to commit such a crime or instigated, ordered, encouraged, or otherwise availed himself of the non-JCE member to commit the crime").

consequence of it.[161] Again, if this "imputation" theory is to be used, it requires evidence of control or influence by the Appellant as to each crime and group of non-JCE participants, which is lacking from the Trial Judgment; and disproven regarding the crimes of Rocky, Savage and Alhaji. Thus, the Trial Chamber's own test that imputation can occur "*when the other conditions for liability are fulfilled,*"[162] has not been met.

59. Alternatively, not only are these detailed control and/or influence findings absent, if the Trial Chamber truly found a type #1 or type #3 JCE, it would have had to make that finding as to each crime location - that certain acts were in fact part of the common plan, and that other acts were a natural and foreseeable consequence of it. The Chamber never did this: it cannot simply make a blanket statement that all of the crimes committed over vast expanses of territory, over a number of years, and by a diverse group of participants were "*either* intended by the members to further the criminal enterprise (...) *or* were a natural and foreseeable consequence of the implementation of the common purpose."[163]

6. Impermissible findings in the alternative; failure to decide on a type #1 or type #3 JCE - Kono District:

60. In its discussion of crimes in Kono District, the Trial Chamber, as noted earlier, found that "CO Rocky, Rambo RUF, AFRC Commander Savage and his deputy, Staff Sergeant Alhaji" were not members of the JCE.[164] However, it concluded that they were "*used by* members of the [JCE] to commit crimes that were *either* intended by the members to further the common design, *or* which were a reasonably foreseeable consequence of the common purpose."[165] Firstly, it is submitted that typical type #1 and type #3 JCE's involve the crimes of JCE members, not non-members; if crimes by non-members are "imputed," the ICTY's *Martić* Appeal requires specific evidence of the accused's "control or influence" as to those non-members.[166] Thus, it was legal error to impute the crimes of Rocky, Rambo, Savage and Staff Alhaji to the JCE, absent such finding.[167] Furthermore, the evidence at trial was that the Appellant had no such control over Rocky,

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[161] *See Kvocka et al.*, (Appeals Chamber), February 28, 2005, para. 83
[162] Trial Chamber Judgment, Para. 1992 (emphasis added).
[163] Trial Chamber Judgment, Para. 1992 (emphasis added).
[164] Trial Chamber Judgment, Para. 2080.
[165] Trial Chamber Judgment, Para. 2080.
[166] *Martic*, Appeals Chamber Judgement, at para. 192.
[167] Should the Appeals Chamber apply the "close cooperation" test from Brdjanin as to when imputation is appropriate, that also was not satisfied.) *See Prosecutor v. Radoslav Brdjanin*, Case No. IT-99-36-A (Appeals Chamber), April 3, 2007, at para.410.

Rambo, Savage and Alhaji. Independently, it was also legal error to make the findings in the alternative, and it failed to definitively determine which form of responsibility (a type #1 or type #3 JCE) was found.

7. Lack of significant contribution:

61. Alternatively, the Trial Chamber has made certain findings as to the Appellant's role regarding *certain* of the crimes committed in Kono District,[168] and concluded that this was a "significant contribution to the furtherance of the common purpose."[169] This is erroneous. Firstly, the alleged actions of the Appellant are disputed in the discussion of JCE under Kano. Secondly, any such significant contribution in Kono could not have been a significant contribution for crimes in Kenema District. Furthermore, alleged significant contribution in any one of the Districts could not properly be considered significant contribution in other districts.

62. Additionally, the Trial Chamber acknowledged that the Appellant was acting under orders of Sesay and Johnny Paul Koroma as to the attack on Koidu Town.[170] That warrants mitigation as to sentencing, something not granted.[171] Additionally, as to the Trial Chamber's finding that a civilian woman was raped by RUF fighters during a food-finding mission ordered by the Appellant,[172] that does not establish grounds for holding Kallon responsible for that crime. There is no finding that the Appellant ordered the rape, and no findings that the three elements of command responsibility were met, so that sexual violence conviction is unfounded.[173]

8. Timing/Date Error:

63. The Trial Chamber also makes several date errors. It held: "By his participation [Kallon] significantly contributed to the commission of crimes of acts of terrorism . . . collective

[168] It finds he was involved in the planning and execution of the attack against Koidu Town and had an active role during the attack; was present when JP Koroma and Sesay instructed fighters to kill Kono civilians and burn houses; was present in Koidu Town when AFRC/RUF killed civilians, (para. 2093); had bodyguards under 15 years and knew SBUs were used for mining and guarding the mining, (para. 2095); brought children under 15 to be trained by the RUF; was actively engaged in abductions for and training of SBUs in Kono, (para. 2096); had bodyguards that supervised mining by enslaved civilians, (para. 2097); organized camps for civilians, (para. 2098), and that a civilian woman was raped by RUF fighters during a food-finding mission ordered by Kallon, (para. 2099).

[169] Trial Chamber Judgment, Para 2101.

[170] Trial Chamber Judgment, Para 2093.

[171] As argued elsewhere, the Trial Chamber erred in finding that because Kallon was a superior, he could not utilize acting "under orders" as a mitigating factor.

[172] Trial Chamber Judgment, Para. 2099.

[173] Participation in a "mock vote" as to someone else does not show that he encouraged rape. (Trial Judgment 2099).

punishment (...) unlawful killings . . . sexual violence (Counts 6 to 9), physical violence . . . enslavement (...) and pillage. These crimes were committed in Kono District between 14 February 1998 and April/*May* 1998."[174] The Chamber acknowledges the JCE ended in April 1998,[175] so there can be no JCE convictions for any crimes in May 1998. Besides, the Trial Chamber's dilemma in contriving a new JCE between the two forces in the glaring absence of any eomes to the fore when it failed to show with precision the closing timeframe of the "renewed JCE" it had contrived. The Chamber had suggested that it was in "late April 1998",[176] then it moved to "the end of April 1998",[177] then to "the beginning of May 1998,[178] only to conclude that "it was prior to the end of April 1998".[179] It is submitted that in the unambiguous absence of a precise closing timeframe for the renewed JCE crafted by the Trial Chamber, added to the several objections against this position as noted above, the conviction of the Appellant under this renewed mode was not only circumstantial but open to multiple doubtful interpretations as to its preeise nature, form and extent.

9. Error on Failing to Determine Mens Rea:

64. Finally, the Trial Chamber makes insufficient findings as to the Appellant's *mens rea* regarding the entire JCE. It primarily appears to suggest he had the *mens rea* for a type #1 JCE.[180] Not only is that conclusion not the only reasonable inference based on the evidence (see above), then the Chamber failed to make any JCE #3 *mens rea* findings,[181] rendering any findings of a type # 3 JCE additionally defective for this reason.

10. Error on the Application and Conviction of the Appellant on Type # 2 JCE:

65. Furthermore, the Trial Chamber erred in law and fact to have introduced the 'systemic' or Type #2 JCE in convicting the Appellant for crimes in Bo and Kenema Districts,[182] and

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[174] Trial Chamber Judgment, Para 2091 (emphasis added).
[175] Trial Chamber Judgment, Para 2077.
[176] Para. 2076 of the Trial Judgment.
[177] Para. 2063 of the Trial Judgment
[178] Para. 2080 of the Trial Judgment.
[179] Para. 820 of the Trial Judgment.
[180] See Trial Judgment, Para 2008 ("Kallon shared with the other participants in the joint criminal enterprise the requisite intent to commit these crimes.").
[181] For a type # 3 JCE, the *mens rea* would require a finding of intent to participate, and a finding that although the crime which was beyond the scope of the JCE, it was foreseeable and the accused willingly took that risk. *See, e.g., Vasiljevic,* (Appeals Chamber), February 25, 2004, para. 101 (stating *mens rea* for different types of JCE).
[182] This was later extended to crimes in Kono and Kailahun, wherein Kallon was convicted for his membership of a system operated by the AFRC and RUF.

for holding as well at paragraphs 784 and 2071 of the Trial Judgment that 'since the announcement of "Operation Pay Yourself" by the AFRC/RUF, looting [Pillage] became *a systemic feature* of both the AFRC and RUF until the end of the Indictment period'. Unfortunately, although the Chamber had ruled that individuals and not organizations or bodies like the RUF (or the AFRC Supreme Council) were on trial,[183] it particularly convicted the Appellant for "the attacks on Bo and the forced labour in Kenema District, in which the RUF was engaged" on the basis that the said conduct was "a deliberate policy of the AFRC/RUF that the Chamber finds must have been initiated by the Supreme Council, of which Kallon was a member".[184] This conflicts with the Trial Chamber's finding and conclusion at paragraphs 387 of the Trial Judgment that: "Although the information in the Prosecution Final Trial Brief does not provide notice of the charges to the Accused, it is relevant here because the Prosecution reverted to its [initial theory on JCE] and submitted that Counts 1 to 14 were either within the joint criminal enterprise [i.e. the basic or Type #1 JCE] or were the foreseeable consequence of the joint criminal enterprise [i.e. the foreseeable or Type #3 JCE]".[185] It is contended that having chosen for the Prosecution the form of JCE relied upon in the Indictment, which was missing in the Prosecution's Final Trial Brief, the Trial Chamber erred in law to come back on that position and introduce a third form of JCE into its Judgment, the Indictment and, a fortiori, the Prosecution's case. It is especially worth noting that Justice Boutet distanced himself from this error in his Dissenting Opinion from the Trial Judgment,[186] but yet failed to apply it to the Appellant leading to his conviction.

66. For all the errors outlined above, the Appellant submits that all the JCE findings against him are invalidated and should be set aside.

GROUNDS 3 TO 6: ERRORS RELATING TO DEFECTIVE INDICTMENT:

The Appellant submits in support of Sub-Ground 5.2 that the Chamber erred by relying on unpleaded locations in the Indictment to convict him. He relies on ANNEX II to illustrate and highlight this Ground.

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[183] Para. 4 of the Trial Judgment.
[184] Para. 2004 of the Trial Judgment.
[185] See paras. 388 to 389 of the Trial Judgment.
[186] Dissenting Opinion of Justice Pierre G. Boutet, para. 18.

67. The Appellant consolidates Grounds 3 to 6 of the Amended Notice of Appeal and argues them together as one Ground hereunder. In this regard, the Appellant adopts all the sub-grounds in Grounds 3 to 6 of the Kallon Notice and Grounds of Appeal filed together with the explanations, references and citations made under them respectively.

1. Errors as to Burden of Proof:

68. As to burden of proof regarding indictment defects, the Trial Chamber stated thus: "Where the Defence has raised no objections during the course of the trial, (...) and raises the matter only in its closing brief, the burden shifts to the Defence to demonstrate that the Accused's ability to defend himself has been materially impaired, unless it can give a reasonable explanation for its failure to raise the objection at trial."[187] The Appellant submits that the Trial Chamber's statement of law in this regard is erroneous. The Appeals Chamber in both ICTY and ICTR cases has explained that: "When an accused raises the issue of lack of notice *before the Trial Chamber*, the burden rests on the Prosecution to demonstrate that the accused's ability to prepare a defence was not materially impaired."[188] The *Niyitegeka* case goes even further, discussing the "*presumption*" that a fundamental defect in the indictment is not cured.[189] Thus, for example, "[t]he Prosecution cannot cure a vague indictment by presuming that the . . . defence would not have changed had proper notice of a material fact been given."[190] Case law has found that objections to defective pleadings may be raised by the defence

[187] Trial Judgment, Para. 336.

[188] *Prosecutor v. Kvocka*, Case No. IT-98-30/1-A, Appeals Chamber, Feb. 28, 2005, Para. 35 (emphasis added); *Prosecutor v Gacumbitsi*, Case No. ICTR-2201-64-A, Appeals Chamber, July 7, 2006, Para. 49 (virtually identical quote); *Prosecutor v. Simic*, Case No. IT-95-9-A, Appeals Chamber, Nov. 28, 2006, Para. 25 (similar); *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A (Appeals Chamber, July 7, 2006), Para. 138 (similar); *Niyitegeka v. Prosecutor*, No. ICTR-96-14-A, (Appeals Chamber, July 9, 2004) at Para. 200 (similar); *Muhimana v. Prosecutor*, No. ICTR-95-1B-A, Appeals Chamber *Judgement* (May 21, 2007) at Para. 80 (where the defense raised the pleading defect in the *defense closing brief*, "[i]t therefore falls to the Prosecution to prove that the Appellant's defence was not materially impaired by this defect") (emphasis added).

[189] *See Niyitegeka v. Prosecutor*, No. ICTR-96-14-A, (Appeals Chamber, July 9, 2004) at Para. 198 (noting that in the *Kupreskic* Appeal Judgment, Para. 122, "a breach of 'the substantial safeguards that an indictment is intended to furnish to the accused' *raised the presumption* 'that such a fundamental defect in the . . . Indictment did indeed cause injustice.'") (emphasis added); *Niyitegeka v. Prosecutor*, No. ICTR-96-14-A, (Appeals Chamber, July 9, 2004) at Para. 234 ("The Prosecution has therefore not rebutted *the presumption of material impairment* of the defence that arises from this omission [of a material fact from the indictment].") (emphasis added). *But see Prosecutor v. Blaskic*, (Appeals Chamber), July 29, 2004, Para. 238 ("The Appeals Chamber is not persuaded by the argument that prejudice should be presumed").

[190] *Niyitegeka v. Prosecutor*, No. ICTR-96-14-A, (Appeals Chamber, July 9, 2004) at Para. 58; *see also Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-A (Oct. 23, 2001), Para. 122 ("In the absence of such a showing [that defendants' ability to prepare their defence was not materially impaired] the conclusion must be that such a fundamental defect in the Amended Indictment did cause injustice (...) The trial (...) was, thereby, rendered unfair.").

when new evidence is introduced at trial, by a timely motion to strike the evidence at issue, as part of a motion for acquittal *at the close of the prosecution's case, or in the defence closing brief.*[191] The Appellant raised indictment issues in trial arguments, motions[192] and in his closing brief.[193] Consequently, it is submitted that most of the Trial Chamber's findings on indictment defects are erroneous, because the Chamber places the burden of proof on the defence.

69. Because of the importance of issues of lack of notice and their potential impact upon a defendant's fair trial rights, such issues may even be raised *for the first time upon appeal.*[194] Having raised the question of prejudice during trial and in the final brief, the Chamber ought to have placed the burden of showing lack of prejudice on the Prosecution. It however failed to rule on this question and instead proceeded to

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[191] *See Muhimana v. Prosecutor,* No. ICTR-95-1B-A, Appeals Chamber, May 21, 2007, at Para. 80 (it was held that objection on pleading defects raised in defense closing brief but not raised at pre-trial or when evidence was introduced was timely); *Prosecutor v. Simic*, Case No. IT-95-9-A, Appeals Chamber, Nov. 28, 2006, Para. 61 (considering pleading defect raised by the defense in a Rule 98 *bis* motion filed at the close of the prosecution's case); *Prosecutor v. Gacumbitsi*, Case No. ICTR-2201-64-A, Appeals Chamber, July 7, 2006, Para. 52 (relating to pleading defect raised by the defence in a Rule 98 *bis* motion for acquittal on certain charges filed at the close of the prosecution's case); *Niyitegeka v. Prosecutor,* No. ICTR-96-14-A, (Appeals Chamber, July 9, 2004) at Para.199 ("In the case of objections based on lack of notice, the Defence must challenge the admissibility of evidence of material facts not pleaded in the indictment by interposing a specific objection at the time the evidence is introduced. The Defence may also choose to file a timely motion to strike the evidence . . . ."); *Kamuhanda v. Prosecutor,* Case No. ICTR-99-54A-A (Appeals Chamber, Sept. 19, 2005), Para.21 (quoting *Niyitegeka*); *Prosecutor v. Ntakirutimana & Ntakirutimana*, No. ICTR-96-10-A & ICTR-96-17-A (Appeals Chamber, December 13, 2004) at Para. 22 (similar).

Thus, for example, in *Gacumbitsi*, the killing of a certain individual was not alleged in the Indictment, and while the Trial Chamber consequently acquitted Gacumbitsi of murder charges, it relied upon the murder in considering genocide charges. *Prosecutor v. Gacumbitsi*, Case No. ICTR-2201-64-A, Appeals Chamber, July 7, 2006, Para. 46. The Appeals Chamber acknowledged that "[t]he Appellant could not reasonably have known, on the basis of the Indictment alone, that he was being charged with the killing [of the individual at issue]" and the indictment was thus "defective." *Id.* at Para. 50. The prosecution, upon appeal, however, argued that Gacumbitsi waived any objection by failing to object when the testimony about the killing was introduced. *Id.* at Para. 51. The Appeals Chamber, however, disagreed: because the defence raised the pleading defect in a Rule 98 *bis* motion for acquittal on certain charges filed at the close of the Prosecution's case and in its Final Trial Brief, it concluded Gacumbitsi "did not waive his objection to the pleading defect" and the burden of proof "remains [upon] the Prosecution[ ] (...) to prove that [Gacumbitsi's] defence was not materially impaired by the defect." *Id.* at Para. 54. A similar result was reached in *Simic*. *See Prosecutor v. Simic*, Case No. IT-95-9-A, Appeals Chamber, Nov. 28, 2006, Paras. 60-61 (where the defense raised pleading objections in their Rule 98 *bis* motion and at the end of the trial - but not prior to trial - "Appellant did not waive his right to raise the issue of failure to plead joint criminal enterprise in the indictment").

[192] Kallon Motion to Exclude Evidence outside the Scope of the Indictment with Confidential Annex A, 14 March 2008 [Kallon Exclusion Motion]. Oral arguments on motion for acquittal 16 October 2006 pp 20-120.See also Kallon Final Brief 18 August 2008.See also detailed instances outlined by the Chamber when the Appellant made various objection-Para 335 of the Judgment footnote 628.

[193] Kallon's final-trial brief ibid

[194] *See Niyitegeka v. Prosecutor,* No. ICTR-96-14-A, (Appeals Chamber, July 9, 2004) at Para. 200; *Prosecutor v. Gacumbitsi*, Case No. ICTR-2201-64-A, Appeals Chamber, July 7, 2006, Para. 51 (quoting same); *Prosecutor v. Simic*, Case No. IT-95-9-A, Appeals Chamber, Nov. 28, 2006, Para. 25 (similar).

unilaterally 'administer cure' on the defective indictment thus compromising its impartiality. The Appellant submits that all "curing" holdings were defective as well.

2. Errors regarding the Pleading of JCE:

70. Preliminarily, the Trial Chamber's statement: "In the Chamber's considered opinion, then a joint criminal enterprise is divisible as to participants, time and location. It is also divisible as to the crimes charged as being within or the foreseeable consequence of the purpose of the joint criminal enterprise,"[195] is troubling. The Trial Chamber has cited no law to support this position. Indeed, we are aware of no ICTY or ICTR law that JCE participants can change, or there can be different JCE time-periods, and changing locations. (The Appellant has earlier argued that the Trial Chamber's acknowledgement of different plans and different participants shows that there was not in fact one JCE). As to the statement that the crimes may be "within [the JCE] or the foreseeable consequence" of it, demonstrates the Trial Chamber's fundamental confusion in believing that it was not required to determine - at either the pleading or merits level - whether there was a type #1 JCE (with crimes within the JCE), or a type #3 JCE (with crime being a foreseeable consequence).

3. Failure to Plead the Material Facts Specifying the Role of Kallon in the JCE:

71. The Indictment additionally failed to state the material facts constituting the Appellant's participation in the JCE. "The charges against an accused *and the material facts supporting those charges* must be pleaded with sufficient precision in an indictment so as to provide notice to the accused."[196] An indictment therefore is defective where it "in no way particularises what form th[e] alleged participation took"—and thus, "fails to fulfil the fundamental purpose of providing the accused with a description of the charges against him with sufficient particularity to enable him to mount his defence."[197]

72. Here, the Chamber held that the Indictment revealed that the Appellant "individually, or in concert with each other" and other participants "exercise authority, command and

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[195] Trial Judgment, Para. 354.

[196] *Muvunyi*, (Appeals Chamber), August 29, 2008, Para. 18 (emphasis added.) *See also Seromba*, (Appeals Chamber), March 12, 2008, Para. 27 (similar); *Simba*, (Appeals Chamber), November 27, 2007, Para. 63 (similar); *Gacumbitsi*, (Appeals Chamber), July 7, 2006, Para. 49 (same as *Muvunyi*); *Muhimana*, (Appeals Chamber), May 21, 2007, Paras. 76, 167 (same as *Seromba*); *Muvunyi*, (Trial Chamber), September 12, 2006, Paras. 24, 401 (similar); *Muhimana*, (Trial Chamber), April 28, 2005, Para. 451 (similar); *Niageruro, Bagambiki, and Imanishimwe*, (Trial Chamber), February 25, 2004, Para. 30 (similar).

[197] *Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-A (Oct. 23, 2001), para. 95.

control over all RUF, Junta and AFRC/RUF forces,"[198] and, thus, that the Appellant participated through his leadership role.[199] The capacity in which the Appellant allegedly participated is not the same as the "material facts supporting" his participation. Since the material facts about his participation were wholly lacking, the Appellant submits that the Trial Chamber erred as a matter of law in finding that his capacity and alleged presence sufficed to state the material facts[200] constituting his participation.

4. Errors in Pleading Article 6(1) Responsibility:

a. <u>All Material Facts as to Personal Commission not Pleaded</u>

73. The Trial Chamber correctly found that the "prosecution's duty to provide particulars in the Indictment is at its highest when it alleges that the Accused have personally committed a crime."[201] The Trial Chamber *admits* that the "Indictment is defective in form in that it fails to plead the material facts underlying allegations that the Accused personally committed the crimes charges in the Indictment."[202] The Trial Chamber, however, incorrectly held[203] that all such defects were "cured."[204] Case law is clear that: "Curing" may only illuminate charges specified in the indictment, but may not amend the Indictment substantially.[205] Thus, for example, any purported "curing" *cannot change the identity of victims nor include new allegations of murder*,[206] nor is a "radical transformation" of the charges permitted.[207] Furthermore, while defects in an indictment

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[198] Trial Judgment, Para. 393.
[199] Trial Judgment, Para. 393.
[200] Trial Judgment, Para. 393.
[201] Trial Judgment, Para. 397.
[202] Trial Judgment, Para. 400.
[203] Trial Judgment, Para. 400.
[204] *See Karera*, (Trial Chamber), December 7, 2007, Para. 13 ("Allegations of physical perpetration of a criminal act by an accused *must* appear in an Indictment.") (emphasis added); *Nchamihigo*, (Trial Chamber), November 12, 2008, Para. 328 ("[T]he mode and extent of an accused's participation in an alleged crime are material facts which *must* be clearly set forth in the indictment.") (emphasis added); *Karera*, (Trial Chamber), December 7, 2007, Para. 14 ("Where it is alleged that the accused planned, instigated, ordered, or aided and abetted the alleged crimes, the Prosecution is required to identify the 'particular acts' or 'the particular course of conduct' on the part of the accused which forms the basis for the charges in question.").
[205] *Prosecutor v. Gacumbitsi*, No. ICTR-2001-64-T, (Trial Chamber, June 17, 2004) at Para. 188 (the pre-trial brief "cannot be used as an instrument to amend the Indictment substantially").
[206] *Prosecutor v. Gacumbitsi*, No. ICTR-2001-64-T, (Trial Chamber, June 17, 2004) at Para. 188.
[207] *Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-A (Oct. 23, 2001), Paras. 117, 121, 92 (rejecting material facts not pled in the amended indictment as a "radical 'transformation' of the prosecution case," the vagueness of which rendered the trial unfair where the "extremely general nature" of the Prosecution Pre-Trial Brief did not cure the defect); *Prosecutor v. Bagosora, et al.*, No. ICTR-98-41-AR73, *Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence* (Appeals Chamber, September 18, 2006) at Para. 30 ("'new material facts' should not lead to a 'radical

may be "'remedied' under certain circumstances" "this should be limited to exceptional cases."[208] As the Trial Chamber admits: "Entering a conviction based on evidence of criminal acts entirely different than those particularized in the Indictment would allow the Prosecution to amend its original allegations without seeking leave to amend the Indictment."[209] This is what has occurred in the instant case.

b. <u>The Purported "Cures" of 6(1) Requirements in the Indictment must be Rejected:</u>

74. All purported "curing" as to Kallon's personal commission of crimes must be rejected as either: (1) providing new information not previously contained in the Indictment, which is therefore a radical transformation of the charges; and (2) for failing to provide clear, consistent and timely information to the Appellant.

75. The Amended Indictment is completely silent as to which crimes the Appellant is *personally* alleged to have committed; the Prosecution's Pre-Trial Brief is similarly silent on this subject. The most detailed elucidation comes from the Prosecutor's Opening Statement which states that the Appellant "used child soldiers in attacks he led," "oversaw the use of civilian labour," "looted" money at a bank, in Bo (and not Kono, for which the court convicts him), "killed a civilian in Kono," "was present (...) when civilians were killed," and that he "abducted UN military observers and attacked Kenyan peacekeepers."[210] The Appellant submits that such brief references neither discussed nor proven at the trial are insufficient information given the exacting standard required when an individual is said to have personally committed crimes. As explained in *Kupreskic*, "in a case where the Prosecution alleges that an accused personally committed the criminal acts, the material facts, such as the identity of the victim, the time and place of the events and the means by which the acts were committed, have to be pleaded in detail."[211] This was simply absent from this case. The various crimes of personal participation, among others, listed in the crime bases of Bo, Kenema, Kono and Kailahun and argued under

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transformation' of the Prosecution's case"); *Prosecutor v. Ntakirutimana & Ntakirutimana*, No. ICTR-96-10-A & ICTR-96-17-A (Appeals Chamber, December 13, 2004) at Para. 28 (adopting *Kupreskic* standard).

[208] *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A (Appeals Chamber, July 7, 2006), Para. 114.

[209] Trial Judgment, Para. 418.

[210] Prosecutor's Opening Statement, p. 46, lines 5-13.

[211] *Prosecutor v. Kupreskic*, ICTY Case No. IT-95-16-A, Appeals Chamber, Oct. 23, 2001, para. 89; *see also Prosecutor v. Krnojelac*, (Appeals Chamber), Sept. 17, 2003, para. 132 (same); *Kamuhanda v. Prosecutor*, Case No. ICTR-99-54A-A (Appeals Chamber, Sept. 19, 2005), para. 17 (same); *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A (Appeals Chamber, July 7, 2006), para. 23 (similar).

Grounds 9 to 15 as well as UNAMSIL offences under Grounds 23 to 30 discussed in this Brief were not specifically pleaded in the Indictment,[212] and the Appellant had no notice of them and thus suffered prejudice in preparing his defenee.

5. ***Errors in Pleading Article 6(3) Responsibility:***

76. The Appellant submits that the Trial Chamber erred in holding that the subordinates and victims involved in or affected by the crimes were sufficiently identified; and that the Chamber's findings on Article 6(3) responsibility were based on a defective pleading that failed to sufficiently notify the Appellant in a timely manner about particulars of offences forming the subject of his Article 6(3) liability as well as his relationship with his purported subordinates. The Appellant shall amore fully argue this issue in his discussion of the crime bases of Bo, Kenema, Kono and Kailahun under Grounds 9 to 15 as well as UNAMSIL offences under Grounds 23 to 30 discussed in this Brief.

GROUND 7: ERRORS RELATING TO THE RIGHT TO A REASONED OPINION AND EVALUATION OF EVIDENCE:

Sub-ground 8.1 to 8.6 argued together: (The Appellant shall also relie on Annex II which is filed as an attachment to this Brief).

77. The Appellant again adopts and relies on the explanations, references and citations contained in the Amended Notice of Appeal relevant to Ground 7 and futher makes the following additional submissions in support of this sub-grounds. At paragraphs 539 to 564 of the Trial Judgement, the Trial Chamber discussed the credibility of several insider witnesses, many of whom it relied upon to convict the Appellant. However, in respect of most them, the Chamber ruled that because of credibility concerns, it would not rely on their testimonies without corroboration.[213] The Chamber expressed similar concerns about other Prosecution witnesses, including child soldiers.[214] Despite credibility issues raised by the Chamber on Prosecution witnesses, the Chamber relied on many of these witnesses in many instances without corroboration. Further, the Chamber completely and

[212] See for example: Count 4 (murder), *instigating* in Wendedu, Kono Distriet; Count 5 (violence to life etc.); *instigating* murder in Wendedu, Kono District; Count 12 (child soldiers) *planning* in Kenema, Kailahun, Kono and Bombali Districts; and Count 15 (peacekeeper attacks) *committing and ordering* in relation to Bombali District

[213] See Paras 540-578, pp 184-193; paras. 579-594, pp.193-197 of the Trial Judgement.

[214] Paras. 579-603, pp.193-199 of the Trial Judgement

erroneously disregarded Defence witnesses called by the Appellant without any case by case credibility analysis. The Appellant submits that whereas the Trial Chamber has some discretion in the assessment of evidence, this discretion does not extend to an outright disregard for the entire Defence case. This violation is compounded when the Prosecution witnesses relied on are found to be largely incredible. The Appellant therefore submits that it is a gross travesty of justice to rely on discredited Prosecution witnesses without any assessment of Defence witnesses, who otherwise would have cast serious doubt on the Prosecution's case.

78. The Appellant suffered prejudice as a result of the reliance on Witness TFI-141 to determine command responsibility for the Appellant and disregarding credible defence testimonies. By relying on winesses: TFI-141 and TFI-263 to determine the Appellant's alleged planning of the use of child soldiers and ignoring defence witnesses on the issue; by relying on discredited testimonies of witnesses: TFI-045 and TFI-371 to determine the Appellant's involvement in the crimes at Tongo; and by relying on the discredited testimony of TFI-366 in relation to events in Kono and other areas to the prejudice of the Appellant, while absolutely ignoring credible Defence witnesses, and also relying on TFI-071 on crimes at Kono without any consideration of the available credible Defence witnesses (some of whom are mentioned below), far-reaching prejudice was created by the Trial Chamber against the Appellant.

79. Although the Court purported to properly approach the issue of evaluation of evidence, it adopted a selective and prejudicial assessment of the evidence.[215] The Trial Chamber erred in failing to consider and therefore give appropriate credit to the following Defence witnesses: for Kono: DMK-132 (who provided credible and unchallenged testimony on, *inter alia*, events in Kono).[216] DMK-163 (a radio operator in Kono whose testimony too

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[215] Although the Chamber acknowledged and adopted the *Kvocke ICTY Appeals Chamber decision* to the effect that the Chamber was 'only 'required to make findings of those facts which are essential to the determination of guilt on a particular count and that *there should be no indication that the Trial Chamber disregarded any particular piece of evidence* (paragraph 478 of the judgement), it did not consider this principle in its assessment of the evidence.
For instance the Chamber mischaracterized its approach when it inaccurately stated that it had considered all of the evidence which tends to prove/disprove JCE (paragraph 482). For instance, it ignored and or failed attach any or any proper weight to the Prosecution /Defense evidence that the Supreme council of the AFRC junta was not inherently criminal and that in fact the Council's mandate included the maintenance of law and order.

[216] Transcript of 29 April, 2008 Generally and Specifically, pp 22- 47

was unchallenged).[217] The Chamber also erred by totally ignoring the testimony of DMK-087 (a senior G-5 who provides credible unchallenged testimony about the command structure in Kono and refuted allegations on the Appellant's use of child soldiers and attacks on UNAMSIL Personnel. He also provided credible testimony on the Appellant's relationship with civilians, which contradicts the Prosecution's theory on the Appellant's role as a criminal).[218] Regarding UNASMIL events, the Chamber disregarded several Defence witnesses, like DMK-161,[219] and relied on the uncorroborated and discredited testimonies of Prosecution witnesses. Regarding the abduction of the Zambian contigent at a place called Moria, for example, the Chamber erroneously relied on witness Kasoma and disregarded the corroborated and credible testimony of DMK-161, who participated in the abductions himself and denied the presence of the Appellant.[220] As further illustration of the deliberate lopsided approach to the evaluation of evidence to the prejudice of the Appellant, the Trial Chamber only relied on Defence witnesses when it suited its interest in justifying a conviction.[221]

Sub-grounds 8.7 (Identification)

80. For these grounds the Appellant relies on the explanations and references provided in the amended Notice of Appeal and the discussions of the issue in relation to the events at Cyborg pit in Tongo, the testimony of witness TFI-263 in relation to Count 12 and UNASMIL attacks in relation to Counts 5, 15 and 17, among others.

Sub-grounds 8.8 (Hearsay Evidence)

81. The Appellant relies on the references in the Appellant's Amended Notice of Appeal. Further the Appellant submits that the Chamber's reliance on the hearsay testimony of witness TFI - 078[222] to conclude that the Appellant *"organised camps for civilians and was a senior commander authorized to issue passes to civilians"*[223] is erroneous and has occasioned a miscarriage of justice. No reasonable trier of fact would conclude, on the

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[217] Transcript of 25 April, 2008 Generally and Specifically pp 75-106. The witness gave an exculpatory testimony on command structure, personal responsibility of Kallon and related matters.
[218] Transcript of 22 April, 2008, especially at pp.78-116, Transcript of 24 April, 2008, pp.3-94.
[219] His entire Transcripts of 21st and 22nd April 2008.
[220] Transcript of 22 April, 2008 Generally and Specifically p.43 onwards; see also the testimony of DMK 039 Transcript of 25 April, 2008, p.16 onwards; DMK 047, Transcript of 25 April, 2008 p.57 onwards.
[221] See for instance paras 1831 – 1858 pp 541 – 550 where the Chamber refers to Defence witnesses only to support adverse findings , also paras 1863 and 1864
[222] Para 1228 pp 372 – 373 of the Trial Judgement.
[223] Para 2089 pp 1621

basis of a single hearsay and even so misconstrued account that the Appellant had the general power to supervise civilian camps, hence had command authority. The Appellant also relies on this sub-ground in relation to the hearsay identification of the Appellant regarding the attaeks at Makump on 18 May, 2000 diseussed under Ground 23 of the Amended Notice of Appeal, as well as the testimony of witness TFI-035 in relation to the events in Tongo Fields.

Sub-ground 8.9 (Circumstantial Evidence)

82. The Appellant relies on the references in the Amended Notice of Appeal and further – submissions in various grounds including errors in the applicaton of JCE, errors regarding the use of circumstantial evidence in relation to UNASMIL attacks and errors in the use of circumstantial evidence in relation to command authority by the accused Kallon during the UNASMIL events (counts 15 and 17)

Sub-ground 8.10 (Single Witness Aceount)

83. The Appellant relies on the references contained in the Amended Notiee of Appeal in relation to this ground. The Appellant will further rely on the submissions in relation to the testimony of witness TFI-035 (on events in Kenema Cyborg pit,) witness Kasoma (in relation to abduction of Zambian UNASMIL troops at Moria near Makeni), witness TFI-141 (in relation to the allegation that the Appellant organised and addressed muster parades at the Guinea highway), and witness TFI-078 (in relation to miseonstrued allegations of Kallon's role as supervisor of eamps in Kono).

Sub-ground 8.11 (Reliance on documentary evidence with little or no Probative value)

84. The Appellant relies on the references contained in the Amended Notiee of Appeal in relation to this Sub-ground. The Appellant further submits that the Chamber erred by relying on Exhibit 212 to make adverse findings against the Appellant when the Exhibit had little or no probative value in relation to the Appellant.[224] This Exhibit was tendered by a co-aceused and hence violated the safeguards contained in rule 82 of the Rules of Proeedure and Evidence. The Chamber erroneously relied on documentary evidence not amenable to cross-examination to dismiss the Appellant's defence witnesses.[225]

[224] Paras 2285-2292 pp 667-669 of the Trial Judgment (where the Chamber uses this exhibit as the sole basis for establishing superior responsibility of the Appellant)
[225] Para. 531 pp.180-181 of the Trial Judgment.

Sub-ground 8.12: This sub-ground is adopted in the form in which it appears in the Ground.

Sub-ground 8.13 (Ignoring UNAMSIL Defence Witness)

85. The Chamber erred by selectively ignoring UNAMSIL Defence witnesses whereas it had ruled that UNAMSIL witnesses were truthful and genuine in their effort to assist the court to ascertain the truth.[226] Despite this evaluation, the Chamber disregarded critical testimonies of several Defence witnesses in this category including: General Garba (who was deputy Force Commander of UNAMSIL) and who provided credible evidence blaming the UNAMSIL force Commander Jetley for the conflict between UNAMSIL and RUF;[227] Witness General Mulinge, who was witness Kasoma's superior and who contradicted Kasoma on key issues concerning the abduction of Zambians at Moria near Makeni and their experiences while in captivity at Yengema;[228]and General Opande who acted as foree commander and gave critical evidence relating to the peace initiatives undertaken by the Appellant, which the Chamber disregarded.[229] Additional submissions on this ground are contained at Grounds 23-24 of this Brief.

GROUND 8: ERRORS RELATING TO KALLON'S MEMBERSHIP OF THE SUPREME COUNCIL/AFRC COUNCIL AND HIS PERCEIVED SENIORITY:

86. The Appellant relies on the references on the Amended Notice of Appeal and the explanations therein. He argues the sub-grounds relating to this ground as follows:

Sub-ground 9.0, [230]

87. The Chamber erred by equating the Supreme Council with the AFRC Council and finding that the Appellant was a member of the former.[231] Both exhibits 6 and 150 relied upon by the Trial Chamber refer to the Armed Forces Revolutionary Council (AFRC). Proclamation (Public Notice No.3 of 1997) dated 25 May 1997, which establishes only an AFRC Council and not a "Supreme Council". Exhibits 6 and 150 establish

[226] Para. 644 p.213 of the Trial Judgment.
[227] Transcript of 19th May 2008 General and Specifically pp 48-57)
[228] Transcript 6 March, 2008 Generally and specifically pp 50-65
[229] Transcript 10 March, 2008 Generally and specifically pp 84 – 85, 11 March 2008, pg 37-38
[230] Paras 754-755p 247 of the Trial Judgment.
[231] Paras. 754-755 of the Trial Judgement, at p. 247.

membership of the AFRC and make no reference to an AFRC Supreme Council. Exhibit 39[232] mentions a "Supreme Council", but fails to define it and similarly fails to mention the Appellant among "the key RUF commanders" who were to serve in "prominent positions" both in the "integrated National Army" and in remaining Ministries assigned to the RUF.[233] Significantly the testimonies of Prosecution witnesses TF1-045 and TF1-334 relied upon by the Trial Chamber [234] fail to support this finding. Without indicating that the AFRC and Supreme Council were the same, witness TF1-045 mentioned that the Appellant and other RUF fighters were members of the Supreme Council; but when asked what he understood "Supreme Council" to mean, he stated as follows: "Well, I don't know exactly what they mean in their government. But that was what I heard people calling it".[235] Witness TF1-334, who said he was assigned to work with one of the 17 AFRC coup plotters,[236] testified that the coup plotters were the members of the Supreme Council of the AFRC.[237] In order to be graphic, the witness testified that he drew up a chart of the hierarchy of the AFRC command structure and indicated that at the top was the AFRC Chairman, his Deputy, the Principal Liaison Officers (PLOPs), "the Supreme Council", the armed forces[238], the Sierra Leone Armed Forces and so forth.[239] There was no doubt in TF1-334's mind that the Supreme Council was a distinct body within the AFRC Council, separate from its general membership[240] and the Appellant belonged to the latter, by virtue of Exhibits 6 and 150. This general membership included not only members of the "armed forces" but civilians as well.[241]

88. The Trial Chamber further found that the AFRC Council "did not vote on issues, as *significant decisions were made by [Johnny Paul] Koroma, SAJ Musa and certain other*

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[232] Para. 761 p.249 & para. 24 p.8 of the Trial Judgement.
[233] Kallon was not also the occupant of any previous Ministry or position assigned to the RUF by the AFRC.
[234] Para. 754 of the Trial Judgement, at p. 247.
[235] TF1-045, Transcript of 18 November 2005, p.81.
[236] Ex. 119B, Transcript of 16 May 2005, p. 83.
[237] Ex. 119B, Transcript of 16 May 2005, pp.82 & 88.
[238] Which may have included the RUF.
[239] Ex. 119B, Transcript of 16 May 2005, pp. 82-83.
[240] Ex. 119B, Transcript of 16 May 2005, pp. 78-88.
[241] Para. 754, p.247 of the Trial Judgement. See also Exhibit 150, were "civilians" is inscribed against names like Mohamed Saidu Kamara, Bai Hinga Kurrary-Bangura, Abdulai Michael Munu and Kande Sorie-Sebbe Bangura. It is also conceived that the AFRC Council may have expanded to include more civilians – According to TF1-334, Hon. Hector Bob Lahai (whose name is not on exhibits 6 and 150) was a civilian member of the AFRC Council, see Exhibit 119B, AFRC Trial Transcript of 17 May 2005, p.3.

Honourables",[242] which did not include the Appellant. These significant decisions, it is submitted, were taken by the Supreme Council and not the AFRC Council and the Appellant only belonged to the latter. Besides, Exhibit 224[243] makes no reference to criminal policies or designs to undertake the events outlined in the Indictment. Also, witness TF1-167 in his testimony to the Court, confirmed under cross-examination that he did not know where the Appellant was assigned or deployed during the Junta period.[244] Not being an AFRC Council member himself, his conclusion that he saw the Appellant most times in Freetown and at AFRC Council meetings defeats the Court's finding that the Appellant often had difficulty in travelling to Freetown due to Kamajor ambushes on the road. Regarding TF1-371, he displayed glaring confusion under cross-examination about his knowledge of the relationship between the AFRC and Supreme Council and, in his seeming confusion, categorised both bodies as one and the same, but without acknowledging that all members of the AFRC were also members of the Supreme Council.[245] It was therefore erroneous for the Chamber to have concluded that the Appellant was a member of the Supreme Council.

Sub-grounds 9.1-9.6 argued together:

89. The thrust of the Appellant's argument in these sub-grounds is that alleged mere membership in the supreme council without more does not imply criminal conduct. Further the Appellant was not involved in any decision making processes amounting to criminal activity and the Supreme Council was in any event not inherently criminal. The contents of sub-grounds 9.0-9.6 in the Amended Notice of Appeal.

90. The Chamber further erred in Law and in its assessment of the evidence by failing to find that the Appellant's membership of the Supreme/AFRC Council was inconsequential as he did not participate in any decision making process and certainly did not participate in decisions regarding any criminal activity.[246] The Chamber's conclusion at paragraph

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[242] Para. 756, p.248 of the Trial Judgement (emphasis added).

[243] Minutes of an Emergency AFRC Meeting dated 16th August 1997 attended by Kallon. At the time of the meeting Kallon was not officially a member of the AFRC Council (Exhibit 6 shows that Kallon only officially became AFRC member on 18th September 1997).

[244] TF1-167, Transcript of 19 October 2004, p.119-120.

[245] TF1-371, Transcript of 31 July 2006, p.117-119.

[246] As already noted above, the Chamber found that the AFRC Council did not vote on issues, as significant decisions were made by Koroma, SAJ Musa and certain other Honorables (para .756) and that there was an Advisory Council of Secretaries to the AFRC Supreme Council established to execute policies and directives (para.

2004 that it "considers that there is sufficient evidence to conclude that Kallon by his membership in the Supreme Council was involved in decisions or policy making by the Supreme Council" is based on no evidence on the record and the Chamber refers to none. This Conclusion just like the next one in the same paragraph to the effect that Kallon cooperated with AFRC at Teko Barracks is erroneous, speculative and prejudicial. The Appellant submits that mere membership of the AFRC Council without any significant participation in the "criminal" policies, conduct and design of the AFRC Junta or without holding any position of effective command and control in government is insufficient to establish a conviction under joint criminal enterprise for the crimes outlined in the Indictment.[247] Thus, apart from finding that Kallon was a member of the AFRC Council by virtue of Exhibit 6, which was dated 3rd September 1997 and published on 18th September 1997, the Trial Chamber failed to arrive at any meaningful conclusion made beyond reasonable doubt that Kallon actively participated in or contributed to the day-to-day operations, deliberations and policies of the AFRC Junta. Kallon was never found to have been involved in any of the national programs and processes put in place to mine diamonds and raise revenue for the Junta government. Rather, what was erroneously found against him concerned various acts of personal conduct involving him, his bodyguards and SBUs involved in diamond mining at Tongo Field,[248] which could not be substantiated and has been appealed.[249]

GROUND 9: BO CRIME LOCATION: ERRORS OF LAW AND FACT & JCE:

91. The Chamber erred in law and in fact by convicting the Appellant for the commission of various crimes in Bo District under the JCE mode of liability.[250] The Appellant proposes

757) & Exhibit 120d; Kallon was not a member of this Advisory Council. Also, the Chamber found that SAJ Musa was in charge of mining (para. 760) and that senior RUF officers were left without official appointments within the junta military structure and the RUF retained its own command structure (para. 762). And that a proposal by Bockarie to integrate the AFRC/RUF armies was rejected (para. 761) and further that there was were conflicts and misunderstandings between the AFRC and RUF with many RUF fighters feeling that the AFRC did not respect them (para 763).

[247] See *Stakic Appeal Judgement*, para. 64; *Brdjanin Appeal Judgement*, para. 430 and *Kvocka et al. Appeal Judgement*, paras. 97-98. See also paras. 585-589 of the *Kallon Final Trial Brief*.

[248] Paras. 2005-2006, p.591 of the Trial Judgement.

[249] This shall be additionally addressed under Grounds 2-3 and 9-15 of this Appeal Brief.

[250] Paras. 1974-2008 pp.580-590 of the Trial Judgement.

to argue Sub-grounds 10.1-10.8 together and thereafter Sub-grounds 10.9 and 10.10 together, 10.11- 10.19 (Relating to unlawful killings) together, and 10.20- 10.25(relating to Pillage) together and finally 10.26 - 10-34 (relating to Aets of Terrorism) together. In arguing this Ground, the Appellant shall commence by adopting its arguments under Ground 8 above, regarding Kallon's membership of the AFRC/Supreme Council and his purported participation in the JCE between AFRC and RUF in its entirety. The thrust of the Appellant's arguments in this Ground is that there was no proper legal and factual basis for holding him guilty for crimes in Bo District, which happened before he became a member of the AFRC Council and before he moved to Bo. Further, there was no showing of the Appellant's substantial contribution to the common plan to commit crimes in Bo; nor was there any evidence that the Supreme Council initiated the crimes in Bo.

Sub-grounds 10.1-10.8:

92. As an important preliminary point, the Chamber gravely erred by concluding that the Appellant substantially contributed to the crimes committed in Bo between 1st June and 30 June 1997.[251] The Chamber itself concluded that the Appellant became a member of the Supreme Council in August 1997 and moved to Bo that same month[252]. It found that the Appellant was based at Kangari Hills in the Northern Jungle from November 1996 to June 1997.[253] Further, it was found that he did not personally commit any of the crimes in Bo District, including unlawful killings, pillage and acts of terrorism.[254] The Chamber nevertheless convicted the Appellant of the said crimes for 'participating and significantly contributing' to the JCE between AFRC and RUF.[255] There was no showing as to how, when and where the JCE, common design or shared intent occurred.[256] In the

[251] See Paragraph 1974 p580 of the Judgement
[252] See paragraph 774 p 253 of the Judgement
[253] Para.741, p.243 of the Trial Judgement.
[254] Paras. 1974-1976 pp.580-581 of the Trial Judgement.
[255] Para. 2003 p.590 of the Trial Judgement.
[256] Besides, the Chamber had found that by June 1997, only parts of Bo District were jointly controlled by the AFRC and RUF and that the AFRC controlled all the apparatus of power in Bo District, in the sense that it wholly controlled the Brigade and the Secretariat based in Bo as well as appointed the Secretary of State for the South, who was AFRC (Para.767, p.251 of the Trial Judgement). Furthermore, the Court found that Members of the RUF, including Sam Bockarie, only passed through Bo District in the early months of the Junta regime, and that "it was not until August 1997 when Bockarie assigned Kallon to Bo as the senior RUF Commander that an RUF contingent was based there. Kallon remained in Bo until February 1998. His responsibilities included arranging for RUF supplies from Freetown." (Para.768, p.251 of the Trial Judgement). Moreover, the Court concluded that "although Kallon was a member of the AFRC Supreme Council, it was often difficult for him to travel to Freetown due to

circumstances, the Appellant submits that the relevant *actus reus* and *mens rea* required in a JCE were not proven against him. Paragraphs 2003 to 2008 of the Trial Judgement are completely bereft of the legal requirements of JCE outlined by the Court in its Judgement at paragraphs 251 to 266.

93. In view of the foregoing as well as the contention in Ground 8 that the Appellant was an ordinary member of the AFRC Council who did not make any (significant) contribution to the decisions or policies of the Junta Government and participation in the JCE found between the AFRC and RUF during the Junta period, it was factually erroneous for the Court to have found that the Appellant "substantially contributed" to the crimes in Bo and that he was involved in a JCE or common plan with the perpetrators of the said crimes without substantiating how. In view of this factual error, it is submitted that it is legally erroneous as well for the Court to have convicted Kallon for events in Bo District.[257]

94. The Chamber also erred by concluding that the non-members of the JCE who committed crimes in Bo District were sufficiently closely connected to one or more members of the JCE acting in furtherance of the common purpose, and that those crimes could thus be imputed to the Appellant.[258] The Appellant adopts his submissions in Ground 2 and his arguments herein regarding his absence, non-participation or contribution to crimes in Bo

Sub-grounds 10.9 - 10.10:

95. The Chamber erred by applying a prejudicial standard and/or threshold not applied to the other Appellants, in similar factual circumstances, in finding him guilty of the crimes committed in Bo. The Chamber's conclusion that the Appellant shared with the other participants the requisite intent to commit the crimes in Bo[259] is erroneous in law and without any evidential basis. The Chamber, for example, removed the Third Appellant from liability for crimes found in Bo District under a JCE #1 on the basis that he did not *inter alia* have effective control over RUF fighters and held that it was doubtful for the Third Appellant to effectively exercise his powers in areas where Bockarie ordered the

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Kamajor attacks", noting rather ambiguously, however, that Kallon attended Supreme Council meetings regularly during that time. (Para. 774 of the Trial Judgement)

[257] See *Stakic Appeal Judgement*, para. 64; *Brdjanin Appeal Judgement*, para. 430 and *Kvocka et al. Appeal Judgement*, paras. 97-98. See also para. 261 p. 84 of the Trial Judgement.

[258] Para 1992 p.587 of the Trial Judgement – sub-ground 10.5

[259] Para 2008 p.591 of the Trial Judgement.

commission of crimes.[260] It, however, failed to apply the same or similar standard to Kallon, who was not present and did not participate or contribute to the crimes in Bo District and only had control over RUF troops in the District in August 1997 after Boekarie had assigned him there – more than a month after the crimes had occurred.

Sub-grounds 10.11 - 10.19 (Relating to unlawful killings) (Counts 1 and 3 to 5).[261]

Commencing at Sub-grounds 10.14:

96. The Appellant submits that the unlawful killings in Bo District were not specifically pleaded in the Indictment against him and that he had no sufficient or proper notice or at all regarding his alleged role in the commission of these crimes. Without prejudice to this submissions, the Appellant further contends that he was not provided any timely, clear and consistent information regarding his alleged responsibility for the crimes in Bo. The Appellant had amply dealt with the issue of notice regarding Bo District and other crime bases in its Final Trial Brief,[262] but the Trial Chamber attached little or no weight to his submissions. In the said Final Trial Brief, it was argued that the Indictment failed to plead the personal physical perpetration of the crimes by Kallon; that it failed to disclose material facts pertaining to the allegations therein; that the identities of the physical perpetrators were not mentioned; and that both the Pre-Trial and Supplemental Pre-Trial Briefs by the Prosecution failed to cure the said defects. It is submitted that the defects in the Indictment and failure to disclose prejudiced the case of the Appellant. He thus submits that the error in convicting him for unlawful killings not pleaded in the indictment invalidates the conviction and should be quashed.

Sub-grounds 10.15 – 10.16 (*Mens rea* and Substantial Contribution):

97. The Appellant reiterates the submissions above. Further, the Appellant notes that whereas the Chamber convicts him for crimes committed in Bo before he was posted there, no crimes are charged for Bo during the period he served there, from August 1997 to February 1998. This is an important consideration that the Chamber ignored, which negates *mens rea* for the crimes committed during his absence.

Sub-grounds 10.17 – 10.18 (Unreliable Prosecution Testimony and Failure to Give Reasoned Opinion and to Consider Defence Testimonies)

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[260] Paras. 2040-2042 pp600-601 of the Trial Judgement.
[261] Para. 1974 pp580-581 of the Trial Judgement.
[262] Paras. 932-938, pp.265-266 of the Kallon Final Trial Brief, 29 July 2008 – relevant to Bo District.

98. The evidence used by the Chamber to support a conviction for the commission of these crimes was discredited and wholly unreliable: The Appellant submits that in view of the evidence of Prosecution witnesses, like TF1-054 and TF1-004, and DMK-160 (a Defence witness whose testimony was used in part by the Court) regarding events in Gerihun and elsewhere in Bo District, no reasonable trier of fact deliberating on the said evidence would have linked the Appellant to the crimes found in Bo District.[263]

Sub-ground 10.19 (Failure to Identify the Category of JCE for the Bo Crimes):

99. For arguments on this sub-ground, the Appellant relies on the relevant submissions under Ground 2 of this Appeal Brief. This error invalidated the conviction on Bo crimes.

Sub-grounds 10.20- 10.25 - Pillage (Count 14)[264]

100. The Chamber erred in law and in its factual analysis by finding the Appellant Kallon guilty of pillage in Bo in which Bockarie looted Le 800, 000 from Ibrahim Kamara in June 1997 in Sembehun: The Appellant Proposes to argue Sub-grounds 10.20-10.25 relating to Pillage in Bo together with Ground 22, the Main Ground of Appeal on Pillage.

Sub-ground 10.26- 10.34 - Further acts of terrorism (Count 1)[265]

101. The Appellant proposes to argue these sub-grounds together with Ground 16 of the Amended Notice of Appeal, on Counts 1-2.

GROUND 10: <u>KENEMA CRIME LOCATION: ERRORS OF LAW AND FACT-JCE:</u>

102. The Appellant adopts his arguments under Grounds 8 and 9 of this Brief regarding Kallon's membership of the AFRC/Supreme Council and his purported participation in the JCE between AFRC and RUF in Bo District in their entirety.

103. The Chamber erred in law and in fact in concluding that the Appellant was involved in the commission of various crimes in Kenema District under the JCE mode of liability.[266] In particular, the Chamber erred in law and in its factual analysis by relying on the "acts committed by the accused with respect to Bo amounting to a significant contribution to

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[263] The Chamber failed to demonstrate for each specific crime, how the Appellant was liable. Instead, the Chamber, in a generalized version and without a crime by crime analysis, concluded without any basis that the Appellant was guilty of unlawful killings in Bo. This denied him the right to a reasoned opinion.
[264] Para. 1974 p.581 of the Trial Judgement.
[265] Para. 1974 p58 of the Trial Judgement.
[266] Paras. 2050-2056 pp.603-606 of the Trial Judgement.

the furtherance of the common plan" in support of its findings as to the Appellant's JCE liability for the crimes in Kenema:[267] The Trial Chamber erred in applying *mutatis mutandis* its findings and conclusion on JCE in Bo District to events in Kenema District.[268] Whilst it is contended that the Appellant did not participate or contribute to any JCE in respect of Bo and Kenema Districts, the evidence used to convict him as well as the crimes for which he was convicted under the JCE mode of liability were different for the two Districts. The Appellant submits that using the erroneous Bo template to convict him for crimes in Kenema District renders the findings erroneous and untenable. It is further submitted that because the Appellant played no or no significant role in the crimes in Bo, the use of non-existent contribution in Bo District to find crimes in Kenema District against him is erroneous and a miscarriage of justice.

104. For the reasons stated below, the Appellant contends that the Trial Chamber further failed to show that he made 'substantial or significant contribution' to the JCE in Kenema District or that he shared the *mens rea* of the perpetrators of the crimes there. The Chamber found that the Prosecution failed to prove beyond reasonable doubt that the Appellant personally committed any of the crimes in Kenema District[269] and that "from August 1997 to February 1998, [the Appellant] was the senior RUF Commander in Bo District,"[270] which period coincides with the timeframe in the Indictment relevant to Kenema District, namely, 25th May 1997 to 19th February 1998. The Appellant's responsibilities in Bo included "arranging for RUF supplies from Freetown".[271] About this same period, the Trial Chamber found that Sam Bockarie of the RUF and Eddie Kanneh of the AFRC were in control of Kenema District under the Junta government's administration and that they both possessed "the same level of *de facto* authority." Both men were involved in diamond mining in the District but Bockarie concentrated further on military affairs whilst Kanneh was involved in civilian administrative matters, such as food procurement.[272] The Appellant featured nowhere in this power equation.

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[267] Para. 2055 pp.605-606 of the Trial Judgement.
[268] Para. 10.2 of Ground 9.
[269] Para. 2053 pp.605of the Trial Judgement
[270] Para. 774, p.253 of the Trial Judgement.
[271] Para. 768, p.251 of the Trial Judgement.
[272] Paras. 769-771, pp.251-252 of the Trial Judgement.

105. Also, athough the Chamber found that diamonds dug by civilians in Tongo were either "given to the RUF Commanders *including Bockarie, Sesay and Mike Lamin*" or 'taken by AFRC Commanders to Eddie Kanneh in Kenema who arranged for sales abroad to procure arms and ammunition for the Junta'[273] *the Court made no finding to the effect that the Appellant was involved in any of these official government processes and programs put in place by the Junta to mine diamonds and raise revenue for the Government.* The Appellant contends that what was rather found against him, which he has appealed against, involved various acts of personal conduct alluded to him by the Court concerning him, his alleged bodyguards and SBUs involved in diamond mining at Tongo. It is, for example, found that the Appellant and other AFRC/RUF Officials "operated mining sites for their personal profit during the Junta period,"[274] although, as noted, the Court also found that he did not personally commit crime in Kenema District.

106. The Appellant therefore submits that it was not proved beyond a reasonable doubt that he had the *mens rea* and substantially contributed to the crimes in Kenema District as to render him guilty under a JCE mode of liability.

Sub-Grounds 11.5 - 11.6 of the Amended Notice of Appeal Argued Together:

107. The Trial Chamber erred in law and in its application of the evidence by adopting a double-standard and discriminatory approach regarding the alleged responsibility by the Appellant Kallon for the crimes committed in Kenema. The Trial Chamber found that the Third Appellant's "ability to exercise his powers effectively in areas where Bockarie ordered the commission of crimes is doubtful"[275] even where the Third Appellant is said to be present. The Chamber however, failed to apply the same standard to the Appellant Kallon who was in Bo at the time Bockarie, his superior, was committing crimes in Kenema District, which District was under Boekarie's command and control at the time of the crimes.[276] This double-standard, taken together with the 'broad', 'expansive', 'opaque' and 'amorphous' nature of the JCE as acknowledged by Justices Boutet and

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[273] Para. 1091, p.336 of the Trial Judgement (emphasis added).
[274] Para. 1092, pp.336-337 of the Trial Judgement. Apart from the personal nature of this accusation, the Prosecution witnesses who gave this testimony against Kallon had motive and proved to be unreliable insiders who had issues with Kallon. TF1-366 was found to be incredible and like TF1-045 had been punished for misconduct by Kallon. See paras. 546 & 561 of the Judgement. For motive, see also Transcript of 25 November 2005, pp.15-16, Transcript of 24 November 2005, p.27, Transcript of 14 April 2008, p.72 & Transcript of 10 November 2005, pp.77-79.
[275] Id., para. 2041, pp.600-601 of the Trial Judgement.
[276] Paras. 769-771, pp.251-252; para. 2050; para. 24 all of the Trial Judgement.

Thompson in their Dissenting[277] and Separate Concurring Opinions[278] respectively, render the conviction of Kallon for JCE-related events dubious and prejudicial.

Sub-Grounds 11.9-11.20 of the Amended Notice of Appeal (Unlawful killings in Kenema)[279] argued together:

108. The Appellant proposes to argue these sub-grounds together. The thrust of the Appellants submissions on the crime of unlawful killings in Kenema District is that the conduct for which the Appellant was convicted was not pleaded in the Indictment, and that it did not constitute substantial contribution nor did it demonstrate a shared intent on the part of the Appellant with the perpetrators of the said crimes. The findings thereunder were also erroneous for failing to identify the category of JCE under which the Appellant was convicted; the crimes found against him were also not proved beyond reasonable doubt.

109. The Trial Chamber erred by convicting the Appellant for the killings in Kenema, which were not specifically pleaded in the Indictment and in respect of which he had no notice or no proper notice. Without prejudice to this sub-ground, the Appellant further contends that he was not provided with any timely, clear and consistent information regarding his alleged responsibility for the crimes in Kenema: The Kallon Defence had amply dealt with the issue of notice regarding Kenema District and Tongo Fields in its Final Trial Brief,[280] but the Trial Chamber attached little or no weight to its submissions. In that Brief, it was argued that the Indictment failed to plead the locations of the allegations made by certain Prosecution witnesses, such as TF1-035 and TF1-141, and that the Indictment, the Pre-Trial and Supplemental Pre-Trial Briefs by the Prosecution altogether fail to provide timeframes and the Appellant's role or level of involvement in the crimes. It is averred that this defect in the Prosecution's case prejudiced the Appellant's defence.

110. Regarding substantial contribution and the failure by the Trial Chamber to identify the specific category of JCE under which they found him guilty, the Appellant adopts the legal submission on JCE errors under Ground 2. In particular, the Trial Chamber erred in law and fact by disregarding material exculpatory evidence in relation to Kenema and

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[277] See Paras. 16-17 of Justice Boutet's Dissenting Opinion. He calls for a narrower interpretation of "significant contribution" in assessing an accused's liability under a JCE.

[278] See Paras. 22-23 of Justice Thompson's Separate Concurring Opinion. He considers the conceptual elements of JCE as having an opaque and amorphous character with "doctrinal contours" that fluctuates.

[279] Paras. 2050-2056 pp.603-606 of the Trial Judgement.

[280] See paras. 953-955, pp.272-273 of the Kallon Final Trial Brief, 29 July 2008 – relevant to Kenema District.

also unchallenged defence evidence. Notwithstanding the Trial Chamber's finding that "Kallon's absence from Kenema at the time of the Intervention was also supported by several Prosecution witnesses, including TF1-071,[281] TF1-125[282] and TF1-367[283],[284] and that "DMK-047 also testified that he was personally at Tongo Field in Kenema District between May 1997 and February 1998 and did not see Kallon at that location"[285], the Court dismissed both the Appellant's alibi evidence and defence regarding his absence from Kenema at the time of the crimes as well as the unchallenged evidence of the outlined Prosecution and Defence witnesses. It, however, failed to arrive at a finding beyond reasonable doubt in convicting the Appellant for JCE-related offences in Kenema District. Further and specifically, the Chamber erred in law and in its factual analysis by holding that the Appellant was guilty of killings at Cyborg Pit in Tongo Field.[286]

111. The Chamber failed to find that the alleged conduct of the Appellant in Tongo field did not amount to a common purpose within a JCE. The Appellant submits that no reasonable trier of fact would have arrived at the conclusion that the Appellant was at Tongo Field during the relevant period of the crimes committed there, not to mention his personal involvement in such crimes.[287] In the Appellant's Closing Brief during trial, the testimony of TF1-035 relied upon by the Trial Chamber to arrive at its findings on the crimes against the Appellant at Tongo[288] was challenged on several grounds, including the admission by the witness that he did know and had never seen the Appellant and did not know that Kallon was based in Bo between August and December 1997 when the crimes in Tongo were perpetrated;[289] the non-identification of the Appellant by the witness during his testimony; the fact that the witness's reference to the Appellant regarding his alleged involvement in the crimes in Tongo were based on hearsay evidence passed on to him by his friends and colleagues after his release from detention in Tongo.[290] The unsubstantiated and uncorroborated account of TF1-035 particularly

[281] Transcript of 26 January 2005, pp. 19-20 (TF1-071).
[282] Transcript of 16 May 2005, pp. 82-83 (TF1-125).
[283] Transcript of 26 June 2006, pp. 22-23 (TF1-367) (CS).
[284] Para. 618, pp.204-205 of Trial of the RUF Trial Judgement.
[285] Id., Para. 618, pp.204-205 of Trial of the RUF Trial Judgement.
[286] Para 2050 p.604 of the Trial Judgement.
[287] See paras. 962-966 and 956-959 of the Kallon Defence Final Trial Brief.
[288] See paras. 1084-1086, pp.334-335 & paras. 1127-1130, pp.346-347 of the Trial Judgement.
[289] Transcript of 7 July 2005, p.27, pp.35-37 & Transcript of 5 July 2005, pp.89-90 (TF1-035).
[290] Id., Transcript of 7 July 2005, p.27 pp.35-37 & Transcript of 5 July 2005, pp.89-90 (TF1-035).

conflicted with the accounts of several other Prosecution and Defence witnesses, including TF1-071, TF1-125, TF1-367, DMK-047, DIS-069[291] and, inter alia, DIS-157[292]. In the case of TF1-071, TF1-125, TF1-367 and DMK-047, the Court as noted found that: "Kallon's absence from Kenema at the time of the Intervention was also supported by several Prosecution witnesses, including TF1-071,[293] TF1-125[294] and TF1-367.[295] DMK-047 also testified that he was personally at Tongo Field in Kenema District between May 1997 and February 1998 and did not see Kallon at that location".[296] It is thus submitted that there was no basis for the Chamber's conclusion that the Appellant substantially contributed to the crimes in Tongo Field. This conclusion has occasioned a miscarriage of justice. Besides, the killings in Cyborg Pit, which constitutes personal commission of crimes, were not specifically pleaded in the indictment. The Appellant had no proper and sufficient notice of these killings and therefore he suffered prejudice in the preparation of his defence.

Sub-Grounds 11.21- 11.27 (Physical violence in Kenema).[297]

112. The Appellant wholesomely adopts his arguments and submissions above in relation to his conviction for conduct not pleaded and for which he had no notice; for lack of substantial contribution, lack of shared intent, failure to identify the category of JCE and for failure to prove the crimes beyond reasonable doubt.

Sub-Grounds 11.28 - 11.33 (Enslavement in Kenema).[298]

113. The Appellant adopts the above submissions in relation to his conviction for conduct not pleaded and for which he had no notice; and there is lack of substantial contribution and shared intent from the Appellant; as well as for failure to identify the category of JCE and failure to prove the crimes beyond reasonable doubt.

GROUND 11 (A): KONO CRIME LOCATION - ERRORS OF LAW & FACT - JCE:

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[291] Transcript of 23 October 2007, p.22, lines 17-27 (DIS-069).
[292] Transcript of 25 January 2008, p.21, line 1 to p.22, line 12 (DIS-157).
[293] Transcript of 26 January 2005, pp. 19-20 (TF1-071).
[294] Transcript of 16 May 2005, pp. 82-83 (TF1-125).
[295] Transcript of 26 June 2006, pp. 22-23 (TF1-367) (CS).
[296] Para. 618 of Trial of the RUF Trial Judgement.
[297] Para 2050 p 604 of the Judgement
[298] Para 2051 p 604 of the Judgement

114. While the Chamber concluded that the Appellant Kallon did not personally commit any of the crimes in Kono District,[299] the Chamber erred in law and in its factual analysis by holding him liable under the JCE mode of liability.[300] The Appellant adopts his arguments under Ground 8 of this Brief on AFRC/Supreme Council and the general legal arguments on errors in the application of JCE at Ground 2. To the extent that there was no more Junta Government and/or Supreme Council in Kono, which the Chamber erroneously employed to infer substantial contribution by the Appellant in the JCE, it is submitted that the JCE conviction of the Appellant for events in Kono has no basis.

1. Error Relating to "Changed Plan":

115. There is overwhelming evidence that any alleged common plan during the Junta period no longer existed after the retreat from Freetown and that there possibly existed other "plans". Indeed, at Paragraph 790 of the Trial Judgement, it is held that Kallon was not involved in the plan drawn in Kabala between the AFRC (represented by SAJ Musa and JP Koroma) and the RUF (represented by Superman and Sam Bockarie) to attack and gain control of Kono District. In view of the Appellant's non-participation in the plan to attack and gain control of Kono District, which the Appellant submits was a new plan that was not pleaded in the indictment, it is submitted that the *actus reus* and *mens rea* are lacking; the Appellant did not *intend* to participate in the common plan whose object turned out to be criminal;[301] nor did he share the intention of the perpetrators of the concerted plan.[302]

116. Significantly, the Trial Chamber itself found that "the common plan, purpose or design (joint criminal enterprise)" relied upon by the Prosecution in the Indictment[303] as well as the status of the AFRC/RUF alliance had "*drastically changed*" following the 14th February 1998 ECOMOG intervention.[304] Furthermore, the Trial Chamber noted that "the Junta *was no longer in power* and was unable to depend on the government or administrative apparatus"[305] for its survival; accordingly, a "new plan" was contemplated by high ranking AFRC and RUF leaders to attack Kono District and Koidu Town in order

[299] Para. 2066 p.612 of the Trial Judgement.
[300] See Paras. 2062-2064 pp.607-610; & paras. 2093-2103 pp.619-622 of the Trial Judgement.
[301] See the *Brdjanin Appeal Judgement*, para. 365; & the *Tadic Appeal Judgement*, para. 228.
[302] See the *Tadic Appeal Judgement*, para. 228.
[303] See Para. 36 of the Indictment
[304] Para. 2067, p.612 of the Trial Judgement.
[305] Id. Emphasis added

to gain control of its diamond mines[306] and, primarily, 'to secure a passage to Kailahun as Bo and Kenema were under control of ECOMOG and the Kamjors forces then'.[307] In view of the fact that this sudden change in the JCE of, *inter alia*, "regaining power" never formed part of the Indictment and the Prosecution's case, as well as that Kallon was never notified of it, the conclusion by the Trial Chamber at paragraph 2069 of its Trial Judgement that the said "new formulation" and "drastic strategic change" in the JCE between the AFRC and RUF did not affect the common purpose or design to commit the crimes outlined in the Indictment, is erroneous. What formed part of the Indictment for the purposes of a JCE between the AFRC and RUF, and which the Appellant was notified about, was the 'common plan, purpose and design (JCE) to take any actions necessary *to gain and exercise political power and control* over the territory of Sierra Leone'.[308]

117. Moreover, the Trial Chamber's findings at paragraphs 24, 27, 28 through to 35 and 803 to 804 of the Trial Judgement portrayed that not only was the Junta's withdrawal from Freetown "chaotic and disorganised",[309] but that the purported joint enterprise which had seemingly kept the Junta together witnessed severe rifts, tensions and collapse. With the overthrow of the Junta government, and ECOMOG being in hot pursuit of both AFRC and RUF combatants after the February 1998 Intervention as well as the finding that throughout March and April 1998 ECOMOG, aided by CDF Militias, had made "significant advances" into the Northern and Southern Provinces of Sierra Leone, recaptured Koidu Town in Kono District and regained control of Kenema District in the East,[310] it became obvious that the disorganised AFRC and RUF combatants were more interested in securing a passage to Kailahun[311] for their safety and protection than in endeavouring *to continue to* 'secure power and gain control of Sierra Leone through criminal means' as claimed in the Indictment.[312] Amidst this chaos, it is highly doubtful that any concerted efforts would have existed between the AFRC and RUF.

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[306] Id, Para. 2067, p.612 of the Trial Judgement.
[307] Paras 790, pp.256-257 and 2067 p.612 of the Trial Judgement
[308] Para. 36 of the Indictment.
[309] Para. 29, p.10 of the Trial Judgement.
[310] Para. 31, p.11 of the Trial Judgement.
[311] Para. 790, pp.256-257 of the Trial Judgement.
[312] As a matter of fact, the Chamber's findings revealed further that after the ECOMOG intervention, the AFRC and RUF forces became so highly suspicious of each other's security that each force orchestrated its own plan of self-preservation: Bockarie and Sesay, by their actions, intended and did arrest, detain and dispossess the AFRC leaders, Johnny Paul Koroma and Gullit, of diamonds which they did by luring them into relocating to Kailahun from Kono;

118. It is also inconceivable that a JCE would have continued between the AFRC and RUF after Johnny Paul Koroma's detention and "removal from power" by Bockarie a few days after the retreat from Freetown.[313] The Trial Chamber's dilemma in contriving a new unpleaded joint criminal enterprise between the two forces in the glaring absence of any eomes to the fore when it failed to show with precision the closing timeframe of the "renewed joint criminal enterprise" it had created.[314] It is submitted that in the absence of a precise closing timeframe for the renewed JCE crafted by the Trial Chamber, added to the fact that the Chamber considered the commencement date of the initial JCE as an immaterial fact to be pleaded in the Indictment,[315] the conviction of Kallon for crimes under the renewed JCE that was never pled is an unjustified resort to circumstantial proof in the face of multiple doubtful interpretations as to the precise nature, form and extent of the relationship between the RUF and the AFRC, at the time.

2. ***Error Relating to Sharing Intent with non-JCE members.***

119. Most of the crimes in Kono were committed by persons with no demonstrable link with the Appellant. The Chamber erred in law and in fact by finding that although Rocky (RUF) Rambo (RUF), Savage AFRC and Alhaji (AFRC) were not members of the JCE the Appellant could, however, be liable for their crimes which were "either intended by the members to further the common design or which were a reasonably foreseeable consequence of the common purpose".[316] This is legally incongruous and untenable as at paragraph 2103 (p.622) of the Trial Judgement, the Chamber had ruled that Kallon shared the intent to commit the crimes in Kono District with the perpetrators. The Chamber therefore erred in its findings at paragraphs 2063 to 2064 (pp.608-610) of the Trial Judgement in the sense that it uses both the basic and foreseeable forms of intent under the JCE mode of liability to convict Kallon. It is submitted that the three categories of

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(Paras. 802-804, pp.259-260 of the Trial Judgement) SAJ Musa and Gullit, by their actions, intended to regain control of Freetown and the Western Area and they marshalled mostly AFRC troops in that direction. The Court finds that the tensions between these two forces "coincided with sustained military pressure from ECOMOG" to regain lost territories.(Para. 817, pp.263-264 of the Trial Judgement).

[313] Para. 804, p.260 of the Trial Judgement.

[314] As noted earlier, the Chamber had suggested that it was in "late April 1998", (Para. 2076, p.615 of the Trial Judgement); then it moved to "the end of April 1998"; (Para. 2063, pp.608-610) then to "the beginning of May 1998; (Para. 2080. p.616) only to conclude that "it was prior to the end of April 1998".(Para. 820, p.264).

[315] Para. 358, p.122 of the Trial Judgement.

[316] Para 2080, p.616 of the Trial Judgement.

JCE outlined by the Trial Chamber in its Judgement and described therein as "settled law under customary international law"[317] can only be used or applied alternatively to convict an accused, not cumulatively.[318]

3. ***Error Relating to Mens Rea and Significant Contribution***

120. The Chamber erred in law and in its factual analysis by concluding that Kallon made a significant contribution to the furtherance of the common purpose in Kono[319] and that he had the necessary *mens rea* to participate in a JCE in Kono:[320] The Court found that in April 1998, "the relationship between the AFRC and RUF in Kono District was fractious" and the Appellant executed two AFRC fighters and attempted to prevent the AFRC from holding muster parades, asserting that the AFRC had no right to assemble as the RUF was the only true fighting force in Kono; this created further tensions between the AFRC and RUF.[321] By his said demonstrable conduct, the Appellant could be said to have distanced himself entirely from any JCE between the RUF and AFRC forces.[322] Further, the Chamber erred in law and its factual analysis by failing to attach due weight to its finding that in Kono District, the AFRC troops took orders from their own commanders rather than from the RUF,[323] which finding negatives the Appellant's alleged participation in any concerted criminal purpose with the AFRC.

4. ***Error relating to alleged Kallon's Command Authority before & during Kono Events:***

121. The Chamber attributes illusory powers, authority and influence to the Appellant to justify his conviction on an overly elastic and unprecedented theory of JCE. It however points to no significant position of responsibility that the Appellant may have occupied during a great part of the pre- and post- indictment period. At para 733 of the Trial Judgment, the Chamber simply states that between 1991 and 1994 Kallon was stationed in Kailahun and thereafter at the Bo jungle and camp Zogoda; *no position of responsibility is attached to him*. Also, at para. 741 of the Judgment, the Chamber found that Kallon was based at the Northern jungle, in Kangari Hills, from November 1996 to June 1997 and that he was promoted to Major in March 1997 by Sankoh and served in

[317] Paras. 254-255, pp.82-83 of the Trial Judgement.
[318] See legal arguments on JCE under Ground 2 herein.
[319] Paras. 2093-2103, pp.619-622 of the Trial Judgement.
[320] Para 2103, p.622 of the Trial Judgement.
[321] Para. 817, pp.263-264 of the Trial Judgement.
[322] This point was adequately argued in Mr. Kallon's Final Trial Brief, at para. 675.
[323] Para. 797, p.258 of the Trial Judgement.

the Northern jungle under Area Commander Isaac Mangor. Apart from his membership of the AFRC Council which the Chamber exaggerates to justify its unwarranted conviction of the accused, the Chamber points to no other significant position of responsibility to warrant the accused's liability under JCE; *the Chamber makes no finding regarding the positions attributed to the Appellant indictment.* Further, at paragraph 833 of the Judgment, the Chamber concluded that in February 1998 during the retreat, the Appellant had the rank of Major and that he remained in Kono District and reported to Superman. The Chamber also noted that the Appellant was one of several senior RUF commanders who were not directly within the control hierarchy of Superman and did not have discrete combat units or forces assigned to their command.[324] The Chamber further recalled that 'the Appellant although a senior RUF Commander, did not occupy a formal position within the operational command structure of the RUF *and that it is therefore unclear to what extent he received reports on the actions of troops throughout Kono*'.[325]

122. The Chamber, however, contradicts itself by stating that in Kono, the Appellant was an operational commander who gave orders which were complied with by troops and that he was assigned to an area known as Guinea Highway and was also tasked with the particular responsibility of defending the Makeni-Kono Highway against advancing ECOMOG.[326] This finding/particulars is, however, not pleaded in the Indictment and the Appellant had no proper notice of it and was thus prejudiced in his defence.

123. Regarding the assignment at Guinea Highway, the Chamber erroneously relied on the testimony of witness TF1-141 without corroboration. It further erred by relying on TF1-141 to conclude that the Appellant enjoyed privileges only afforded to senior RUF commanders such as bodyguards.[327] The Chamber had ruled that it would not rely on the witness when dealing with the acts and conduct of the accused unless corroborated.[328]

124. As discussed elsewhere (under Ground 20 - Count 12) the testimony of witness TF1-141 lacks credit and is implausible. The witness provided irreconcilable and contradictory versions of his location between February and December 1998. Thus, no reasonable trier of fact could have relied on the witness to conclude that the Appellant had command

[324] Para 834 of the Trial Judgement.
[325] Para. 2149 of the Trial Judgement (emphasis added).
[326] Paras. 835 and 2135 of the Trial Judgement.
[327] Par 838 of the Trial Judgement.
[328] Paras 582- 583, p 194 of the Trial Judgement.

control at the Guinea Highway and he gave orders to fighters at daily master parades while there.[329] Indeed, the Chamber erred by holding that the Appellant gave orders in March 1998 to fighters at daily muster parades in Guinea Highway area.[330] The Appellant could not have given these orders at Guinea Highway as at that material time, himself and the other RUF troops were based in Koidu town; according to the Chamber's own finding, the RUF troops retreated from Koidu town in April 1998.[331]

125. Regarding the Appellant's responsibility of defending the Makeni Highway against advancing ECOMOG, the Chamber concluded without any basis and/or reference to the record that in that capacity "Kallon would instruct commanders to undertake ambush laying missions on the basis of orders from Superman".[332] The Appellant submits that his posting at the Kono-Makeni Highway is not pleaded and that he was prejudiced by lack of notice. Morever, this position did not confer on him any overall command authority, as any command responsibility within that context for the Appellant would have been only limited to the commanders or fighters he was supposed to have instructed to lay ambush at the Kono-Makeni Highway. There is absolutely no evidence that any of these fighters or commanders were involved in the commission of crimes for which the Appellant should be responsible. No reasonable trier of fact would thus conclude on the basis of his posting at this limited specific location, that he had general command authority in Kono.

126. The other element the Chamber employs to find command responsibility for the Appellant in Kono is based on the testimony of witness TF1-361, who stated that the Appellant supervised the burning of homes in Kono during the retreat of April 1998.[333] Witness TF1-361's testimony however lacks any credit. During eross-examination, the witness admitted that the Appellant neither had any area of responsibility nor a radio set and that he (witness) did not know much about the Appellant.[334] No reasonable trier of fact would thus rely on this testimony to conclude that the Appellant is the person who supervised the burning of homes in Kono during the retreat from Koidu in April 1998 and that consequently, he (the Appellant) had effective control over all fighters in Kono. Also

[329] Par 836 p 268 of the Trial Judgement.
[330] Para 836, p.268 of the Trial Judgement.
[331] Para 836, p.268 of the Trial Judgement.
[332] Para 835 of the Trial Judgement.
[333] Para 836 of the Trial Judgement.
[334] Transcript 19 July 2005 p 28 lines 18-22

the burning of houses is a crime of personal commission that was never pleaded and in respect of which the Appellant had no notice to his prejudice.

*5. **Errors Relating to the Appellant's status as Vanguard.***

127. The Chamber erred in law by holding that the mere fact of being a Vanguard afforded the Appellant 'power and engendered respect'. There is no factual basis for this conclusion and there is certainly no factual basis that for the specific case of the Appellant, his status as a Vanguard 'afforded him power and engendered respect' among fighters.[335]Moreover, this was a material fact that ought to have been pleaded in the indictment which omission caused prejudice to the defence of the Appellant who knew he was charged on the basis of specific positions specified in the indictment[336] and not the ambiguous designation of "Vanguard". Besides, the Chamber erred in law and in its factual analysis by generally convicting the Appellant Kallon for crimes committed in Kono District, which were not specifically pleaded in the Indictment. The Appellant submits that this occasioned prejudice to his defence as he had no proper and sufficient notice of the charges against him. The Chamber erred in law by implying that any defects in the Indictment in relation to the crimes in Kono District had been cured, but failed to show how.

GROUND 11(B): KONO: ERRORS RELATED TO SPECIFIC CRIMES IN KONO:

Sub-Grounds 12.28-12. 34 (Unlawful Killings - Kono) Counts 1-5[337] *argued together.*

128. The Appellant adopts the submissions above and those related to JCE at Ground 2.

Sub-Grounds 12.35-12. 41 (Sexual Violence - Kono) Counts 1 & 6-9[338] *argued together.*

129. The Appellant adopts the above submissions.

Sub-Grounds 12.42-12. 49 (Physical Violence - Kono) Counts 1 & 2, 10 & 11[339] *also argued together.*

130. The Appellant adopts the above submissions.

Sub-grounds 12.50-12.56 (Enslavement-Kono)Count 13[340] *argued together with Ground 21.*

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[335] Paras. 2093-2095, pp 619-620 of the Trial Judgement.
[336] See Paragraphs 25-28 of the indictment.
[337] Para 2063, 2093- 2103, pp 608-622 of the Trial Judgement
[338] Para 2063, 2093-2103, pp 608-622 of the Trial Judgement
[339] Ibid.

131. The Appellant adopts the above submissions.

Sub-Grounds 12.57- 12. 63 (Pillage) Count 14[341] *argued together with Ground 22.*

132. The Appellant argues this sub-grounds together by adopting the foregoing submissions herein regarding the Chamber's erroneous interpretation of JCE liability, which invalidates the Appellant's conviction for pillage. The Appellant will further argue these sub-grounds together with Ground 22 - the main general ground on Pillage.

Sub-Grounds 12.64- 12. 69 (Acts of terrorism and collective punishment) Count 1 - 2[342] *argued together with ground 16:*

133. The Appellant argues these sub-grounds together by adopting the above submissions regarding the Chamber's erroneous interpretation of JCE liability which invalidates the Appellant's conviction for terrorism and collective punishment. The Appellant will further argue these sub-grounds together with Ground 16, the main general ground on Count 1 & 2 - terrorising the civilian population.

GROUND 12: KONO DISTRICT – INSTIGATION[343]

1. Error relating to Non- Pleading Issues:

134. The Trial Chamber erred in law and fact by convicting the Appellant for the killing by an RUF fighter, of Waiyoh, a female Nigerian civilian, on the orders of Rocky in Wendedu in May or June 1998 (Counts 4 to 5). The Chamber erred by convicting the Appellant for a crime that was not specifically pleaded in the Indictment. The material facts of instigating this crime were neither pleaded nor cured: Further, the place of the murder (Wendedu) was also not pleaded, nor did the Indictment allege that the Appellant was personally involved in the said killing.[344] During trial, the Appellant had raised this specific issue in his motion to exclude evidence outside the scope of the indictment but the Chamber erroneously failed to give a remedy.[345]

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[340] Para 2064, pp 611, 2094, pp 620 of the Trial Judgement
[341] Para 2063, pp 610, 2093 – 2103, pp 619-622 of the Trial Judgement
[342] Para 2064 pp 610, 2093 – 2103 pp 619-622 of the Trial Judgemet
[343] Paras 1174-1175,p358,2117.2120 p625
[344] Para. 48 of the Indictment.
[345] *Prosecutor v. Sesay et al*, Confidential Kallon Motion to Exclude Evidence Outside the Scope of the Indictment 14 Feb 2008 para 85

*2. **Error relating to conflating 6(3) mens rea with 6(1) actus reus:***

135. The Chamber erred in law by making the inconclusive determination about the Appellant's responsibility for the killing of Waiyoh. Whereas the Chamber employed the 6(3) *mens rea*, it erred by convicting under a 6(1) liability.[346] Further, the Chamber erred in its factual analysis by making a contradictory finding regarding the Appellant's relationship with Rocky.[347] Notwithstanding that the Chamber erroneously used an Article 6(3) *mens rea* of command responsibility to convict the Appellant on an Article 6(1) *actus reus*, which was never in fact established, several judicial findings showed that Rocky was not subordinate to nor was he under the "supervisory" command and control of Appellant: RUF Commanders, including Rocky who was the Commander in charge of the Wendedu Camp, Banya who was the "Ground Commander at Wendedu" Komba Gbundema who was deployed at Yomandu and, inter alia, RUF Rambo who was deployed at Gandorhun all reported and were answerable to Superman.[348] These Commanders, like the Appellant Kallon, were Vanguards "who were co-equals among themselves" and 'could not obstruct the orders or activities of each other'.[349] In the case of Rocky in particular, the Court found (through Prosecution witness TF1-078) that on one occasion when Appellant had the opportunity, he visited Kaidu, a Camp under Commander Rocky at the time, and "advised" Rocky that "the rebels should not be "hostile" with the civilians".[350] Witness TF1-078 further testified that the Appellant assisted him to secure a pass for his family to come to Kaidu from the bush; sadly, the Trial Chamber misconstrued this one-off helpful event as conclusive evidence that Kallon was in charge of a pass-system operated by the RUF and that he operated from his headquarters at Guinea Highway to give directives and supervisory orders to Rocky.[351]

*3. **Error relating to Proof beyond Reasonable Doubt:***

136. The Chamber erred in law and fact by failing to find that the Appellant's responsibility for the killing of Waiyoh had not been proved beyond a reasonable doubt: In particular, based on the reasons outlined below, the Kallon Defence submits that the Trial Chamber

[346] See Para. 2120 p 625 of the Trial Judgement.
[347] Para. 2137 p.630 and para. 2118 p.625 of the Trial Judgement.
[348] Para. 1175 (ref. to Rocky), para. 811 (ref. to Komba Gbundema and RUF Rambo), para. 1176 (ref. to KS Banya).
[349] Paras. 667 to 668 and para. 2118 of the Trial Judgement.
[350] Para. 1231 of the Trial Judgement.
[351] Paras. 1228, 2118 and 2137 of the Trial Judgement.

erred by finding at paragraph 2120 p. 625 of the Trial Judgement that "Kallon [is] liable under Artiele 6(1) of the Statute for instigating the killing of Waiyoh in May 1998 in Wendedu, as eharged in Counts 4 and 5 of the Indietment" and in holding that "Kallon's eonduct prompted Rocky to order her killing, ereating a nexus between [his] conduct and the crime": The findings in the Trial Judgement at paras. 1174-1175 that the Appellant was senior to Rocky and that it was the visit of the Appellant's bodyguards at Wendedu that led Roeky to order the killing of Waiyoh is unsubstantiated and lacks merit. The Trial Chamber failed to show how the Appellant instigated CO Rocky, a Vanguard like Kallon who was only answerable to Superman.[352] Also, and to the contrary, two of the key witnesses relied upon by the Chamber clearly failed to support the Court's findings and conclusion in order to prove the Appellant's alleged guilt for instigating the said murder beyond reasonable doubt.[353]

4. ***Error relating to Elements of Instigation:***

137. There is no sufficient evidence therefore that the alleged instigation substantially contributes to the killing of the woman. The Chamber further erred in law and fact by failing to find that the elements of instigation were not proved beyond reasonable doubt: In view of the submissions above, the Kallon Defenee submits that both the *actus reus* of instigating, to wit, an act or omission of the Appellant which could be said to have

[352] Para. 1175 of the Trial Judgment.

[353] In the case of **witness TF1-078**,(Para. 1175, p.358) the Chamber found, through him, the following reasons for the murder of Waiyoh: "one day Rocky ordered the execution of a female Nigerian civilian *for no apparent reason*, which surprised and terrified the civilians. Although the womau had lived in Kono District for 20 years, Rocky told the eivilians that if she escaped she would disclose their position to ECOMOG and the camp would be bombarded by ECOMOG jets" (Para. 1233, p.374). In view of the fact that this witness had testified that Kallon had advised Rocky that rebels should not be hostile to civilians, (Para. 1231, p.373) it is inconceivable that the only plausible innocent conclusion capable of establishing guilt was for the Court to conelude that Kallon instigated Rocky to kill Waiyoh. Another reason proffered by TF1-078, which the Court failed to consider, was that Rocky is said to have ordered the killing of Waiyoh or Yawo (as the late woman was varyingly ealled) because 'he did not feel comfortable with the tribal marks on her face' (Transcript of 22 October 2004, pp. 80 to 82), considering that she was a Nigerian like the ECOMOG troops.**In the case of **witness TF1-071** (see Para. 1175, p.358-359 of the Trial Judgment), the Kallon Defence was able to establish the following facts in the *Kallon Final Trial Brief*, which no reasonable trier of faet would have ignored in its deliberations in view of the circumstantial nature of the evidenee coneeming Waiyoh's death: a) TF1-071's account about Waiyoh's death was hearsay, it was entirely based on unverified information received from civilians said to be in Wendedu; b) the witness eonfirmed during cross-examination that he was not present when the incident took place; e) he also confirmed that Kallon and Rocky were "just ordinary colleagues" and that Kallon was "not a commander for Rocky"; rather, the witness confirmed that both men reported to Superman in Kono District in 1998. (See paras. 1026 to 1029, pp.297-299 of Kallon's Final Trial Brief. See Transcript of 21 January 2005, pp. 57 to 70 & Transcript of 26 January 2005, p.30).

'substantially contributed' to Rocky's conduct of ordering the killing of Waiyoh,[354] and the *mens rea* thereof, to wit, that the Appellant 'intended to provoke or induce Waiyoh's death by prompting, urging or encouraging Rocky and his bodyguards to so do', were not proven beyond any reasonable doubt. In particular, no nexus was established between Rocky's conduct of ordering Waiyoh's death and Kallon's purported conduct of instigating Rocky to order Waiyoh's death. The link to Waiyoh's death, as found by the Court, was in fact effected via two separate and distinct modes of Article 6(1) liability, namely, i) Kallon's unfounded *prompting* of Rocky to kill Waiyoh and, ii) Rocky's *ordering* of Sergeant Kanneh to kill Waiyoh.[355] Thus, although Rocky did not himself, like Kallon, commit the offence directly, the totality of evidence available to the Court only showed how Rocky ordered the killing but fell short of demonstrating or proving how Kallon prompted the said conduct of Rocky.

GROUND 13: KONO: KALLON'S SUPERIOR RESPONSIBILITY - THE FORCED MARRIAGES OF TFI-016 AND HER DAUGHTER IN KISSI TOWN BETWEEN MAY AND JUNE 1998:[356]

138. The Chamber erred in law and fact by convicting the Appellant under 6(3) liability for events in Kono District when it had ruled and concluded that that "Kallon, although a senior RUF Commander, did not occupy a formal position within the operational command structure of the RUF and it is therefore unclear to what extent he received reports on the actions of troops throughout Kono District:"[357] In particular, for the reasons stated below, the Appellant contends that the Trial Chamber erred in law and fact in finding at paragraph 2151 (p. 633) of the Trial Judgement that "Kallon is responsible under Article 6(3) of the Statute for the 'forced marriages' of TF1-016 and her daughter in Kissi Town [Kono District] between May and June 1998".

1. Error Relating to Appellant's Effective Command:

[354] See the *CDF Appeal Judgement*, para. 52; & *Kordic and Cerkez Appeal Judgement*, para. 27.
[355] See Para. 1175, p.358-359 of the Trial Judgement.
[356] Para. 2151 p.633 of the Trial Judgement.
[357] Para. 2149, p.633 of the Trial Judgement.

139. The Chamber failed to link the Appellant, directly or otherwise, with the crime of forced marriage said to have been perpetrated against TF1-061 and her daughter in Kissi Town, Kono District. The factual findings in paragraphs 1211 to 1214 (pages 367-369) of the Trial Judgement have no bearing on the Appellant. As noted in Grounds 11 and 12 above, there is nothing to show that the Appellant was in effective command and control of RUF troops at Kissi Town. During this time, the Appellant, as found by the Trial Chamber, was based at the Guinea Highway on the military mission of laying ambushes along the said highway to impede ECOMOG's movement, although it was contemporaneously found by the Court that the Appellant "did not have discrete combat units or forces assigned to his command".[358] Additionally, the Court found that the Appellant was subordinate to Superman[359] during this period and that he either had the same Vanguard status with some of the Commanders, like Rocky,[360] or was lesser in rank and authority to certain other Commanders in Kono, like RUF Colonels Rambo and Isaac Mongor.[361] The Appellant relies on the Appeals Chamber Judgement in *Prosector v. Blaski*, which sets forth the standard for pleading command responsibility.[362]

2. ***Error relating to Knowledge of Crimes of Subordinates.***

140. The Appellant submits that elements of superior responsibilities were not met in respect of the Appellant's crimes at Kissi Town. The defects were never cured. Kissi Town was never pleaded as a particular location at which the Appellant exercised command authority in respect of this specific crimes. The alleged subordinates of the Appellant at Kissi Town were never sufficiently or at all particularized. Remarkably, the Appellant submits that the finding by the Trial Chamber that Kallon 'had reason to know of the fighters who committed the crime of "forced marriage" at Kissi Town' in Kono District because the crime was "widespread in Kono District and indeed throughout Sierra Leone,"[363] is vague, baseless and fails to meet the requisite standard for knowledge by a superior. It is regrettable that the Chamber's verdict of guilt conflicts with its own sensible conclusions at paragraphs 308 to 312 of the Trial Judgement to the effect that:

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[358] Paras. 834, 835 and 2094 of the Trial Judgement
[359] Paras. 833 and 835 of the Trial Judgement.
[360] Paras. 667 to 668 of the Trial Judgement.
[361] Para. 2138 of the Trial Judgement.
[362] *Prosecutor v. Blaskic*, (Appeals Chamber), July 29, 2004, para. 218 (emphasis added)(footnotes omitted); *see olso Prosecutor v. Ntagerura et al.*, ICTR-99-46-A (Appeals Chamber, July 7, 2006), para. 152 (similar).
[363] Para. 2148 of the Trial Judgement.

"the superior must have knowledge of the alleged criminal conduct of his subordinates *and not simply knowledge of the occurrence of the crimes themselves*".[364] The standard of proof of the superior's knowledge, the Court ruled, "will only be satisfied if information was available to the superior which would have put him on notice of offences committed by *his subordinates or about to be committed by [them]*".[365] It is submitted that from the Chamber's own findings there is no credible showing that, assuming he had command authority in Kissi Town - which is denied, the Appellant was put on notice of the crimes by his alleged subordinates in Kissi Town; or that he knew of the criminal conduct and intent of his subordinates and sufficiently identified them, as opposed to mere knowledge of crimes by RUF fighters generally, which in any event is not proven beyond a reasonable doubt. Besides, the Chamber further erred in law and in fact by relying on evidence that was unreliable and which did not establish the Appellant's guilt beyond a reasonable doubt: As noted above, the factual findings in paragraphs 1211 to 1214 (pages 367-369) of the Trial Judgement on the forced marriage/sexual violence incident at Kissi Town have no bearing on and made no reference to the Appellant.

3. ***Errors relating to Evaluation of Evidence and Elements of Effective Control:***

141. The Appellant in sum avers that the Court's findings and conclusions on events in Kissi Town relative to the Appellant were bereft of the legal elements required to convict the Appellant on an Article 6(3) responsibility.[366] The Chamber failed to establish superior-subordinate relationship between the Appellant and the perpetrators of the crimes against TF1-016 and her daughter; the Appellant did not have any command and control over the perpetrators – Kortor being a civilian and Alpha, the rebel commander at the time. In fact, of even graver significance is the manner in which the Trial Chamber ignored vital exculpatory evidence during cross-examination of Prosecution witness TF1-016. The totality of this witness's testimony[367] disclosed a number of issues on which a criminal conviction ought not to have been established, including the following: i) the witness could not tell the precise period of her capture in Tomandu before she was taken to Kissi Town, she could not tell the first dry season in 1998 or the year in which the rebels were

[364] Id., Para. 309, pp.100-101 of the Trial Judgement (emphasis added).
[365] Para. 310, p.101 of the Trial Judgement.
[366] See para. 285, p.92 of the Trial Judgement, ref. to the *Gacumbitsi Appeal Judgement*, para. 143 etc.
[367] (TF1-016) Transcript of 21 October 2004, pp.3-50.

thrown out of Freetown[368] - she however remembers that she left Koidu for Guinea when the rebels attacked the town after they had been thrown out of Freetown (whieh was in February 1998); she then spent three months in Guinea before returning to Tomandu, where she was captured by RUF fighters.[369] Whilst this period eoincides with the Court's finding that the incident involving the witness occurred between May and June 1998, it equally conflates with the Court's finding that "the Prosecution has not proven that Kallon was ever in Tomandu or had reason to know of events there",[370] in addition to the finding that 'Kallon did not occupy a formal position within the RUF operational structure'[371]. According to the witness, Tomandu lies along the Guinea border and is in the same chiefdom as Kissi Town (Lei Chiefdom),[372] which is far away from Koidu Town or Guinea Highway where Kallon was at the material time. It is strange that whilst the Appellant Kallon was removed from liability for events in Tomandu, where the witness was captured, he was convicted for events in Kissi Town, where the Appellant is not said to have been in command and control of combatants at any time. **ii)** Also, the total evidence before the Court was in fact conclusive that Kotor was TF1-016's actual husband and that the witness was not saying the truth about Kotor sexually assaulting her. Apart from referring to Kotor as "Kotor Koroma" who bore the same surname as her real husband,[373] the witness described Kotor as a civilian who did not carry a gun, who only tapped palm wine for "RUF" fighters and had sex with her regularly.[374] Perhaps a more crucial evidence that a reasonable trier of facts could not have disregarded is the witness's concluding answer to Mr. Turay (Counsel for Kallon)'s closing question to her: *Question: "Yes, so you said you managed to escape and return to Koidu?"; Answer: "I escaped together with Kotor Koroma – we escaped from Alpha – myself together with my daughter and Kotor Koroma, we escaped from them and came to Koidu".*[375] This glaring admission sharply differs from the witness and the Court's efforts at criminalising Kotor for sexually abusing the witness. Apart from denying that Kotor was not her actual

[368] (TF1-016) Transcript of 21 October 2004, pp.22.
[369] (TF1-016) Transcript of 21 October 2004, pp.21-22, pp.7-8.
[370] Para. 2149, p.633 of the Trial Judgment.
[371] Id., Para. 2149, p.633 of the Trial Judgment.
[372] Transcript of 21 October 2004, pp.7-8, p.13 & pp.13. (Tomandu was a walking distance to Kissi Town).
[373] (TF1-061) Transcript of 21 October 2004, p.42 & p.23.
[374] (TF1-061) Transcript of 21 October 2004, pp.23-24, p.29.
[375] (TF1-061) Transcript of 21 October 2004, p.45.

husband, the witness had earlier testified that he left Kotor in Koidu when it was announced that the rebels should release all civilians held in their 'custody';[376] she had also earlier described Kotor as behaving like a rebel in the sense that he sexually and brutally abused her whilst in captivity.[377] The Trial Chamber on its part described Kotor as "a member of the RUF" and inferred that Kotor was a rebel when it found that "both TF1-016 and her daughter were given to *rebels* as wives...".[378] A reasonable trier of fact would have found that if Kotor was a rebel and hostile to the witness, and perhaps if he were not the husband of the witness, he would not have escaped with the witness away from Alpha, who was the head of the group of rebels that captured the witness and her daughter. And **iii)** The Court failed to consider that when the rebels arrived with the witness and other civilians in Koidu, they were immediately released on the orders of the head of the rebels, whose name the witness could not recall.[379] This portrayed failure to condone any form of abduction, enslavement or sexual abuse of civilians.[380]

142. The Appellant further submits that the Trial Chamber ignored or failed to consider the Defence submissions in the Kallon Final Trial Brief regarding the unchallenged and credible Defence evidence and exculpatory or contradictory Prosecution testimonies concerning allegations of sexual offences in Kono District, including forced marriage and, inter alia, rape.[381] The Defence avers that the corroborative testimonies of inter alia TF1-361,[382] TF1-167[383] and TF1-078[384], which supported Kallon's testimony as well as the testimonies of DMK-039,[385] DMK-087[386] and DIS-214[387] in removing Kallon and the RUF from liability for sexual offences, including forced marriages and rape, were disregarded by the Chamber; and that no reasonable trier of facts would have done so.

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[376] (TF1-061) Transcript of 21 October 2004, p.43 & p.20.
[377] (TF1-061) Transcript of 21 October 2004, p.24.
[378] Para. 1211, p.367 of the Trial Judgment.
[379] (TF1-061) Transcript of 21 October 2004, p.20 (line 21) to p.21 (line 6).
[380] Unfortunately, rather than the witness, it was the Proseeution who suggested in its examination-in-chief and gave the impression that the witness and other civilians were released as a result of an unfounded 'ceasefire'. See Transcript of 21 October 2004, p.20 (line 21) to p.21 (line 6).
[381] Paras. 1117-1129, pp.331-336 of the Kallon Final Trial Brief.
[382] (TF1-361) Transcript of 12 July 2005, p.20.
[383] (TF1-167) Transeript of 20 Oetober, 2004, p.18.
[384] See (TF1-078) Transcripts of 25 Oetober 2004, p.64; 27 October 2004, p.6; & 26 October 2004, p.21.
[385] (DMK-039) Transcript of 25 April 2008, pp.23-25.
[386] (DMK-087) Transcript of 22 April 2004, p.108.
[387] (DIS-214) Transcript of 17 January 2007, pp.70-72.

GROUND 14: KONO: KALLON'S SUPERIOR RESPONSIBILITY: THE ENSLAVEMENT OF HUNDREDS OF CIVILIANS IN CAMPS THROUGHOUT KONO DISTRICT BETWEEN FEBRUARY AND DECEMBER 1998.[388]

Error relating to incurable Defective Pleading:

143. The Appellant relies on the legal arguments on superior responsibility in relation to Ground 12 above to argue this sub-ground. The Chamber found the Appellant guilty under 6(3) for the enslavement of hundreds of civilians in camps throughout Kono District between February and December 1998.[389] This conclusion makes the overly exaggerated presumption that Kallon had effective control over all RUF troops in Kono District between February and December 1998 lacking in any evidential basis.

144. As a preliminary issue, the Appellant submits that the indictment did not plead the essential elements of his alleged superior responsibility in respect of Count 13 for Kono District. It simply stated that between 14 February 1998 to January 2000, AFRC/RUF forees abducted hundreds of civilians and used them as foreed labour[390] and that by their acts or omissions in relation to "these events" the Appellant was liable under 6(3) for the crime of enslavement. The Appellant submits that there was no cure for this defect and that the Chamber erred by basing its conviction on a defective pleading, which caused the Appellant prejudice as he was unable to prepare his defence. The Supplemental Pre-trial brief which was supposed to give clarification and hopefully provide a cure worsened the scenario by providing contradictory information. At paragraph 481, the Supplemental Pre-trial Brief stated that the crime of enslavement happenced between 14 February 1998 and 30 June 1998, thus contradicting the indictment which specified the period as 14 February to January 2000. The defect in the indictment was therefore not cured and it is prejudicial for the chamber to have convicted the Appellant for the crime commited under a defective indictment. In fact, the Chamber compounded this confusion by finding that Kallon was only found to be in a superior-subordinate relationship with RUF fighters in Kono District *until August 1998*.[391] The Defence therefore submits that the Chamber erred in proceeding to find against Kallon under an Article 6(3) liability the crime of

[388] Para 2151 p633 of the Trial Judgment.
[389] Para 2151 of the Trial Judgment.
[390] Para. 71 of the Indictment.
[391] Para. 2141, p.631 of the Trial Judgement.

'enslaving hundreds of civilians in camps throughout Kono District between February and December 1998',[392] in lieu of *between the period of "February and August 1998"*.

145. In particular, the Kallon Defence submits that the Prosecution's case on "enslavement" in Kono District was so exhaustively argued in the *Kallon Final Trial Brief*[393] that no reasonable trier of fact would have arrived at the conclusion that the Appellant bears responsibility under Article 6(3) of the Statute for enslaving civilians throughout Kono District. In accordance with the Defence's argument, it is noted that the Chamber found in its Trial Judgment that Superman *inter alia* "gave a written order to Commanders on 30 March 1998 to hand over all civilians for mining" in Kono (reference to Exhibit 341) and that he appointed an Overall Mining Commander and Minister for Mines in Kono in December 1998.[394] Besides, Exhibit 259,[395] which is a correspondence from Brigadier Sam Bockarie titled "Orders/Instructions" and addressed to "All Commanders of RUF/SL - Ops Kono", demonstrated that diamond mining was a matter of great and exclusive interest to the RUF high command in Buedu. In a bid to re-stamp his authority, Brigadier Sam Bockarie, the then RUF leader, wrote in Exhibit 259 above that "no one should carry out any personal mining without the knowledge of the Brigadier [i.e. Brigadier Sam Bockarie]," and that "all soldiers should go for muster parade".[396] Paragraph 7 of the Exhibit concludes on the following note: "any soldier caught violating these orders will be militarily dealt with." Consequently, the Appellant contends that in view of the submissions above as well as the contention that he did not wield a supervisory role over the RUF Camps in Kono, the Court's finding at paragraph 2148 of its Judgment that the Appellant "had actual knowledge of the enslavement of civilians" in Kono District because he had "supervisory role with respect to the civilian camps", which the Prosecution failed to prove beyond reasonable doubt, is flawed and without merit.

146. The Appellant reiterates his submissions in Ground 13 on the issue of superior responsibility in Kono. The Chamber fails to make the distinction between general knowledge and specific knowledge that sufficiently identified subordinates had committed crimes. Indeed at par 2148, the Chamber simply concludes that since the

[392] Para 2151 of the Trial Judgment.
[393] Paras. 1256 to 1275, pp.379-388 of the Kallon Final Trial Brief.
[394] Paras. 1241-1245, pp.376-377 of the Trial Judgment.
[395] See Court Records, dated 23rd August 1998.
[396] See paras. 2 & 3 of Exhibit 259.

Appellant occupied a supervisory role with respect to the civilian camps, he had *actual knowledge of the enslavement of civilians there.*[397] There is absolutely no reference to knowledge by the Appellant of crimes by his alleged subordinates or any subordinates at all. This error invalidates the conviction

GROUND 15: KAILAHUN CRIME BASE - ERRORS OF LAW AND FACT - JCE[398]

SUB-GROUND 16: 1 - 16.2:

1. Error relating to non-Pleading:

147. All the crimes for which the Appellant was convicted in Kailahun were not properly pleaded and he received no notice, and thus suffered prejudice in his defence.

2. Error related to Knowledge and Shared Intent:

148. The Appellant adopts its general submissions on JCE errors and the submissions under Grounds 8 to 11 of this Brief regarding the Appellant's membership of the AFRC/Supreme Council and his purported participation in the JCE between AFRC and RUF. The Appellant further submits that in most of the crimes for which the Chamber found the Appellant guilty under JCE mode of liability, there was absolutely no demonstration of the Appellant's knowledge of the crimes or how he shared the intent to commit the crimes with the perpetrators. With regard to shared intent, the Chamber sets the standard when evaluating the accused Gbao's culpability.

3. Error relating to Double-standards:

149. The Trial Chamber states that it had no eredible evidence that Gbao received reports regarding unlawful killings; that there was insufficient credible evidence that Gbao failed in his duty to ensure investigations were carried out or that he failed to report "punishments"; that Gbao's ability to exercise powers in areas where Bockarie ordered crimes was doubtful;[399] and that there is no sufficient basis from which to infer that Gbao

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[397] The ICTY Appeals Chamber in ORIĆ has ruled that mere general knowledge of crimes does not satisfy the requisite element. In relation to the relevant issue the Appeals Chamber observed "The difficult y in detecting the necessary Trial Chamber findings on this issue appears to arise from the approach taken in the Trial Judgement rather than examining ORIĆ's knowledge or reason to know of his own subordinate's alleged criminal conduct. The Trial Chamber concentrated its entire analysis on ORIĆ's knowledge of the crimes themselves which were not physically committed by Krdzić his only identified culpable subordinate. " Judgement of 3 July, 2008, paragraph 57

[398] Paras 2156-2173 pp 634-639 of the Trial Judgment.

[399] Paras 2041 - 2042 of the Trial Judgment.

shared with the principal perpetrators the requisite intent to eommit the crimes charged. The Chamber, however, fails to apply this test to the Appellant Kallon. For him, the Chamber sets a much lower culpability threshold in which it holds that his direct involvement in the crimes as well as his presence at the time the crimes were committed was unnecessary for culpability.[400] As a result of the application of a different and prejudicial standard to the Appellant, the Chamber erroneously found him guilty for several crimes in respect of which he was otherwise innocent. Applying 'the Gbao test', the Appellant ought to have been acquitted of the crimes committed in Kailahun.

150. There was no evidence that the Appellant had the ability to exercise any powers in Kailahun where Bockerie reigned Supreme. Moreover many of the serious crimes such as the killing of the 63 Kamajors were committed by Bockarie himself.[401] The Chamber makes no attempt whatsoever to demonstrate how the Appellant would be liable for crimes committed by Bockarie when he exercised no powers at all over Bockarie, when there is no demonstration of any reports of the killings received by the Appellant and when there is no analysis of how the Appellant could possibly have shared the intent to commit these crimes, with the perpetrators.

151. The Chamber therefore erred by adopting a biased and discriminatory approach in assessing the Appellant Kallon's responsibility under JCE for the crimes committed in Kailahun: The appellant notes the Dissenting Opinion of Justice Boutet in holding the following in favour of the Gbao (who was present in Kailahun at the time of Bockarie's crimes and was convicted by the majority for participating in the said crimes through a JCE) that Gbao's presence at the crime scene is not sufficient to infer that he significantly contributed to, or aided and abetted, this horrendous mass execution[402] and that the evidence adduced does not prove that the perpetrators of the killing exhibited any awareness that the Third Aeeused encouraged them to carry out these killings through his inaction.[403] The Appellant submits that this elearly discriminatory approach to the evaluation and application of legal principles occasions serious errors of law and fact that not only leads to a miscarriage of justice but invalidates the conviction. Consequently, the

[400] Para 2004 of the Trial Judgment. (Put differently, Kallon's inaction and absence from a scene of crime may still be a basis for culpability).
[401] Para 2156 of the Trial Judgment.
[402] Para. 10 of Justice Boutet's Dissenting Opinion.
[403] Para. 11 of Justice Boutet's Dissenting Opinion.

Appellant implores the Appeals Chamber to apply the same standard to him since he did not assist in the crimes and was clearly absent at the time the crimes were perpetrated in Kailahun District, in addition to the fact that he was not found to have personally committed any crime in the District[404]. The Defence also implores that judicial notice be taken of Justice Bankole Thompson's opinion on the expansive, opaque and amorphous nature of the JCE pleaded in the Indictment[405] against all the Appellants.

Sub-Grounds 16.3 -16.12 (Unlawful killings (Counts 1-5) in Kailahun) The Appellant argues this Sub-grounds together.

152. The Chamber erred in law and fact by convicting the Appellant under the JCE mode of liability for Unlawful Killings (Counts 1-5) wherein Bockarie killed three civilians and ordered the killing of another 63 civilians in Kailahun Town on 19 February 1998 (Counts 1 to 5); and One *hors de combat* SLA soldier was killed on Bockarie's orders in Kailahun on 19 February 1998 (Count 4). Specifically;[406] it is sumitted that the Chamber erred in law and fact by convicting the Appellant for crimes which were not specifically pleaded in the Indictment and for which he had no or no proper notice. Also, the Chamber erred in law and in fact by finding that the Appellant significantly contributed to the foregoing killings and that the killings were committed in the context of the furtherance of the common purpose of securing revenues, territory and manpower for the junta government and the reduction of elimination of civilian opposition to the Junta rule when there was no Junta in place at the time of the killings.[407] Based on the arguments below, the Appellant argues that this conclusion is legally and factually erroneous:

153. The Appellant notes that the Trial Chamber found that on 19th February 1998, Bockarie personally killed 3 civilians as well as ordered the killing of other 63 civilians in Kailahun Town. The Appellant also recalls the Chamber's finding that 'at the time of Bockarie's crime in Kailahun, Kallon was not present in the District';[408] rather, the Court found that on the 16th February 1998, Scsay joined Kallon at Mile 91 in Tonkolili District in the North, from where they proceeded to unsuccessfully attack Bo in the South.[409] The

[404] Paras. 2157, p.635 of the Trial Judgement.
[405] Para. 23 of Justice Thompson's Separate Concurring Opinion.
[406] Par 2156 p 635
[407] Paras. 2161-2162, pp.636-637 of the Trial Judgement.
[408] Para. 1397, p.418 of the Trial Judgement.
[409] Para. 786, pp.255-256 of the Trial Judgement.

Chamber failed to establish any link between Bockarie's conduct and the "renewed" JCE it crafted after the ECOMOG intervention; nor did it find that Kallon acted in concert with Bockarie or significantly contributed to Bockarie's crimes, if at all, in furtherance of sustaining a criminal alliance with the AFRC.[410] Besides, no nexus was established between Bockarie's stated intention of ridding Kailahun District - the RUF headquarters - of "possible Kamajor infiltrators among civilian population"[411] and Kallon; nor was it shown that Bockarie's said conduct was in furtherance of a JCE he had abandoned in Freetown. The Defence thus avers that Bockarie and his subordinates in Kailahun District at the time of the crimes failed to share with Kallon the requisite *mens rea*. Kallon had since 14th February 1998 ceased to be a member of the AFRC Council. Similarly, by Bockarie's behaviour in withdrawing from the AFRC/RUF Junta alliance before the ECOMOG intervention as well as by mistreating the AFRC Junta Leaders shortly after the intervention and after the killing of the Kamajors in Kailahun, a more reasonable inference from the evidence available to the Court ought to have been that Bockarie's mind no longer worked within the framework of a joint enterprise with the AFRC. In particular and as noted earlier, it was found that shortly after the said killings,[412] Bockarie and Sesay dispossessed both Johnny Paul Koroma and Gullit of diamonds[413] for use by themselves and the RUF, in lieu of using the diamonds as a revenue base to further the Trial Chamber's concept of a renewed joint alliance.

154. The Chamber additionally erred by simply concluding that the Appellant shared with the "other participants" in the JCE the requisite intent to commit the crimes[414] without stating who these participants were and what their roles were in the specific crimes. The Chamber erred in law by holding and implying that circumstances of commission of crimes in other parts of Sierra Leone, including Kallon's *mens rea*, could apparently be transposed mechanically to the crimes in Kailahun.[415] Moreover, the Chamber erred in law and fact by failing to explain whether it found the Appellant guilty under the first or

[410] Similarly, had Kallon per se aided Bockarie in his crimes, he would have been found guilty as an accessory to Bockarie.
[411] Para. 1387, p.414 of the Trial Judgement. Bockarie's conduct in this regard was to protect the RUF rather than to promote a JCE which collapsed with the overthrow of the Junta in Freetown.
[412] Para. 1397, p.418 of the Trial Judgement.
[413] Paras. 801-804, pp.259-260 of the Trial Judgement.
[414] Para. 2163, p.637 of the Trial Judgement.
[415] Paras. 2161, p.636 of the Trial Judgement.

second modes of JCE for the killings in Kailahun by Bockarie[416] and further conflating JCE liability with command responsibility in respect of the crimes committed in Kailahun and thus applying the wrong test in its JCE findings:[417] and holding that Bockarie was a Commander and fighter under the Appellant.[418]

Sub-Grounds 16.13- 16.19 (Sexual Violence Count 1 & 7-9):

155. The Chamber erred in law and fact by finding the Appellant liable for Sexual Violence (Counts 1, 7 to 9) committed against specific individuals and other unknown persons in Kailahun.[419] The Appellant adopts his arguments in relation to "unlawful killings" for these sub-grounds. Further the Appellant submits that the Chamber erred by convicting the Appellant for crimes that were outside the JCE time frame: Having found that the JCE between the AFRC and RUF ended in April 1998, the Chamber erred in convicting Kallon, through the said JCE, of 'sexual violence' against 'an unknown number of other women who were forcibly married to RUF fighters *between November 1996 and about September 2000* (Counts 1 & 7-9)'; for 'enslavement' of civilians *between 30 November 1996 and about 15 September 2000* and for 'forcibly training/enslaving' civilians *from November 1996 to 1998*.[420] It is unclear as to how the 'forcible training of civilians for military purposes'[421] can amount to 'enslavement' at international criminal and humanitarian law.[422]

Sub-grounds 16.20- 16.26 (Enslavement (Count 13) in Kailahun)[423] argued together with Ground 21 of the Notice of Appeal:

156. The Appellant argues these sub-grounds together by adopting the submissions on the erroneous application of JCE in Kailahun above and JCE generally at Ground 2.

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[416] Paras. 2163, p.637, & Paras. 2170-2171, p.638 of the Trial Judgement.
[417] Paras 2170-2171, p.638 of the Trial Judgement.
[418] Para. 2170, p.638 of the Trial Judgement.
[419] Para 2156 p 635 of the Trial Judgement
[420] Para 2156, p.635 of the Trial Judgement, at sub-paras. 5.1.2 (iii) & 5.1.3.
[421] Para 2156, p.635 of the Trial Judgement, at sub-para. 5.1.3 (iv).
[422] See paras. 198-203, pp.63-64 of the Trial Judgement; to qualify for 'enslavement', it must be shown that those who are forcibly trained had powers relating to right of ownership exercised by their trainers over them and that their trainers intended to enslave them: *Kunarac et al.* Trial Judgement, para. 540. The Trial Chamber failed to portray this against Kallon in its Trial Judgement.
[423] Para. 2156, p.635 of the Trial Judgement.

GROUND 16: ERRORS RELATING TO COUNT 1 - TERRORIZING THE CIVILIAN POPULATION:

1. International Law did not recognize terrorism as a crime during the relevant period:

157. The Trial Chamber erred in law by convicting the Appellant on the crime of terrorizing the civilian population. Without undertaking any independent analysis of the relevant considerations, the Trial Chamber adopted the holding in *Prosecutor v. Galić* that terrorism is a recognized crime in international law.[424] Although the Trial Chamber in *Prosecutor v. Brima, Kamara and Kanu* ("*AFRC*") reached the same conclusion and was subsequently affirmed, this Chamber should hold otherwise.[425] Even now, there is no consensus on the definition of "terrorism" in international criminal law,[426] so there could not have been a recognized definition a decade ago, being the relevant time-period.

158. The principle of *nullum crimen sine lege* holds that no one may be convicted or punished if his or her actions did not violate a law in existence when the actions occurred.[427] Because of this, a Trial Chamber may not convict the accused of a crime that, "taking into account the specificity of customary international law and allowing for the gradual clarification of the rules of criminal law, is either *insufficiently precise* to determine conduct and distinguish the criminal from the permissible, or was not sufficiently accessible at the relevant time."[428] More than one judge has noted that the various formulations of the crime of terrorism may violate this principle.[429]

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[424] TCJ, para. 112 (citing *Prosecutor v. Galić*, IT-98.29-A, Judgement (AC), 30 November 2006 (hereinafter "*Galić* Appeals Chamber Judgement").

[425] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-A, Judgement (TC), 20 June 2007, *aff'd* 22 February 2008 (hereinafter "*AFRC*").

[426] *See* Jennifer Trahan, *Terrorism Conventions: Existing Gaps and Different Approaches*, 8 New Eng. J. Int'l & Comp. L. 215 (2002); *see also Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 Geo. L J 119, n. 384 (2008).

[427] International Covenant on Civil and Political Rights, March 23, 1976, 999 U.N.T.S. 171, Art. 15(1).

[428] *Prosecutor v. Vasiljevic*, IT-98-32-T (Trial Chamber), November 29, 2002 para. 193 (emphasis added); *see also Galić* Appeals Chamber Judgement at para. 93; International Covenant on Civil and Political Rights, Art. 15. ("No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, a the time when it was committed.").

[429] (*Prosecutor v. Galić*, IT-98-29-T, Judgement (Trial Chamber), 5 December 2003, Separate and Partially Dissenting Opinion of Judge Neito-Navia, paras. 108-109; *Galić* Appeals Chamber Judgement, Separate Opinion of Judge Shahabuddeen, para. 3). The very fact that there are different formulations shows that terrorism is insufficiently precise. For example, in *Galić*, the crime was termed "terror against the civilian population," but it was referred to as the crime of "infliction of terror" in the *AFRC* Trial Chamber Judgement. (*Prosecutor v. Galić*, IT-98-29-A, 30 November 2006, para. 86; *AFRC*, SCSL-2004-16-T, 22 February 2008 para. 660-671). Here, the crime is referred to as "acts of terrorism." (*See, e.g.*, Trial Judgment, paras. 6, 110, 113, 115, 1032, 1096).

159. United Nations negotiations on a multilateral terrorism convention have been going on since 1996.[430] The closest that "the international community has ever come to adopting a widely accepted general definition of terrorism" is the definition in the International Convention for the Suppression of the Financing of Terrorism.[431] However, this was not agreed upon until December 1999, and entered into force on April 10, 2002.[432] The United Nations Working Group tasked with developing a comprehensive convention on international terrorism following the September 11, 2001 attacks almost reached a consensus on what terrorism was, but the effort ultimately failed.[433] Efforts since then have not been successful. The lack of success in developing a definition of what constitutes terrorism is evident from the treatment of the issue in connection with international and "hybrid" tribunals. When the drafters of the Rome Statute came to agree in 1988 upon a list of war crimes to be covered by the International Criminal Court, they did not include the crime of "terror," "inflicting terror," or "terrorism" regarding either international or internal armed conflict.[434] In 2007, the international community recognized that there was no common understanding of terrorism when the Special Tribunal for Lebanon was created, and consequently had to take its definition of terrorism from Lebanese domestic law.[435] ICTY Judge Nieto-Navia recognized the lack of a definition in 2003,[436] and Appeals Chamber Judge Shahabuddeen did so in 2006.[437]

160. Even if, *arguendo,* terrorism were now sufficiently precisely defined as a crime to satisfy the principle of ***nullum crimen sine lege***, it certainly was not at the times relevant to this case. It was six years *after* the events at issue in this case started that the definition of terrorism in the International Convention for the Suppression of the Financing of

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[430] G.A. Res. 51/210, U.N. GAOR, 51st Sess., Supp. No. 49, Vol. I, at 346, UN Doc. A/51/49. (1996).

[431] Michael P. Scharf, *Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects*, 37 Case W. Res. J. Int'l L. 359, 360 (2005).

[432] International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 109, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc A/54/49 (Vol. I) (1999), S. Treaty Doc. No. 106-49 (2000), 39 I.L.M. 270 (2000), ***adopted*** 9 Dec. 1999, ***entered into force*** 10 Apr. 2002.

[433] Scharf, *supra* note __, at 361.

[434] *See* Rome Statute, Art. 8.

[435] S.C. Res. 1757, Art. 2, U.N. Doc. S/RES/1757 (May 30, 2007).

[436] *Galić*, Separate and Partially Dissenting Opinion of Judge Nieto-Navia, paras. 108-109.

[437] (*Galić* Appeals Chamber Judgement, Separate Opinion of Judge Shahabuddeen, para. 3). Particularly given the backdrop of the U.S.'s ill-defined "war on terror," this Chamber should be exceedingly cautious to endorse a new international crime when international legal experts are clearly divided on the subject and have as of yet no agreed upon definition. (Press Release, Ad Hoc Committee on Assembly Resolution 51/210, Negotiating Comprehensive Anti-Terrorism Convention Opens Headquarters Session, U.N. Doc. L/3123 (Feb. 25, 2008).

Terrorism entered into force. To hold Kallon responsible for a crime that was not recognized as such until after he committed it would violate *nullum crimen sine lege*, an "essential element of the rule of law."

2. The evidence at trial was susceptible to multiple reasonable inferences as to intent:

161. Even if one were to assume that terrorism was a recognized crime during the relevant time-period, the Trial Chamber's conviction is erroneous because the evidence at trial was susceptible to multiple reasonable inferences as to intent. Under the Trial Chamber's own formulation, to be found guilty of terrorism, the accused must have the "specific intent of spreading terror among the civilian population."[438] "In order to draw [that] inference (..), it must be the only reasonable inference available from the evidence."[439] However, the evidence presented at trial was susceptible to multiple inferences on intent.

3. The Evidence Supports the Reasonable Inference that the Attacks in Bo District were Not Intended to Spread Terror Among Civilians

162. The evidence of the attacks in Bo District does not mandate an inference that they were done with the specific intent to spread terror among the civilian population. Regarding the attacks on Tikonko, the Trial Chamber found two bases upon which to convict the accused of terrorism.[440] Neither excludes alternate reasonable inferences on intent. Firstly, the Trial Chamber inferred the intent to cause terror among civilians from the burning of houses during the attacks.[441] However, the Trial Chamber also found that the goal of the attacks was to locate Kamajors believed to be hiding in Tikonko.[442] This supports the alternative reasonable inference that the homes were burned to flush out any Kamajors there. Second, the Trial Chamber found that the two hundred civilian deaths, the mutilation of a corpse, and the fighters leaving Tikonko singing "those people would know us today" supported a conviction for terrorism.[443] Although the mutilation of a corpse is admittedly barbaric, there is nothing to suggest that the fighters mutilated the body as a threat. It is at least as plausible that the fighters mutilated the corpse as a sign

[438] Trial Judgment, para. 113.
[439] *Prosecutor v. Brdjanin*, IT-99-36-T, September 1, 2004, para. 353.
[440] Trial Judgment, paras. 1032-33.
[441] *Id.* at para 1032
[442] *Id.* at para 993.
[443] *Id.* at para 1033.

of disrespect and anger, without intending any message to others. Indeed, if the intent were to send a message, then it would be odd to mutilate only one corpse. Similarly, it is reasonable to infer that the singing after the violence was boasting without any further goal. Finally, the death of civilians in an attack on a suspected Kamajor stronghold may have been incidental to the purpose of the attacks, to eliminate a military threat.

163. The Trial Chamber next found that the burning of thirty homes in Sembehun and the killing of Tommy Bockarie there were acts of terrorism.[444] In doing so, it noted that Ibrahim Kamara was insulted and that troops fired indiscriminately when in the town.[445] Again, this evidence does not require an inference that these acts were done to spread terror. Kamara was insulted as an intimidation tactic during a robbery, and Tommy Bockarie was killed when he refused to give the fighters his cassette player.[446] The clear intent of these actions was to perpetrate theft. This leaves only the fact that "troops discharged their weapons indiscriminately and set houses on fire."[447] This evidence is entirely consistent with troops setting fires as a military tactic and/or to confuse and demoralize armed resistance. Similarly, the shots could have been indiscriminate because of the fighters' lack of training or combat discipline. The Chamber simply lacked sufficient evidence to find that these actions were done with the requisite specific intent.

164. The third incident that the Trial Chamber found supported terrorism convictions was the attack on Gerihun.[448] To find intent, the Trial Chamber relied on the fact that civilians—including Paramount Chief Demby and Pa Sumaila -were killed "in the vicinity of public places" and that the attack on Gerihun was proximate to the attacks on Tikonko and Sembehun.[449] Demby and Sumaila were killed in Demby's home, and their bodies were not found until the next day.[450] The most reasonable inference is that this was not a public execution intended to cause fear, but a political assassination intended to prevent opposition and resistance. Finally, the proximity of the attacks can be reasonably explained as a function of military logistics. Moving troops takes time and resources, and delay between attacks allows targets to prepare. By concentrating attacks in small

[444] *Id.* at para 1035.
[445] *Id.*
[446] *Id.* at para 1007.
[447] *Id.* at para1009.
[448] *Id.* at para 1036.
[449] *Id.*
[450] *Id.* at para 1012-14.

geographie areas and small time spans, attackers gain the element of surprise without having to expend the resources necessary to transport troops over long distances. There is simply no evidenee that these acts were specifically intended to cause terror to eivilians.

4. *The evidence supports the reasonable inference that the attacks in Kenema district were not intended to spread terror among civilians*

165. The Trial Chamber found that the accused were guilty of acts of terrorism arising out of the attacks in Kenema District.[451] First, the Trial Chamber found that the violenee in Kenema Town against Kamajors and those suspected of aiding them, eoupled with the fact that the troops publicized the violence in various ways, required an inference that the crimes were perpetrated to spread terror among the civilian population.[452] The Kamajors were a military threat to the AFRC/RUF troops, so violence against them is entirely consistent with the intent to secure a military victory. Publicizing those acts is similarly consistent with the intent to intimidate Kamajor combatants.

166. Next, the Trial Chamber found that the killing of a civilian challenging AFRC/RUF fighters at Tongo Field, the enslavement of civilians there, and the murder of civilians at the "Cyborg Pit" constituted acts of terrorism.[453] Regarding the civilian who was killed while trying to prevent the fighters from capturing and raping civilian women,[454] although the Trial Chamber characterized this as killing a member of a crowd demonstrating against the AFRC/RUF troops,[455] there was no demonstration.[456] Killing a civilian to prevent him from interfering in the commission of another crime does not require the inference that the specific intent was to spread terror. It is equally probable that the troops shot the civilian because he was threatening to interfere. The fact that the other civilians saw the repercussions of interference and fled does not mean that the troops intended to inflict terror. Moreover, the evidence does not support the inference that the enslavement and murder of civilians was intended to cause terror. There is nothing indicating that the enslavement of some was, as the Trial Chamber found,

[451] *Id.* at paras. 1123-1135.
[452] *Id.* at para 1123-25.
[453] *Id.* at para 1127-30.
[454] *Id.* at para 1080.
[455] *Id.* at para1127.
[456] *Id.* at para 1080.

"intend[ed] to evoke, [*sic*] extreme fear."[457] Civilians were enslaved to provide slave labor to mine diamonds (a profit motive).[458] The most reasonable inference is that subsequent killings were intended to maintain the senior commanders' monopoly over mining in AFRC/RUF areas against encroachment by junior commanders and not to terrorize the civilian population.[459]

5. *The evidence supports the reasonable inference that the attacks in Kailahun district were not intended to spread terror among civilians*

167. The Trial Chamber found that the killing of Kamajors and the sexual violence in Kailahun District constituted acts of terrorism because they were performed with the specific intent to cause terror in the civilian population.[460] This finding fails to take account of the most reasonable inference, that the Kamajors were killed because they were perceived as a military threat, and were killed to prevent them from fighting against the AFRC/RUF, not to terrorize civilians. This is similar to the Trial Chamber's own holding that the murder of a woman in the Kono District was not terrorism because the "killing was done on suspicion of her possible collaboration with ECOMOG."[461] Furthermore, there is no evidence whatsoever that the particular acts of sexual violence committed in the Kailahun District were done to terrorize the population. The evidence equally supports the inference that the sexual violence was done for the individual perpetrators' own sexual gratification.

6. *The evidence supports the reasonable inference that Kallon lacked the intent to spread terror:*

168. The Trial Chamber found that Kallon shared the intent of the JCE to commit the acts of terrorism committed in Bo, Kenema and Kailahun Districts.[462] To share this intent, one of his principle aims must have been to spread terror among the civilian population.[463] However, the evidence, as demonstrated above, was susceptible to multiple reasonable inferences. There was no evidence that Kallon even knew about these particular acts so

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[457] *Id.* at para 1130.
[458] *Id.* at para1118.
[459] *Id.* at paras. 1082-87
[460] *Id.* at paras 1491, 1493
[461] *Id.* at para.1344.
[462] *Id.* at para. 2008, 2056, 2163.
[463] *Id.* at para. 121.

any finding of the requisite intent was unsupported by the evidence. Moreover, even assuming that Kallon knew about some of the atrocities, the evidence could also reasonably lead to the inference that he chose to ignore their commission—even those done with the requisite specific intent—to avoid conflict with other high ranking members of the RUF who condoned the actions. The Trial Chamber assumed that Kallon had the specific intent to spread terror without evidence of that. The Appeals Chambers should therefore reverse his convictions on this charge.

7. Kono- Error relating to insufficient proof and failure to make findings (Reasoned Opinion)

169. Was under an obligation to make findings of fact that permitted this Chamber to be able to review the convictions.[464] However, it failed to do so in connection with the terrorism convictions in Kono District. The Trial Chamber found that there was "an overwhelming amount of evidence that point[s] to the execution of policies that promote violence, targeted civilians, civilian object in order to spread terror among the civilian population."[465] The Trial Chamber did not consider any of the alternative reasons for the conduct or explain its rationale for finding that every one of the acts mentioned was specifically intended to cause terror.[466] As a result, the Trial Chamber deprived the accused of a meaningful review on appeal.

Sub-ground 17.3- 17.4 Error relating to non pleaded crimes to support count 1-2 and non-pleaded locations

170. The Appellant submits that "burning" is not a crime pleaded in the Indictment: The Trial Chamber erred in law to have convicted the Appellant of the offences under Count 1 (acts of terrorism) under a JCE[467] when "the burning of civilian houses" per se was not pleaded as a prohibited conduct or crime under the Indictment. What was pleaded under Count 14 was the conjunctive acts of "looting and burning" defined or described in the Indictment as "Pillage". As noted in the Indictment, only specific crimes or offences, and not merely events or occurrences not amounting to crimes, can form the basis of Counts 1 and 2 of the Indictment. The Indictment categorically accuses the Appellant of 'committing

[464] *Prosecutor v. Prlić*, IT-04-74-AR73.4, 11 May 2007 para. 25 (noting that "a Trial Chamber must provide reasoning in support of its findings on the substantive considerations for a decision").
[465] Trial Judgmentm para 1342.
[466] *Id.* at paras. 1341-43.
[467] Para. 1975 of the Trial Judgement.

crimes set forth in paragraphs 45 through 82 and *charged in Counts 3 through 14* as part of a campaign to terrorize the civilian population of Sierra Leone".[468] Consequently, it is contended that whilst Pillage, as a crime under the Indictment, may support Counts 1 and 2, if found beyond reasonable doubt, 'acts of burning' per se cannot.

171. The chamber further erred in law by relying in the burning of civilian homes in "Rembodu and Koidu town" not pleaded in the indictment. This occasioned prejudice to the Accused preparation for defence as he had no notice of these occasions and crimes.[469]

GROUND 17: ERRORS RELATING TO COUNTS 3-5:

172. In order to argue this ground, the Appelllant adopts and relies on his arguments and submissions in Grounds 2, 8, 11 and 12 in their entirety.

GROUND 18: ERRORS RELATING TO COUNTS 6-9:

173. Also, in order to argue this ground, the Appelllant adopts and relies on his arguments and submissions in Grounds 2, 8, 6, 11, 13 and 15 in their entirety.

GROUND 19: ERRORS RELATING TO COUNTS 10-11: PHYSICAL VIOLENCE:

Sub-ground 20.1 conviction on crimes and locations not charged in Kono

174. Although the Appellant was convicted of Mutilations in various locations in Kono District, ineluding Tombodu, Wendedu, Penduma, Yardu, Kayima and Sawao, the indictment specified only 3 locations, namely, Tombodu, Kaima and Wendedu. Sawao was later added in the Prosecution's Supplemental Pre-trial Brief.[470] The Appellant relies on the general submissions in relation to JCE in Kono in Ground 11 as well as Ground 2 on substantive JCE issues to argue this ground. Further, the Appellant submits that the Chamber erred in law and fact by convicting the Appellant based on loeations not pleaded in Counts 10-11; the Chamber thus erred by basing its conviction on additional locations such as Penduma, Yardu, Kayima. These additional locations occasioned prejudice to the accused's preparation of his defence. The prejudice was never cured.

[468] See Para. 44 of the Indictment (emphasis added).
[469] Para 2064 p 610 of the trial judgement
[470] Para 417 of the supplemental pre-trail brief

1. Error relating to Lack of Notice

175. The Chamber erred by convicting the accused for the amputation of hands of three civilians rebels led by staff Alhaji.[471] The Appellant submits that he had no sufficient notice regarding this crime. Further, there is no evidence that the accused had any knowledge about the commission of this crime or was in any way linked to the perpetrators of the crime. The Chamber failed to demonstrate how the accused shared with the perpetrators the intent to commit the crime. The Appellant further submits that he had no notice regarding the flogging of TF1-197 and his younger brother[472] and therefore suffered prejudice in the preparation of his defence. Further the Chamber did not establish how the accused shared with the perpetrators the intent to commit this crime which he knew nothing about and when the perpetrators were neither under his eontrol or authority. Regarding the crimes in Wendedu, Kayima, Sawao, Penduma, Yardu[473] the Appellant reiterates his submissions above.

Sub-ground 20.2 (Physical violence count 11) Kenema

176. The Appellant relies on the general submissions on JCE in relation to Kenema. Further, the Appellant submits that there was no proof beyond a reasonable doubt that the aceused was in any way responsible for the beating of TF112, the physical violence meted out on TF1-129 by rebels ineluding Sesay.[474] There is absolutely no evidence that the accused knew about the commission of these crimes, or that, he in some way contributed to the commission of these crimes. There is no evidence, and the Chamber refers to none, that the accused shared with the perpetrators the intent to commit the crimes in question. The Appellant further submits that he had no notice regarding these allegations not pleaded in the indictment and which were not in either the Pre-trial Briefs nor the opening statement.

GROUND 20 : ERRORS RELATING TO CONSCRPTION, ENLISTMENT AND USE OF CHILD SOLDIERS (COUNT 12)

177. The Appellant argues the sub-grounds relating to this ground together.

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[471] Paras 1172, 1311
[472] Par 1173
[473] Paras 1314-1319
[474] Paras 1109-1112

1. Essential findings relating to the Appellant's alleged planning of the use of child soldiers

178. In its disposition, the Chamber finds the Appellant guilty of planning the use of child soldiers (pg 683). Under the section on responsibility of the accused Kallon the Chamber apparently relies on four main aspects to arrive at his conviction.[475] Kallon being a senior RUF commander during the attack on Koidu in February in which children were abducted "in large numbers" to be sent to RUF camps, in June 1998 Kallon and Sesay giving orders for children to be trained at RUF camps, Kallon bringing a group of children to Bunumbu for training in 1998 and Kallon allegedly being the senior RUF commander on 3 May 2000 at Moria near Makeni where child soldiers were used in the ambush of UNAMSIL Forces.

2. Defective indictment in relation to the accused Kallon's alleged participation in conscripting and Use of Child Soldiers

179. The indictment only generally states that the AFRC/RUF was involved in the abduction of boys and girls who were given combat training and used in active fighting[476] and that the AFRC/RUF routinely conscripted, enlisted and or used boys and girls under the age of 8 of 15(sic) to participate in active hostilities[477] and that by their acts or omissions in relation "to these events" (there is no indication as to which specific events the indictment refers to) all the 3 accused are individually criminally responsible for the crime of conscription and use of Child soldiers. The indictment provides no specific details regarding the role of the accused Kallon. This ambiguity is compounded by the expansive timeframe for the alleged crime which is "all times relevant to this indictment". Further, the crime is supposed to have been committed "throughout the republic of Sierra-Leone".

180. The Appellant submits that this clear defect in the indictment occasioned irreparable prejudice to the accused Kallon as he was not able to effectively prepare his defenee. He was not put on any proper notice regarding the case he was supposed to answer in respect of this count.

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[475] Paras 2231- 2233
[476] Para 43
[477] Para 68

181. In a similar factual scenario the ICTR Appeals Chamber in *Niyitegeka* has stated that an indictment ought to delve into particulars The Chamber stated as follows:

> "One Prosecution witness described Biesero as "a large area", a Proseeution filing in another case refers to it as a "vast region with undulating hills and plains." A general allegation that the Appellant led others in several attacks in a "large area" at "various locations and times throughout April, May and June 1994" does not adequately inform the Defence that the Prosecution intends to charge participation in a specific attaek at Kivumu at the end of April or beginning of May 1994 during which the Appellant personally shot at refugees. The indictment must "delve into particulars" where possible; generalized allegations of attacks in Bisesero do not suffice".[478]

182. The ICTR Appeals Chamber was dealing with a somewhat better scenario-a period of 3 months and a much smaller and speeified geographical location in Rwanda and yet ruled the indictment defective, whereas in the present ease the accused is charged with committing the offenee over a period of 4 years and throughout Sierra- Leone without any particulars at all.

183. On the issue of eure, the Appeals Chamber in Niyitegeka ruled that mere service of witness statements did not suffice.

> "Furthermore, no attack at Kivumu at the end of April or beginning of May is concluded in the summary of witness GGY's evidence in the Prosecution's Pre-Trial Brief. Regardless of whether the witness statement referred to the Kivumu attack or not, the Appellant could well have concluded from the failure to mention Kivumu".)[479]

184. The Appeals Chamber is urged to find that mere service of witness statements did not cure the defect in the Kallon indictment in relation to eount 12.Moerever, the Appellant submits that since the Supplemental Pre-trial brief elearly states that any evidenee diselosed was to provide notice to the aceused Kallon in relation only to JCE, the accused had no notice that witness statements were meant to provide notiee regarding planning in respeet of which the Chamber convicted the accused.

185. Significantly, the conduet for which the Chamber convicted the aceused constitutes personal commission of crimes under count 12 of the indietment. Consistent with the Trial Chamber's own conclusions regarding the threshold for pleading aets of personal commission, and its finding regarding the failure by the Prosecution to proffer any explanation to plead aets of personal commission in the indietment as required, the

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[478] Eliezer Niyitegeka V Prosecutor, ICTR 96-14-A Par 217.
[479] Para 221

Appellant urges the Appeals Chamber to find that the accused was irreparably prejudiced by the non-pleading of his alleged criminal conduct under count 12.

186. The Appeals Chamber is also respectfully urged to note that the Trial Chamber adopted an inconsistent and double standards approach in its evaluation of the effect of a defective indictment on the accused Kallon's ability to defend himself in relation to count 12. The Chamber acknowledged that the indictment was defective in relation to personal commission by the accused of some crimes under count 12[480]. However it proceeded to find the accused guilty under the planning mode of liability based on other crimes he is alleged to have personally committed and in respect of which the indictment was equally defective. The Chamber thus erroneously relied on the testimonies of witnesses TF1-263,TF1-141,Dennis Koker,TF1-366,TF1-371,TF1-045,TF1-045,TF1-060 and Edwin Kasoma[481] which made allegations of personal commissions not pleaded in the indictment.

187. Although the Supplemental pre-trial brief provided some details regarding the accused Kallon's role in the conscription and use of child soldiers, many of the details were equally vague[482].

188. Further it is alleged that the accused was present in Kailahun with armed child soldiers as young as 10 years. No specifics of the period are given.[483] This lack of specificity occasioned irreparable prejudice to the accused. He was not able to determine the exact nature of the case he faced and was thus unable to effectively prepare his defence.

3. *Error relating to elements of planning*

189. The Trial Chamber found that the accused Kallon was guilty of planning the use of children under the age of 15 by the RUF to actively participate in hostilities in Kailahun,

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[480] See for instance Para 2221 p 651 of the judgment

[481] Paras 1629-1700

[482] For instanee it states that the accused's responsibility could be inferred from his position of responsibility and command within the AFRC/RUF without specifying the period and the alleged "position of responsibility and command". Further that he was present at military camps where children underwent training without any specification of the period and the location of the military camps .Further that he was present during attacks where child soldiers were used without specifics on dates and locations of these attacks and further that he was present at "Cyborg Pit in Kono" District where Small Boys Units were used without any specification of the period. No evidence was adduced during trial regarding the commission of any crimes at a place known as "Cyborg pit in Kono"

[483] Par 467 of the supplemental pre-trial brief

Kono, and Bombali districts between 1997 and September 2000.[484] The law on planning has been spelt out by this Appeals Chamber as follows

> "... While there must be a sufficient link between the planning of a crime both at the preparatory and the execution phases," it is "sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct." The Appeals Chamber agreed with the Trial Chamber that the *mens rea* "requires that the accused acted with direct intent in relation to his or her own planning or with the awareness of the substantial likelihood that a crime would be committed ... in the execution of that plan."[485]

190. As the Appellant will illustrate *infra* the Trial Chamber failed to demonstrate that the accused Kallon planned the use of child soldiers and that his planning was a factor that substantially contributed to the crime. Further the Trial Chamber failed to find that the Prosecution had not proved beyond a reasonable doubt, the accused Kallon's mens rea in relation to this crime. The Appellant submits that rather than require of the Prosecution to prove his case beyond a reasonable doubt, the Chamber erroneously convicted the accused simply because of his being an officer of the RUF movement which the Chamber found had a system of forced recruitment and use of child soldiers.[486]The Trial Chamber ignored its own finding in CDF to the effect that mere occupancy of some position of responsibility in an organisation involved in culpable conduct does not in itself attract criminal responsibility .

191. In that case the Chamber had held that

> ".. the presence of Fofana at Base Zero where child soldiers were also seen is not sufficient by itself to establish beyond reasonable doubt that Fofana had any involvement in the commission of these criminal acts under any of the modes of liability charged in the Indictment."[487] The trial record contains ample evidence that the Civil Defence Forces (CDF) as an organization was involved in the recruitment of children under the age of 15 to an armed group, and used them to participate actively in hostilities, however this does not demonstrate beyond a reasonable doubt that Fofana was personally involved in such crimes." [488]

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[484] Para 2234 p 654
[485] Para 301 p 97 of the trial judgement
[486] See for instance Paras 1614-1628,2223-2225,2231,2233)
[487] Para 961 pp 284
[488] Para 962 pp 285

4. Kallon being a senior RUF Commander during attack on Koidu 1998 when Children were allegedly abducted in large numbers and sent to RUF camps

192. Regarding the alleged seniority of the accused Kallon during the attack on Koidu Town in February 1998 the Chamber fails to demonstrate through any evidence, Kallon's level of seniority and eommand position at the material time and how that per se could have played a substantial role in the crime. It is noteworthy that the indictment states that at this material time, Kallon was a Deputy Area Commander, whieh, admittedly could be- if established a senior position. However, no evidenee was ever addueed that Kallon was Deputy Area Commander at the time or that the position ever existed.During the Prosecution case the Prosecutor sought to contradict the indictment by alleging the accused was overall commander in Kono thus contradicting the indictment and occasioning prejudice to the Appellant[489]. Similarly, the Chamber attributes un-explained seniority to Kallon without reference to the indictment thus compounding the prejudice.

193. The Appeals Chamber is urged to find that the Trial Chamber erred in basing its finding on the use of soldiers partly on the mere unsupported contention that the aceused was a senior commander in relation to Kono and Kailahun . Moreover, leaving aside the issue of seniority, it is far from clear how mere presence renders the accused Kallon guilty when the exact nature of Kallon's contribution in the alleged planning of the use of child soldiers is not credibly established beyond a reasonable doubt.

5. Error relating to conclusions on Appellant's alleged role in planning- Kono

194. The evidence considered by the Chamber [490] to conclude that Kallon made a substantial contribution in the abduction of a large number of children to be sent to RUF camps is extremely tenuous and does not demonstrate Kallon's culpability beyond a reasonable doubt. Indeed the Chamber does not refer to any evidence on record to support its alarmist conclusion of "a large number of children abducted" during the attack on Koidu. The Chamber erroneously relied on TF1-263 who alleged that during the month he was abducted thcy were gathered and taken to PC ground where about 200 of them assembled

[489] Sec For instance Transcript of 29 April 2008 p 44 where Prosecution took the position that the Appellant was overall commander in KONO

[490] (Paras 1629-1632)

and General Issa asked Morris Kallon to select "people" to go for training in Kailahun.[491] Among those who were selected were the witness' age group and some were taller than him.[492] Those others selected were 6. [493]

195. The Appellant submits that his personal role in the conscription of the witness and his colleagues is a material fact that ought to have been pleaded in the indictment. This defect was never cured.

6. No proof of witness' age and failure to identify the Appellant-Kono

196. The Chamber erred in failing to find that the Prosecution had not proved beyond a reasonable doubt that at the time TF1-263 was abducted he was under 15 years of age and failing to acknowledge that from the record there was suffieient doubt created by the witness' contradictory testimony on his age. Although in direct testimony and during re-examination the witness stated that he was 14 years at the time of abduction, during cross-examination he clearly confirmed that he was born in 1983 and hence 15 years in 1998 when he was abducted.

> Q: is it right in fact that you were born in 1983 or you just don't know?
> A: Aetually my date of birth is 1983. It was an error on my side just now.
> Q: Is it the reality, Mr. Witness, that you're not sure if it was 1983 or 1984?
> A Yes, my date of birth is 1983[494]

197. Since the witness could not tell the month he was born, he could have been 15 in February 1998.Any doubt regarding the age of the witness ought to have been resolved in the accused's favor. When the witness testified later in the Taylor trial he was not able to tell his age. [495]because the age which he had provided in his witness statement turned out to be different from that on his birth certificate and which demonstrated he could not have been a child combatant within the meaning of the Statute of the Special Court. The witness blamed his father both for not knowing his own age as well as concealing his birth certificate [496]

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[491] Transcript of 6 April 2005 p 28-30
[492] Transcript of 6 April 2005 p 29
[493] Transcript of 6 April 2005 p 30
[494] Transcript of 7 April 2005 p47
[495] Charles Taylor Trial, Transcript dated 7 October ,2008 page 18009 ,
[496] Charles Taylor Trial, Transcript dated 7 October 2008 page 18014, line 20-8-18017

7. *Error relating to identification of Appellant by TF1-263*

198. The Chamber further failed to find that the Prosecution had not established beyond reasonable doubt that witness TF1-263 suffieiently identified the accused Kallon. This was raised by the Defence during cross-examination. From the witness's testimony it was not established that the person he named as "colonel Morris Kallon" and whom he met during the rainy season in Koidu was indeed the 2nd aceused.[497] In cross, Counsel for the Appellant put to the witness that there were several Kallons in Kono at the time but the witness stated he knew none of them.[498] During further cross examination it was elear, the witness did not know the accused Kallon at all, never spoke to him at the time and never spoke to or saw him again subsequently.[499] The witness admitted he knew nothing about the RUF. [500]

8. *Error relating to Payments to witness TF1-263*

199. Witness TF1-263 received a total of Le 1,456,000 between September 2004 and April 2005.[501] The Defence submits that this huge sum of money, much of it not reasonably related to any legitimate witness expenses create reasonable inference that the testimony of this witness was motivated more by economic gain as opposed to giving truthful testimony.

9. *Error relating to the evaluation of the testimony of witness TF1-141*

200. The Chamber erred in relying on the testimony of witness TF1-141 to conclude that the accused Kallon was present during their abduction.[502]The abduction of witness TF1-141 and any alleged role of the accused Kallon thereof is a material fact that ought to have been pleaded in the indictment. The omission which was never cured caused prejudice to the accused as he was not in a position to effectively defend himself[503].Moreover, mere

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[497] Transcript of 8 April 2005 p 101 lines 28-29, p 102
[498] Transcript of 11 April 2005 pp 34-35
[499] Transcript of 11 April 2005 p 36
[500] Transcript of 11 April 2005 p 38
[501] Transcript of 11 April 2005 pp 21-22, see also exhibit 22
[502] Para 1630
[503] Indeed, the Supplemental-pre-trial brief summary of this witness's statement makes neither mention of the accused Kallon nor any issues relating to the use of child soldiers.The Chamber does not address this issue.Moreover the testimony of this witness was not corroborated and in relying on it, the Chamber contradicted its

presence, without more does not demonstrate a crime or substantial contribution to the commission of a crime.

201. Further, no reasonable trier of fact would rely on the testimony of witness TF1-141.The Chamber not only failed to find the testimony of this witness wholly implausible but also made several contradictory and irreconcilable conclusions on material aspects of the prosecution case based on the testimony of the witness. At paragraph 1636 of the judgement, the Chamber concluded that in February 1998 a number of young boys, girls and young women from Koidu and other locations in Kono among who was TF1-141, then 12 years old, were taken to camp Lion for training. At paragaphr1645, the Chamber concluded that after graduation from camp Lion, TF1-141 was sent to Baima in Kailahun district after which he was transferred to Benduma in the same district where he served as security guard for the camp from approximately February to December 1998.

202. This testimony is in direct contradiction with the Chamber's own conclusion elsewhere placing the witness in Kono at the same time he is supposed to be either training at Camp Lion in Kailahun or serving as Security guard in Benduma in Kailahun.[504] The Chamber does not explain how it makes two contradietory and irreconcilable conclusions regarding the location of witness TF1-141 and relying on both to the prejudice of the accused. The appellant submits that none of the accounts given by witness TF1-141 was plausible and no reasonable trier of fact would rely on irreconcilably contradictory versions of a witness to base a finding of guilt.

10. Children abducted in Kono in 1998 aged 10-15 years- trained to act as spies[505]

203. The Chamber relied on witness TF1-071 to draw this conclusion on which basis the Chamber apparently partly relied to convict the Appellant. There was no credible

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own decision requiring corroboration of the witness' testimony. There is no other testimony on the record regarding the abduction of the witness and eight others in the presence of Kallon.-Supplemental Pre-trial Brief 2 April 2004

[504] For instance at paragaphr 1675 the Chamber concludes that during Muster Parades at the Guinea Highway (in Kono) in February/March 1998, Kallon would instruct TF1-141, who was 12 years old and other SBUS to participate in food finding missions. At paragraph 1216 the Chamber also places the witness at the same Guinea High way in Koidu where he is supposed to have seen the Appellant give instructions "every morning" at muster parades. At paragraph 1743 the Chamber further contradicts itself by placing TF1-141 in Kono district between February and April 1998 where he was involved in food finding missions and further at paragraph 1153, regarding alleged rape of women at Guinea Highway in Koidu in March 1998.

[505] Para 1632

demonstration by TF1-071 that Kallon was in any way involved in the planning of the use of child soldiers. The Appellant also had no sufficient and or proper notice that the testimony of this witness would implicate him. The summary of the witness' testimony attached to the supplemental Pre-trial brief makes no mention at all of the accused Kallon's involvement in the crime of child soldiers.

204. Regarding TF1- 334 who testified that in March 1998 in Kono, children aged between 8-12 years of age were forced to carry food for the troops or were subsequently trained to join the movement (para 1631) the witness did not in any way implicate Kallon. There is absolutely no evidence that Kallon was involved in the planning of the abduction of children aged between 8-12 years of age from Tombodou, Yomadu and other surrounding villages by AFRC and RUF soldiers (1631) or that he knew about these abductions. These specific abductions were never pleaded in the indictment and Kallon did not have any form of notice that this evidence would be used against him. Without such notiee Kallon could not and did not defend himself against this evidence and has thus suffered prejudice. Regarding the alleged subsequent training of these children to join the movement, (1631) the witness provided no evidence of the alleged subsequent training including where it took place, the number of children involved, the basis for concluding they were children, the duration of the training and any involvement of Kallon in the alleged training.

11. Kailahun – Training of Children by RUF

205. The Chamber concluded that the RUF used the Bayama training base, 23 miles from Kailahun to train abducted "boys and girls" who were placed under the command of CO Jah Glory and his Deputy Morris Kakwa. This training base was subsequently moved to Bunumbu close to the RUF headquarter in Giema. There is absolutely no evidence that Kallon was in any way involved in the decision making processes that established the two training bases. There is no evidence that the accused was at all involved in the planning of the abduction of these "boys and girls" and their subsequent training in Bayama or Bunumbu. Indeed at the material time, Kallon was a fairly junior offieer holding the rank of Major and occupied no significant position of responsibility within the RUF hierarchy that would have enabled him to substantially participate and eontribute to the alleged

planning of abduction and training of child soldiers at Bayama. Indeed the Chamber points to no evidenee that Kallon was part of the "substantial degree of planning condueted at the highest levels of the RUF organization"[506] Significantly, the Chamber refers to boys and girls as those trained. There is no showing that these boys and girls were under the age of 15 years.

206. Witness TF1-362 who occupied an important position in the training of RUF combatants before and during the indictment period provided information about the command structure within the training unit of the RUF and gave a detailed account about training procedures and recruitment of combatants including those involded but did not mention the Appellant in any way as being part of either the recruitment and or training of child soldiers.Indeed she did not give any testimony implicating the accused as being present at training bases as alleged in the Supplental Pre-trial Brief.[507]

207. Regarding any alleged role of Kallon in the abduction and training of "Boys and Girls" at Bayama and Bunumbu, this was a material fact that ought to have been pleaded in the indictment.[508] The only evidence suggesting a tenuous link between Kallon and a venue where children were trained was rejected by the Chamber.[509] Moreover this evidence is not strietly in tandem with the Supplemental Pre-trial Brief which gives notice of Kallon being present at Camps where children were trained rather than bringing children for training at those camps.

208. The Chamber found that the RUF and AFRC forces used children in combat in Kailahun district.[510] The Chamber relied on the testimony of TF1-093.The witness however never implicated the accused Kallon in any way in the crime. Moreover, as the Chamber found at Para 1649, TF1-093 was 15 years of age when he started fighting for the RUF. There is insufficient basis to conclusively determine the ages of the children who the witness

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[506] Para 2225
[507] Transcript of 20 April 2005 pp 22-51 and Transcript of 22 April 2005 pp 2-23.
[508] This omission occasioned prejudice to the accused as he had to defend himself against these general and imprecise allegations. The omission was compounded by the fact that the Supplemental pre-trial brief gave notice concerning Kallon's presence at training bases where children were trained as opposed to his participation in abductions and training of the children. Moreover, no evidence was addueed of Kallon's presence in either Bayama or Bunumbu.Also, this testimony related to the personal commission of a crime by the aceused Kallon whose material particulars were not pleaded as required and whieh was never cured by any elear, timely or consistent information in post-indictment pleadings or disclosures. The Supplemental pre-trial brief only states that "Kallon was present at eamps where ehild soldiers were trained".
[509] Para 2221
[510] Paras 1649-1653

mentioned were between 8 and 17 years of age. The witness discussed the training of child soldiers at a plaee called Bagalagao in Kailahun which is not pleaded in the indictment and in respect of which the accused Kallon had no notiee.[511] There is no evidence that the accused Kallon either participated in the design and maintenance of the system of forced recruitment of children or their use in Kailahun.

12. Error Relating to Sesay and Kallon giving orders for Children to be trained at RUF camps (Para 2232)

209. The Chamber erred by relying on the allegation that Sesay, Kallon and Superman gave orders that "young boys" should be trained to become soldiers.[512] There is no crime disclosed here. As the Chamber itself concludes, the boys to be trained were 15 years of age and above. Moreover no reasonable trier of fact would rely on such vague, general and unsubstantiated allegations to conclude that the Appellant gave an order for children to be trained. It means nothing to say Sesay, Kallon and Superman gave orders-were the orders given collectively on one specific day?, when and where were these orders given? Were the said orders executed? How many children were trained as a result of these orders and wherc were thcy trained and by who? These are pertinent issues which the Trial Chamber, in its apparent haste to convict, does not bother to address.

210. No reasonable trier of fact would rely on the testimony of witness TF1-366 to conclude that the accused Kallon was involved in the sending of SBUs for training. His testimony was vague, imprecise and lacking in all essential particulars. He stated that the accused Kallon gave him the order to scnd young boys to Kailahun for training and that "Superman also gave him the order and even Sesay sent messages."[513] Regarding their age the witness stated that somc of them were 15 years, but "many of them were SBUs."[514]The witness did not explain how he arrived at the age of 15(and not 14 or 16) or how he determined the ages of the SBUs. Further the Chamber erred by relying on the

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[511] Transcript of 29 November 2005 p 89

[512] Para 1638

[513] Transcript of 8 November 2005 p 67 However he did not provide particulars when this happened, how many "young boys" were involved and where exactly they were trained and who may have trained them and for what specific purpose. This caused prejudice to the accused as he could not defend himself against allegations lacking in essential details and particulars.

[514] Transcript of 8 November 2005 p 67

testimony of this witness which was not corroborated[515] by any or any credible testimony.[516] It was clear that the witness's mission was simply to ensure the accused Kallon was implicated in the crimes regardless of the absurdity of the allegations he made against the accused[517].

13. Error relating to Kallon bringing juveniles under 15 to Bunumbu[518]

211. Firstly the Chamber erroneously relied on the testimony of Dennis Koker who alleged that "in 1998" he saw Morris Kallon bring juveniles under 15 to Bunumbu for training.[519] The Chamber concluded that although Kallon "may have" personally conscripted children by bringing them to Bunumbu for training ,the prosecution had failed to plead this material information resulting in prejudice to the accused and therefore this evidence would not be used to support a finding of guilt for personal commission under 6(1).[520] Having made this finding, the Chamber erred in law by relying on the same evidence to support its finding that Kallon participated in the planning of the conscription and use of child soldiers. The Chamber failed to appreciate that planning too is a form of personal commission under 6(1) requiring a stringent form of pleading.

212. Secondly, the Chamber erred by failing to find that there was no proper basis on which to conclude that children that the accused Kallon allegedly brought to Bunumbu for training were under 15 years of age. This submission is further fortified by the Chamber's own finding that sometime in June 1998, Kallon, superman and Sesay issued orders that "young boys" should be trained to become soldiers and handle weapons at Bunumbu and that these boys were 15 years of age and above.

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[515] At Para 546 the Chamber stated that it would not rely on the testimony of the witness on the acts and conduct of the accused unless where corroborated in a material aspect by a reliable witness. There is no witness or any credible witness who corroborates this witness regarding the allegation that Kallon sent SBUs for training

[516] The ICTR Appeal Chamber in the "Media" Trial has defined corroboration to be when "...one *prima facie* credible testimony is compatible with the other *prima facie* credible testimony regarding the same fact or a sequence of linked facts...".Nahimana et al v Prosecutor Appeals Case No.Ictr -99-52A, Judgement 28 Nov 2007 Para 428.This logically means that testimony which has been declared to require corroboration cannot corroborate another testimony that too requires corroboration.

[517] For instance he stated rather stupidly that Kallon was the commander for the "whole of the RUF even for Superman." That superman was the deputy to Morris Kallon.[517]No reasonable trier of fact would rely on the uncorroborated testimony of this witness to conclude Kallon's involvement in the planning of use of child soldiers.See Transcript of 8 November 2005 p 14

[518] Para 1638

[519] Para1638

[520] Para 2221

14. Bombali:- Kallon being the senior RUF Commander on 3 May 2000 at Moria near Makeni where child soldiers were used in the ambush of UNAMSIL Forces

213. The Chamber relies on circumstantial evidence to conclude that the accused Kallon was the Commander at Moria, a small village near Makeni, where Zambian UNAMSIL personnel were abducted[521] 1834-1858 and where fighters as young as 10 years were allegedly among those involved in the abduction.[522]

214. Firstly, the Chamber erred by relying on this evidence to convict Kallon as it constitutes personal commission of a crime which according to the Chamber's own evaluation should be subjected to a stringent pleading standard[523] Although the Chamber promised to consider whether the Prosecution had cured each allegation of personal commission by subsequent communications, it never made this consideration in respect of the personal commission by Kallon of the abduction of UNAMSIL soldiers at Moria during which child soldiers were allegedly used. The presence of Kallon in Moria when child soldiers are supposed to have been used is an act of personal commission which ought to have been pleaded and which was not curable or was not cured by any clear, timely and consistent information. The only information provided by supplemental pre-trial brief relates to Kallon being present during attacks where child soldiers were used.[524] This cannot constitute clear information regarding his role as no details of where and when the attacks took place is provided. Moria is not mentioned as a crime location- a material fact- either in the indictment or the pre-trial briefs. Regarding Bombali District, where Moria is allegedly located, the Supplemental pr-e-trial brief charges Kallon only for the use of child soldiers in food-finding missions and his alleged attempt to prevent the repatriation and transfer of 90 child combatants from Makeni to Freetown[525]

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[521] Para 1638
[522] Para 1687
[523] See for instance 2221 where the Chamber ruled that Prosecution had failed to plead Kallon's alleged bringing of Children to Bunumbu and that mere disclosure of documents containing such evidence did not constitute clear, timely and consistent notice of material facts pertaining to alleged personal commission of the crime by the accused and that this failure to provide adequate and sufficient notice occasioned material prejudice to the defence in the preparation of its case. See also par 399 where the Chamber acknowledges the indictment failure to plead particulars in relation to allegations of personal commission).
[524] See Para 467 c of the Supplemental Pre-trial Brief pp 154-155
[525] Ibid Para 467 h and j

Significantly, the charge of use of child soldiers for food-finding missions was generally dismissed by the Chamber as not amounting to active participation in hostilities.[526] The Chamber makes no findings regarding Kallon's alleged role in preventing the repatriation and transfer of 90 child combatants.

215. In consequence, the Chamber convicted Kallon for a crime for which he had no notice while it either made no findings or dismissed those for which he had some notice in respect of the use of child soldiers in Bombali district.

15. No reasonable trier of fact would rely on the testimony of Kasoma

216. The testimony of witness Kasoma apart from being inconclusive regarding Kallon's involvement in the abduction of the Zambians, did not provide any notice to the accused Kallon regarding the use of child soldiers at Moria[527].

16. Error relating to circumstantial evidence

217. There is no sufficient basis to conclude that because Kallon may have received a general warning and instructions from Sankoh regarding disarmament,[528] and or because he is

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[526] Para 1773 pp 517-518 of the judgement

[527] The witness made three post-indictment statements to the Prosecutor. His first statement was made on 25 June 2004 in Zambia and he related the events without mentioning the name of Morris Kallon. In this statement, he said the events in which he was abducted took place near Lunsar on 4 May 2000 and not Moria. The decision on motion of acquittal stated that the events took place near Lunsar. However Kallon was convicted on the events at Moria which allegedly took place on the 3rd April 2000. Witness made another statement on 29 July 2004 but never mentioned the name Morris Kallon. It is when the witness came to Freetown to testify that the Prosecutor produced and served on the defence proofing notes dated the 1, 2, 3 February 2006 containing 7 paragraphs that witness mentioned for the first time the name of Morris Kallon and only about Morris Kallon visiting Yengema and no information about his alleged role in his abduction and the presence of child soldiers. This series of events and the various statements the witness made without mentioning the accused cannot, by any stretch of imagination constitute clear, timely and consistent information. Moreover, the testimony of this witness is at variance with the more credible testimony of his senior General Mulinge who the Chamber, without any basis ignored. Called by the Defence, witness Mulinge who was in the company of the Zambian contingent, was also abducted and spent 23 days with Kasoma in Yengema. He never named Kallon as the Commander who abducted them. He instead stated that the abductor walked with a limp-a description that fitted Komba Gbundema and thus corroborated many other accounts. Mulinge further stated that Kallon never visited them in Yengema and that the Commander of the Camp never introduced them to a Kallon. It is inconceivable that Kallon would have visited Yengema 4 times in the company of Sesay and several child combatants without Mulinge's notice. It is also inconceivable that Kasoma would have seen Kallon Visit them in Yengema and fail to mention to Mulinge that here was his abductor. The net effect of all the accounts given by witness Kasoma about Kallon and the belated timing of his mention of the accused coupled with the doubt created by the testimonies of other witnesses and particularly Mulinge lead to the irresistible conclusion that Kallon was not present at Moria when Kasoma and group were abducted hence cannot be responsible for the use of child soldiers on that occasion. Further the Chamber's conclusion regarding Kallon's presence at Moria[527] based on circumstantial evidence is erroneous and not a reasonable inference from the evidence.

[528] Para 1851

supposed to have sent a reinforcement order for an unspecified mission to the Brigade Commander for Kono[529] and or because he is supposed to have sent a general situation report to Sankoh[530] it follows that he was the Commander present at Moria where Zambatt UNAMSIL were abducted. The circumstantial evidence considered and misinterpreted by the Chamber does not lend itself; even remotely, to any reasonable conclusion that Kallon was the Commander present at Moria. Even if the Chamber's inference were to be reasonable, there are several other reasonable inferences open from the evidence.

218. At the time of the UNAMSIL events several senior officers were actively engaged in the conflict and any one of them besides the accused Kallon could have been the Commander present at Moria. For instance witness TF1-360 testified about Melosky Kallon who was the brigade commander based in Lunsar[531] (and in whose area of jurisdiction the abduction took place) and also stated that it was Komba Gbundema who abducted the Zambatt UNAMSIL. It is therefore a reasonable inference that Kasoma, who did not know Kallon and had never met him, may have heard about another Kallon and most likely Melosky Kallon. Ot

17. ***Other indicia relied on by the Chamber:***

219. The Chamber erroneously drew the conclusion that the accused Kallon was involved in the use of child soldiers as fighters in 1994 (1615). On this, the Chamber erred in a number of respects; by relying on evidence outside the scope of indictment (the indictment period runs from 30th December 1996 to 15 September 2000), by relying on the uncorroborated evidence of witness TF1-045. [532]

220. Further, no reasonable trier of fact would rely on the testimony of TF1-045 to conclude that Kallon was involved in the planning of the use of child soldiers, based on the unsubstantiated testimony of witness TF1-045 who did not explain his basis for concluding that those he saw with Kallon were under the age of 15, or how he concluded

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[529] Para 1852

[530] Para 1853

[531] TF1-360 testified about Melosky Kallon who was the 5th Brigade Commander based at Lunsar Transcript of 25 July 2005 p110 lines 2-9,lines 18-22.Witness also confirmed there were several other Kallons in the RUF movement. Transcript of 25 July 2005 pp 110-113 and that there were several people who went under the name Kallon, p 112 line 28,p113 line 2

[532] This is despite the Chamber's own assertion that it would not rely on TF1-045's testimony without corroboration: par 561

that they were child fighters. Morcover, the presence of the accused Kallon with child fighters in Zogoda is an act of personal commission that ought to have been pleaded in the indictment.

18. Error relating to consistent pattern of conduct:

221. Finally, the Chamber erred by relying on the presence of Kallon in Zogoda with child soldiers to demonstrate a consistent pattern of conduct in violation of Rule 93 of the Rules of Procedure and evidence[533].

19. Error regarding proof of age of child combatants

222. The magnitude of the Chamber's error on the assessment of the ages of the alleged child soldiers clearly emerges from the testimony of witness TF1-141 whom the Chamber relies on severally to convict the Appellant. The witness indulged in falsities about his age. He admitted to have given his age as 18 in order to gain some disarmament benefits. He dramatically stated *"well as I said, I never knew who this woman was or why those questions. Now I told her I was 18 because the time we came to disarm, we the children were removed. We had no benefit. We suffered. I thought it was something like that that was coming. So let me give an age, this age, so that I might not be removed"*[534].

223. The Prosecution has not discharged its burden regarding the ages of the children in respect of whom their use the Appellant allegedly planned. There is no evidence that those allegedly abducted during the attack in Koidu, or those allegedly sent to RUF camps for training, or those allegedly used at Moria were under the age of 15.As the Chamber itself concludes at Para 1638 of the judgement, Kallon and Sesay gave orders that young boys should be trained and that "those boys were 15 years of age and above" .

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[533] Para 1615.The Appellant submits that at no time did the prosecution disclose to him information to show his link to a consistent pattern of conduct by the RUF of recruiting and training children for military purposes " that began as early as 1991 and continued throughout the indictment period" Rule 93 (B) requires that acts tending to show a consistent pattern of conduct shall be disclosed by the prosecutor to the defence pursuant to Rule 66.The failure to comply with Rule 93 (B) thus occasioned prejudice to Kallon's defence as he did not know that this aspect of the evidence would be used against him, and hence could not and did not defend himself accordingly.

[534] Transcript 14 April 2005 pp 23-24

224. No reasonable trier of fact would rely on the testimonies of the various witnesses to establish beyond reasonable doubt that the children allegedly conscripted and sent for training were below 15 years of age[535].

225. The Chamber's reliance on the conclusion that the accused knew or had reason to know that the persons conscripted "may have been" under the age of 15 as constituting circumstantial evidence is erroneous. The Chamber's own use of the phrase "may have been" suggests an inconclusive inference and hence invalidates any argument that this could be the only reasonable inference from the record in order to justify the use of circumstantial evidence in this instance.

226. Further, it was upon the Prosecution to prove beyond a reasonable doubt that Kallon planned the use of children for hostilities. The Chamber's conclusion that where doubt existed as to whether a person abducted or trained was under the age of 15, it was incumbent upon the perpetrator to ascertain the person's age is absurd. The Appellant did not raise any defence of mistake to warrant the Chamber's conclusion. Having denied planning the use of children under 15, the Chamber ought to have required the Prosecutor to fully discharge his burden of proof other than resort to the use of improper circumstantial evidence and shifting the burden of proof.

227. Resulting from the individual and cumulative effect of the above factual and legal errors which have occasioned a miscarriage of justice and invalidated the conviction, the Appeals Chamber is respectfully prayed to set aside the conviction and sentence on Count 12.

Ground 21: <u>ERRORS RELATING TO ABDUCTIONS & FORCED LABOUR COUNT 13</u>

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[535] As demonstrated above, the testimony of witness TF1- 263 does not lend itself to any conclusive determination that he was below 15 years of age or that those he was abducted and sent for training with were under that age. In the absence of any corroboration by independent credible evidence, the testimonies of witnesses TF1-141 and TF1-366 cannot be relied on to determine the ages of those child soldiers that the 2 witnesses attempted to link to the accused Kallon.Denis Koker on whom the Chamber relied to conclude that he saw Kallon bring Juveniles to Bunumbu for training did not provide any credible evidence about those he saw with Kallon. He described them as follows, "they were men, there were women, men above 30 years, men below 20 years, below 15, women below 15." Regarding his ability to determine those who were below 15 the witness curiously stated that "he was trained before he went there," and so he knew how to "allocate" ages. He further stated that he interviewed the children because he knew that one day an international tribunal would be created. Transcript of 28 April 2005 p 66

1. Events in Tongo Field in Kenema, Kono and Kailahun

228. The Chamber convicted the Appellant Kallon under count 13 for enslavement, a crime against Humanity punishable under Article 2(c) of the Statute, for his alleged participation in a JCE in relation to events in Tongo Field in Kenema District, in Kono and Kailahun Districts.

2. Error relating to Appellants alleged role in Tongo Field

229. The Appellant relies on the submissions on JCE in relation to Kenema. In addition, the Appellant submits that the Chamber erred in law and fact by convicting him based on material facts not pleaded in the indictment and in respect of which he had no or no proper notice[536]. The Chamber thus erred by concluding that the Appellant was one of commanders conducting private mining in Tongo, which is a material fact that ought to have been pleaded.[537] The Chamber erred by failing to find that the defect had caused material prejudice to the Appellant and that there had been no cure of this defect. The Appellant was not able to prepare his defence resulting from this prejudice.[538]

230. The Chamber further erred in law and fact by relying on the discredited testimonies of witnesses TF1-371, TF -045 and TF1-366 without corroboration by credible independent testimonies.[539] The Chamber further erred by failing to consider exculpatory testimonies of prosecution witnesses and defence testimonies, without any or any proper basis. (Ground 7(8.2)). It was therefore erroneous for the Chamber to conclude that the Appellant substantially contributed to the crimes in Tongo under Count 13.

3. Error relating to Appellants Alleged Role in Kono

231. In relation to Kono, the indictment states generally that between 14 February 1998 and January 2000, AFRC/RUF forces abducted hundreds of civilians and took them to various locations both within and outside the District for forced labour. No particulars are provided in respect of Kallon's responsibility. The Defence submits that this defect was not cured by any timely, clear and consistent information. The Supplemental Pre-trial Brief, instead of providing clarification, further compounded the pleading defect by

[536] Ground 21-22.2
[537] Para 1092
[538] Para 1092
[539] See ground 8.3 of the notice, see also paragraphs 1088-1094 of the judgement.

providing contradictory time frames for count 13 in respect of Kono. It stated the period to be between 14 February 1998 and 30 June 1998.[540] The Chamber therefore erred in relying on a defective indictment that was never cured to convict the accused for the crime of abduetions and forced labour in respect of Kono and for which he suffered prejudice in the preparation of his defence.

232. The Chamber erred in law and fact by finding that from 1999-2000 the Appellant, on the orders of Sesay gathered approximately 400 civilians who were jailed and taken daily to Kono[541] and erroneously purporting it to be a crime committed in Kono.[542] These findings are outside the scope of the indictment. The indictment timeframe for Count 13 in respect of Bombali where Makeni is situate is "1st May 1998 to 31st (*sic*) November 1998".[543] Further, the abduction of such a large number of civilians by the Appellant constitutes an act of personal commission that should have been pleaded in the indictment. This omission occasioned irreparable prejudice to the Appellant.

233. The Trial Chamber thus erred in law by relying on these factual allegations which were outsidc the scopc of the indictment and which the Appellant had challenged in his motion to exclude evidence. This motion too was erroneously dismissed causing prejudice to the Appellant.[544] The Chamber further erred in law and fact by holding that the Appellant could be liable becausc he had a housc in Kono where his bodyguards lived and supervised forced mining.[545] This was an act of personal commission not pleaded in the indictment. This omission was never cured by any clear timcly and consistent information. The period within which the Appellant committed this crime was also never established. These defects caused irreparable prejudice to the Appellant who was unable to effectively prepare his defence.

234. At paragraph 2095 of the Judgment, the Chamber relies on a number of aspects to conclude that the Appellant contributed substantially to the system of enslavement created by the RUF. These aspects are: the use of children under the age of 15 years in the attack on Koidu and during the period of the AFRC/RUF joint control over the

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[540] Para 481 of the supplemental pre-trial brief).
[541] Para 1249
[542] The discussion of this crime is done under the rubric of "Crimes in Kono District", p.348 of the Judgement.
[543] Para 73 of the indietment
[544] Ground 1-2.6 of the amended notice.
[545] Para 1259

District; that the Appellant had bodyguards who were under the age of 15 years who were involved in enslavement of civilians; that in 1998 and 1999 the Appellant brought persons under the age of 15 years to be trained at Bunumbu and that he was actively engaged in the abduction of and planning of training of SBU's in Kono District. The Appellant submits that these elements cannot be used to establish his substantial contribution for 2 reasons: firstly, because they constitute acts of personal commission which were never pleaded in the indictment and in respect of which the Appellant received no proper notice. Secondly, that in relation to count 12, the Chamber dismissed some of these allegations.

235. At paragraph 1741 of the Judgment, the Chamber concluded that it was not satisfied beyond reasonable doubt that SBUs seen with commanders were acting as bodyguards. At paragarph 1742, the Chamber concluded that it was not satisfied that the boys seen with the Appellant in Freetown and Makeni were bodyguards. It is therefore ridiculous for the Chamber to conclude at paragraph 2095 that the "Chamber has also found that Kallon had bodyguards who were under the age of 15 years and that he knew that the SBUs were used to force the enslaved mining and guard the mining sites. Remarkably, the Chamber cited neither a transcript nor any supporting reference in support of this very prejudicial conclusion. In relation to the conclusion that the Appellant brought persons under the age of 15years to be trained by the RUF at Bunumbu, this again demonstrates the Chamber's disregard for consistency in its findings. At para 2221, it had ruled against relying on evidence that the Appellant personally conscripted children by bringing them for training at Bunumbu because the Prosecution failed to plead these material particulars in the indictment. Curiously, the Chamber now finds it appropriate to use the same evidence to convict the Appellant without explaining the basis for the turn-around.

236. The Chamber rather sensationally concludes at paragraph 2092 that the Appellant was "actively" engaged in the abduction of and planning for training of SBUs in Kono District in February/March 1998. The reference provided at footnote 3819 relates to the testimony of witness TF1-141. The relevant page of the transcript (p.89: Transcript of 11 April 2005) does not by any stretch of the imagination support the Chamber's conclusion that Kallon was "actively" engaged in the abduction for and planning of training of SBUs in Kono in February/March 1998. Moreover, as illustrated in the discussion of witness

TF1-141 under count 12, no reasonable trier of fact would rely on witness TF1-141 to make any plausible conclusion regarding the use of child soldiers by the Appellant.

237. The reference to paragraphs 1695-1701 at footnote 3819 does not support the Chamber's alarmist conclusion that the Appellant was actively engaged in the abduction of SBUs in Kono. The paragraphs referred to related to the discredited testimonies of witnesses TF1-263 and TF1-141 in respect of whom the Appellant has demonstrated under Count 12 to be unreliable and not worthy of any credit. Further, the testimonies relate to alleged personal participation by the accused Kallon in the commission of crimes which were not pleaded in the indictment, in respect of which he had no sufficient notice and on the basis of which the accused's defence preparations were prejudiced.

4. Superior Responsibility (Count 13)-Kono

238. The submissions in Ground 14 of the Amended Notice is relied upon to argue this issue.

5. Errors in relation to Appellants alleged role in the Crime of Enslavement

239. The Appellant relies on the general submissions on JCE for Kailahun in support of the present submissions in relation to count 13. It is reiterated that the Chamber erred in its conclusion that the Appellant made a substantial contribution to the JCE in Kailahun as there was no evidential basis for such a conclusion.

240. In relation to the findings at para 1438 that the Appellant brought people to be trained by the RUF at Bunumbu, the Appellant reiterates his submission that the Chamber erred in relying on this conclusion which constitutes a material particular that was never pleaded and which the Chamber dismissed at para 2221. It was erroneous for the Chamber to have sought to rely on this same evidence in support of count 13.

241. In relation to paras 1439 and 1440 at which the Chamber discusses the testimonies of TF1-263 and TF1-141 concerning the training of child soldiers and their participation in combat, the Appellant reiterates his submissions under count 12 and urges the Appeals Chamber to find that the witnesses' testimonies in relation to the Appellant constitute acts of personal commission not pleaded and hence prejudicial. Further the testimonies are implausible for the reasons given in the submissions referred to.

GROUND 22: ERRORS RELATING TO PILLAGE COUNT 14 (PILLAGE)

242. The Appellant relies on the general submissions in relation to JCE in Bo (Ground 9) and Kono (Ground 11), and on Pillage under Ground 16 of this Brief to prove this Ground. In relation to Bo, the Chamber held the accused guilty of a crime committed by Bockarie.[546] That is looting of Le 800,000 from Ibrahim Kamara in June 1997. There is no demonstration how the accused Kallon should be responsible for this crime when he was neither in Bo at the time, had no control over Bockarie or even knew about the commission of this crime. Indeed the Chamber did not demonstrate how the accused Kallon could possibly have substantially contributed to the commission of this crime. Further this crime was not specifically pleaded in the indictment and the accused Kallon could not and did not have notice of the crime. While the Chamber in other instances attempted to cure some defects regarding notice, in this particular instance no assessment was undertaken by the Chamber. The preparation of the Appellant's defence was thus prejudiced.

243. The Supplemental pre-trial brief gave general information that provided no proper or sufficient notice regarding the commission of the crime. The only notice given in the supplemental pre-trial brief related to pillage of money was that the accused Kallon broke into the National Development Bank in Bo in 1998 and looted all the monies contained therein. However, there was no evidence during trial to support this allegation. It is therefore fundamentally unfair for the Chamber to ignore crimes for which the accused had some notice and respecting which no evidence was led and instead convicting him for crimes that he had absolutely no notice.

1. Error relating to Appellants alleged Pillage role in Kono

244. The Appellant reiterates here his general submissions on JCE in relations to Kono. Additionally, the Appellant makes the following specific submissions: the Chamber erred by failing to find that the crime of pillage in Kono had not been proved beyond reasonable doubt in respect of the Appellant. In this regard, the Chamber erred in law and in fact by relying on the uncorroborated evidence of witness TF1-366 to conclude that

[546] Para 1029, 1974

Kallon was present at a meeting in Koidu when JPK allegedly addressed a meeting and ordered the burning of houses and that reports were made to Kallon.[547]

245. The Appellant further submits that mere presence at a meeting does not amount to the commission of a crime and the Chamber thus erred by drawing a wrong inference. Moreover, the Appellant had insufficient notice regarding this meeting and the consequences thereof as it was neither contained in any pre-trial brief nor the opening statement. The Chamber further erred by relying on the evidence of witness 217. The Appellant had no notice that the issues discussed by the witness would implicate him as there was no mention of the Appellant in the summary of the witness' testimony attached to the supplemental pre-trial brief. Indeed the only specific notice the accused had regarding pillage in Koidu is to the effect that he looted Sheep.[548] There was no proof beyond a reasonable doubt that the Appellant shared the intent to commit the crime of pillage with the unidentified perpetrators in Koidu.

2. Errors regarding the looting of Tankoro Bank

246. The Chamber erred by basing its conviction under count 14 on the alleged looting of Tankoro Bank. [549] The Appellant submits that the Chamber erred by convicting the accused for a crime in respect of which he had no notice. As noted above, the only particulars relating to the Appellant provided in the supplemental pre-trial brief relate to the looting of Sheep in Koidu. The supplemental pre-trial brief also gives notice of looting by the Appellant of a Bank in BO and not Koidu. [550]

247. Prosecutor's opening statement indeed also indicted the robbery of a bank in BO by the accused and not Koidu.[551] It was therefore prejudicial to the Appellant's defence for the prosecution to give notice of a crime in BO and for the Chamber to convict for that crime in Kono. The Appellant reiterates the submission that the Chamber's approach of ignoring allegations in respect of which the accused had notice and convicting him for those he had no notice is grossly unfair and unreasonable.

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[547] Par 1141-1144
[548] Para 548
[549] Para 2063, 4.1.1.5 and 1145
[550] Par 531 of the supplemental pre-trial brief
[551] See transcript of 5 July 2004, p 46 lines 5-13

3. Error relating to Appellants alleged role in the appropriation of a bicycle, Le 500,000 and cigarettes from witness TF1-197 (Paragraph 1335)

248. The appellant submits that there is no proof beyond a reasonable doubt that the Appellant should be responsible for this crime. No evidence was adduced regarding any relationship between the accused and the perpetrators of this crime or that he knew about the commission of the crime or he knew those who committed the crime. There is no demonstration that the Appellant shared with the perpetrators, the intent to commit this crime. Moreover, the accused had no proper notice regarding this specific crime. While the indictment provided no details regarding this crime, the summary of the witness' testimony attached to the supplemental pre-trial brief neither made mention of Kallon nor any relationship between him and the alleged perpetrators only described as "rebels."

GROUNDS 23-26 & 28: DIRECTING ATTACKS AGAINST UNAMSIL: COUNTS 15 & 17:

249. **Grounds 23, 24 and 28 shall be argued together.**

Error Relating to Pleading of 6.1 Liability:

250. Para 83 of the Indictment is the only pleading dealing with UNAMSIL attacks. The paragraph generally charges AFRC/RUF of engaging in wide spread attacks against peacekeepers and humanitarian assistant workers in Bombali, Kailahun, Kambia, Port Loko and Kono Districts and that by his acts or omissions the appellant was individually criminally liable under 6.1 and or alternatively 6.3 of the Statute. The indictment does not plead particulars of the acts and or omissions of the Appellant. The indictment also does not plead any of the elements of 6.3 responsibility.

251. The Appellant objected to the pleading of the indictment in relation to his purported responsibility under counts 15 – 18 in the Motion of Acquittal, [552]Motion to Exclude Evidence outside the scope of the indictment[553], Motions on the defects in the indictment[554] and the Final Trial Brief[555]. In his response to the Appellant's Motion to

[552] The Appellant raised issues in relation to the civilian status of UNAMSIL-Transcript of 16 Oct 2006 pp 50-60.
[553] Kallon Motion to Exclude Evidence outside the Scope of the Indictment dated 14th March 2008
[554] The first Motion on defects in the indictment (Kallon Motion challenging defects in the form of the indictment and annexes A,B, and C dated 28th January 2008) was ordered expunged from the record purportedly because it

exclude evidence, the Prosecutor while purporting to demonstrate lack of prejudice to the Appellant failed to provide any evidence of clear timely and consistent information that could cure the defects in the indictment in respect of the UNAMSIL count.[556]

252. The Trial Chamber found generally that the indictment failed to plead any particulars of personal commission, and that the prosecution had not demonstrated reasons for his inability to plead the particulars and that therefore the indictment was defective.[557] The Chamber then undertook to consider whether the indictment was cured in respect of the various unpleaded allegations of personal commission. In the light of the persistent objections by the Kallon Defence stated above, this finding was belated and caused prejudice to the Appellant.Despite this undertaking the Chamber failed to make a finding of prejudice caused by the Prosecutor's inability to particularise the mode of personal commission in the indictment which inhibited the ability of the Appellant to prepare an effective defence. Rather, to the further prejudice of the Appellant the Chamber undertook to cure the indictment. This exercise led to an erroneous finding of cure in respect of only one attack namely: the attack of Salahhuedin.[558] We disagree that the indictment was cured in this respect as there was no clear, timely and consistent information provided to the Appellant in relation to his alleged attack of Salahuedin. Besides the attack of Salahuedin, the Chamber found the accused guilty of other 6.1 attacks not pleaded[559].

Error relating to alleged cure in relation to the attack of Salahuedin

253. The Appellant relies on his submission at the combined Grounds 3-6 on the defects in the indictment. The Trial Chamber erred by holding at paragraphs 2242-2246 pg 656 of the

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exceeded the page limit. See order relating to Kallon motion challenging the defects in the form of the indictment, 31st January 2008. The Appellant further brought challenges to the form of the indictment in his motion of 7th February 2008.

[555] Kallon Final Brief dated 10th September 2008

[556] See Prosecution response with coufidential annex A to Kallon Motion to exclude evidence outside the scope of the indictment with confidential anuexe A dated 31st Mareh 2008. pp25313 – 25319

[557] Para 399 of the Trial Chamber Judgment

[558] Para 2242 -2246 of the Trial Chamber Judgment

[559] Abduction of Jaganathan, attaek on Maroa and three peace keepers, abduction of Mendy and Gjellesdad, abduction of Kasoma and ten peacekeepers and ordering the attack directed at Kasoma's convoy of approximately 100 peacekeepers on 3rd May 2000. With regards to all these attacks the Appellant submits that the indictment is not cured and that the prejudice alleged by him is well founded.(paras 2242-2258 pp656-660 of the Judgment)

Trial Judgement that the defects "with regard to Kallon's personal participation in this attack" were cured. The Chamber's attempt to resort to witness statements as a cure for defective pleading is fundamentally erroneous. It is settled Jurisprudence that the mere service of statements is insufficient to cure a defective indictment[560]

254. The Pre-Trial Briefs and opening statements do not provide any notice of this attack.[561] The only notice of an attack at the camp relates to Gbao commanding the RUF which surrounded and attacked the camp.[562]The Appellant is alleged to have mobilised men to attack an unspecified "*Kenyan*" at an unspeeified date and location.[563] The Opening Statement contradicts this information by giving notice of the Appellant's attack of "Kenyan *peacekeepers*". In relation to the Makeni DDR camp, the Opening Statement gives notiee of Kallon "*threatening*" peaeekeepers.[564] No notice of a personal attack by the Appellant of either Salahuedin or any other peacekeeper at the camp is given.

Error relating to witness statements providing clear, timely and consistent notice relating to the attack on Salahuedin

255. Consistent with the finding of the Trial Chamber at Para 399, witness TF1-042's summary of statement attached to the Supplemental Pre-Trial Brief failed to provide the identity of any particular peacekeeper allegedly assaulted by the Appellant to enable him sufficiently prepare his defence. To this extent the defect in the indictmcnt was not cured and caused prejudice partieularly in view of the contradictory and inconsistent

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[560] *Nijitegeka,* (Appeal Chamber), July,9,2004,para.221 (As a geueral matter,' 'mere service of witness statement by the [Proseeution pursuant to the disclosure requirement' of the Rule does not suffice to inform the Defence of material facts the Prosecution intends to prove at trial"); *Ntakirutimana and Ntakirutimana,* (Appeal Chamber), December 13, 2004, para. 27 (same quoted languagc); Muhimana, (Trail Chamber), April 28, 2005, para. 452 (Disclosure of witness statements by the Prosecution does not, by itself, suffice to inform the Defence of material facts that the Prosecution intends to prove at trial"); *Karera,* (Trial Chamber), December 7, 2007, para. 15 ("Merc service of witness statements by the Prosecution as part of its disclosure requirements is generally insufficient to provide notice to an accused. The Appeals Chamber of the ICTR in Muvunyi decided that: "it is to be assumed that an accused would prepare his defence on the basis of material facts contained in the indictment and not on the basis of all the materials disclosed to him that may support any number of Charges or expand the seope of existing eharges.ICTR-2000-55-AA, 29/8/2008 para.30.

[561] Prosecution's Pre-Trial Brief dated 27 February 2004,Supplemental Pre-Trial Brief of 21 April 2004,Prosecutor's Opening Statement 5 July 2005. The Supplemental Pre-Trial Brief does not give notice of the Appellant's attaek of Salahuedin instead specifying that the Appellant "mobilized men to attack the Kenyan" and that he threatened peacekeepers and told them to dismantle the eamp against 72hours; an allegation in respect of whieh the court made no findings. There is no notice in the Supplemental Pre-Trial Brief that the Appellant personally assaulted Salahuedin or indeed any other peaeekeeper at the Makeni DDR eamp.

[562] Para 572 of the Supplemental Pre-Trial Brief

[563] Para 572 of the Supplemental Pre-Trial Brief

[564] Transcript of 5th July 2004 p 46

information provided on the matter. To compound the confusion created by the contradictions and inconsistencies and the consequent prejudice to the Appellant, the Trial Chamber found that the statements of TF1-362 and TF1-314 provided notice on Salahuedin.These statements contain absolutely nothing in relation to the attack on Salahuedin.

256. Consistent with the Trial Chamber's findings at para 399, the alleged personal perpetration of this attack by the Appellant was never pleaded, and therefore the indictment is defective in that respect. Unlike the specific finding with regard to Salahuedin, the Trial Chamber did not find that the defect regarding the abduction of Jaganathan was cured.The Appellant submits that the defect was never cured.[565]

Error in identification of the Appellant-Attack of Salahuedin and abduction of Jaganathan:

257. Salahuedin was not called to testify about the alleged attack on him by the Appellant.Witness Jaganathan who testified about this attack stated he did not know the Appellant because he had never seen him before and that it was later that he was told by one Major Maroa that it was Brigadier Morris Kallon who perpetrated the attack[566]During cross-examination the witness admitted that apart from what the he was told by Maroa,he could not for sure confirm that the person who abducted him was Brigadier Kallon.[567] Witness TF1-044 also stated that Ganese told him that it was Brigadier Morris Kallon who assaulted Salahuedin.[568]

258. The appellant submits that he was not sufficiently identified as the person who attacked Salahuedin and abducted Jaganathan.Witness Jaganathan provided insufficient particulars to establish that it was thc Appellant involved in these crimes.The only person who is supposed to have identified to the accused was Major Maroa who was never called to testify.It is futher submitted that according witness Brigadier Ngondi, Maroa told him

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[565] With regard to this particular incident the Prosecutor's disclosures were contradictory and inconsistent. The opening statement talked about the attacks on Kenyan peacekeepers. Jaganathan was not a Kenyan. The Pre-Trial Brief says nothing about this incident. The Supplemental Pre-Trial Brief talks about the attack on a Kenyan. Jaganathan's summary talks about his abduetion by an unspecified Kallon, which contradiets the Opening Statement and the substantive Supplemental Pre-Trial Brief regarding the identity of the victim/victims as well as that of the perpetrator. This eannot, by any stretch of the imagination be construed as clear, timely **and consistent disclosure.**

[566] Transcript of 20 June 2006 p24-25

[567] Transcript of 20 June 2006 p 87

[568] Transcript of 27 June 2006 p 10

that the Appellant assaulted Jaganathan,bundled him to his car and drove off.[569] Jaganathan contradicts this version by saying that it was Salahuedin who was assaulted by the alleged Kallon.[570]This material contradiction renders the Chamber's reliance on hearsay evidence based on the account allegedly given to Jaganathan by Maroa unsafe. The Chamber further failed to apply its own standard on the identification issue set out at paragraph 492 of the judgment.

Attack on Maroa and three peacekeepers - Errors relating to defective pleading and identification:

259. This attack like the others was not pleaded in the indictment and the defect was never cured[571]. The Chamber also erred in relying on the unreliable hearsay evidence of Jaganathan to convict the Appellant for this crime.

The abduction of Mendy and Gjellesdad:

260. The indictment did not plead this allegation and there was no cure for this defect[572].

Error in identification of the Appellant:-Abduction of TF1-044(Lt. Col. Joseph Mendy) and Major Gjellesdad:

261. The issue of identification was raised by the Appellant in the context of the testimony of this witness but the Chamber did not address the matter[573]. The ability of the witness to remember accurately, material issues like the ability of identifying Kallon at the DDR camp on 27 and 28 of April 2000 was undermined by his inability to recall the disarmament of 2 RUF combatants on those days when he alleges he saw the Appellant

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[569] Transcript of 29 March 2006 p29

[570] See account above.

[571] The Pre-Trial Brief does not say anything about the attack of Maroa and three others by the Appellant. The Supplemental Pre-Trial Brief does not identify Maroa and the three peacekeepers as victims of an attack ordered by the Appellant. Additionally with regards to Kenyan peacekeepers, the substantive supplemental pre-trial brief relates to an alleged order given to the Appellant by Sesay to mobilise men to attack unidentified Kenyan peacekeepers in Magburaka and not at the DDR in Makeni. In any event the Supplemental Pre-Trial Brief contains no information or particulars to confirm if this order was executed. Additionally, Maroa never testified at trial. The Appellant was convicted for the alleged attack on Maroa and alleged three unidentified peacekeepers through impermissible hearsay testimony and by proxy.

[572] The Pre-Trial Brief did not plead this allegation. The Supplementary Pre-Trial Brief contains no information about this attack. Therefore there was no notice and the Appellant suffered prejudice in preparing his defence. Additionally, Gjellesdad did not testify. The Appellant was therefore convicted on the basis of impermissible hearsay and by proxy.

[573] Transcript of 27 June 2006 p 111,120-122

at the same location.[574] The witness persisted that the appellant resided in Makeni[575] despite overwhelming Defence and Proseeution evidence that the appellant was based at Magburaka up to 1st May, the 2000.[576] The Chamber erred by failing to consider credible Defense testimonies that were corroborated by Prosecution witness TF1-041 who testified on events of 1 May 2000[577]. Witness DMK-108 who tcstified that Kallon came to the DDR camp in Makeni and later drove back towards Magburaka[578].

262. The Trial Chamber inappropriately disregarded the testimony of Major Hajj[579] the Tanzanian Milob who was with Lt Mendy shortly prior to him going towards the DDR Camp at Makump on receiving a radio communication with Major Jaganathan. The Testimony of this witness raised sufficient doubt regarding Mendy's allegation that he and Gjellesdad were abducted at the Task Force Office in Makeni[580]

The abduction of Kasoma and ten peacekeepers and alleged ordering by the Appellant of the attack directed against Kasoma's convoy of about 100 peace keepers:

263. Neither the indictment, the Supplementary Pre-Trial Brief nor the Opening Statement give clear, timely and consistent notice of this allegation. The witness made a number of statements to the Prosecutor over a period of over two years and never mentioned the name of the Appellant, doing so only when he came to testify. This cannot be said to be Clear, timely and consistent information.[581]

Witness Statements of TF1-362 and TF1-314 did not give clear, timely and consistent notice of attack on Kasoma and others:

264. Contrary to the Chamber's finding, the witness statement of TF1-362 did not give timely, clear and consistent notice to the appellant. The said witness did not either in her witness statement or oral testimony in court[582] testify about the personal involvement of the appellant in any attack nor did she corroborate Lt Colonel Kasoma's testimony that he

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[574] Transcript 27 June 2006 pp 121-122.
[575] Transcript of 27 June 2006 p 120 lines 12-22
[576] Transcript of 10 July 2006 p67, liues 23-28.
[577] Transcript of 10 July 2006 pp 67-70
[578] Transcript of 29 April 2008 pp 68-73,See also DMK 095 Transcripts of 1 May 2008 pp 40-44
[579] Transcript of 8 May 2008 pp 73-76
[580] Transcript of 8 May 2008 pp 73-77
[581] The witness during cross-examination admitted that he never made mention of the Appellant in his first statement of 29 July 2003,the second one of 25 January 2006 and that he only mentioned the accused a month before his testimony before the Court. See Transcript of 23 March 2006 pp141-144
[582] Transcript of 20/4/2005

knew the Appellant through information he received from TF1-362.[583] General Mulinge whom witness Kasoma stated[584] was also present during the introduction denied[585] ever seeing Kallon during their captivity at Yengema under the custody of Monica Pearson.Witness TF1-314 also failed to give clear and consistent notice to the appellant.[586]

Error in relying on the identification evidence of TF1-288: Lt.-Col. Edwin Kasoma:

265. The Trial Judgment found that Lt Colonel Kasoma and the ZAMBATT were abducted at a small village called Moria by RUF, including a commander who walked with a Limp.[587] He was "taken to a shelter where "I found this gentleman who was later on identified as the commander of the area"[588] The Appellant submits that there was ample direct evidence on record establishing that the Commander of the area in question was Mclosky Kallon and not Morris Kallon.[589] TF1-360 testified that Komba Gbudema abducted the ZAMBATT UNAMSIL soldiers at Makot. [590] The Chamber found that Lt Col. Kasoma was taken to Makeni where they were taken to the MP office, where the commander who brought him introduced him to Sesay as the commander of ZAMBATT.[591] Kallon was present at the time.[592] It is submitted that a reasonable trier of fact would, upon making this finding at paragraph 1840 of the trial Judgment,have concluded that the said commander was indeed not Morris Kallon but someone else.

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[583] Kasoma stated in his testimony that Kallon and Sesay came to Yengema where he –Kasoma- and Mulinge were held held hostage Transcript of 22 March 2006 p 27,that Kallon was very close to Sesay and that he –Kasoma knew this from information be received from Wimess TF1 362-Transenpt of 2 March 2006 P 40.

[584] See Transcript of 22 March 2006 p 38 where Kasoma says the when Kallon and Sesay came to where the witness and General Mulinge were held hostage,TF1 362 would brief the witness together with Mulinge.Transcript of 22 Mareh 2006 p 38.

[585] Transenpt of 6 Mareh 2008 p 67

[586] Exhibit 53, the proofing notes of the witness dated 20th October 2005, pg 16861, para.1, Exhibit 52 witness statement paras.1-4 underlined by the Prosecutor on 7/112005 at page 12671 and by 2nd accused at pg 12672at pg8 exhibit, 49, marked at pg 10727 by 2nd accused are a clear indication to reasonable Trier of faet and law that they failed to convey elear, timely and consistent notice to the appellant. In exhibit 49 dated 29th Oet.2003, witness said Gbao and Superman laid ambush at Makoth. In exhibit 52 dated 4th Nov.2005, witness repeated that Gbao and Superman laid ambush at Makoth. It is only when witness came to testify in Arusha that witness ehanged her story and said Gbao and Kallon laid ambush at Makoth. This cannot be timely, elear and consistent statement by any stretch of the imagination.

[587] Trial Judgement paras.1834-1840,pgs543-544

[588] Trial transcript of 22/03/2006 pg 1.

[589] Trial transeript of TF1-041 dated 17/07/2006, pg 28, Exhibit 212 pgs 00008784 dated 2/2/200, 000008766, dated 29/12/99, 00008774 dated 2/1/2000.

[590] Transeript of 26 July 2005 p 66.

[591] Trial Judgement para.1840 pg 544

[592] Trial Judgement at para.1840 pg 544.

266. The Court made inconsistent findings about the role of the appellant in the abduction of Kasoma, At Par 2257 the Chamber concludes that the Appellant brought Kasoma to Makeni and introduded him to Sesay.The transcript of Sesay[593] which the Chamber purports to rely on to make its finding at Para 1840 provides instead an alibi for Kallon wth regard to the attacks on UNAMSIL. The finding at para 2257 of the Judgment is unsupported to the extent that the footnote 1325 referes back to an equally an unsupported finding at Par 1858. The Appellant submits that the testimony of Sesay cited to substantiate the finding at paragraph 1840 rather than incriminate, exculpates Mr Kallon's regarding the abduction ZAMBATT and supports his alibi in respect of the abduction of Kasoma at Moria and the artack at the DDR Camp in Makump[594]. The Appellant submits that DMK-161 a senior RUF commander who conducted the abduction with Komba Gbundema testified and supported Appellant's alibi at the crime base at Moria during the abduction of Kasoma[595]

Legal and factual errors on the application of a wrong standard adopted in assessing identification evidence.

267. The Chamber erred in failing to exercise caution in the assessment of the uncorroborated identification of the Appellant under uncertain and difficult circumstances provided by a lone witness. Thc Chamber found that Lt Col. Kasoma and General Mulinge were moved to Yegema and detained at the house of Monica Pearson, while others were kept in a nearby school.[596] The Trial Chamber also found that although at the time of his abduction the witness did not know the commander who told him at gun point to write a note, the appellant was identified to the witness by Monica Pearson at Yengema in about four

[593]Transcipt 25 May 2007 pp 61-64

[594] Trial Transcript testimony of Isa Sasey dated25 May 2007 pgs 63-64. Sesay said while being briefed by Saidu Kallon about the attack on the DDR Camp Makump, Kallon joined him. It was while both of them were in that location that he saw trucks and landrovers brining UNAMSIL troops from the direction of Freetown. Sesay saied, Saidu Kallon briefed him that it was Kailondo who had attacked the DDR Camp and there was crossing firing. The Appellant recalls that DAG111 testified that Mr Gbao had scnt a Sitrep to Kailondo in a previous attack on the 17 April 2000 stating that he had the situation under control paragraphs 573-574 pg 192 of trial judgement.

[595] Transcript of 22 April 2008 pg 28 et seq. This witness was the overall armoury commander of the RUF and a personal Security officer for Foday Sankoh. He testified that Kailondo was the over all Commander in Makeni. And that Kailondo, Komba, Melosky Kallon and himsclf carried out the abductions. He said, he it was who established contact with Foday Sankoh at the abduction site thrugh Gilbril Massoquoi who was with Sankoh in Freetown co-ordinating the abductions.See also the testimony of DMK 087 dated 24 April 2008 pgs 56-75 that supports Kallon's alibi.

[596] Trial Judgement para.1842 pg 544.Para.1849,pg 547,para 1882,pg 556

occasions.[597] There is no clear evidence on record to support such an unequivocal finding of identification.[598]

268. It is significant to note that General Mulinge testified as witness for the Appellant and said "Kallon never came to Yegema; Monica never introduced him to us. Kasoma never told me about Kallon.[599]This testimony was never challenged by the Prosecution. Monica Pearson TF1362 testified and said while the witness, General Mulinge and other abdueted UNAMSIL soldiers were detained at her location, she saw Isa Sesay there, then Base Marine, the Brigade Commander at Magburaka and Brigade Commander for Kono.[600] TF1-362 did not mention the appellant's name. Although the Prosecution led evidence that the Brigade commander for Magburaka around this period was Mr Kallon,[601] then Colonel Alfred[602], according to TF1-362, the brigade commander of Magbuaraka who came to her location was called Base Marine.

269. The Appellant draws the Appeal Chamber's attention to exhibit 338, exculpatory disclosures from the Taylor trial indicating that apart from the Appellant, there were two other Morris Kallons in the RUF within the period material to this indictment. This exculpatory information appropriately and promptly brought to the attention of the Trial Chamber upon receipt and marked exhibit 338 would have provided good eause for a reasonable Trier of fact to consider the question of identification raised by the Appellant

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[597] Trial Judgement para.1850, pg 547 footnote 3557. At Pg 38 of the transcript of 22 March 2006, the witness did not say Monica identified the appellant to him as put by the Trial Chamber. He said "Monica would brief us every time they came. Asked "Üs, who? " And he replied "Brigadier Mulinge and me".

[598] Witness was asked by the Prosecutor"You said that Sesay and Kallon came to Monica's house .Did ant=ything happen when they came to Monica's house? Ans: Basically, when they came to Monica's house, they came to give orders to her.Q.: How did you know? Ans: Monica would brief us every time they came. Q.When you say "us"who are you talking about? Ans: Myself and General Mulinge. Trial Trancript of 22 March 2006 pg 38. The witness was persistently asked at pages 39 and 40 if Moniea talked about any other commander and failed to mention Kallon's name doing so ouly when the Prosecutor asked urged him "" Witness, you mentioned the name of Morris Kallon. Who was Morris Kallon?" The following answer raises reasonable doubts about the purported identification of Kallon by Moniea in four occasions to the witness as the Trial Chamber misconstrued the evidence on the subject to indicate: "From what I came to understand, Morris Kallon happened to be one of the commanders under Sesay and he was very close to Issa Sesay and most of the time he is the one who immediately executed his order's 40. It is the defence position, that the testimony of the witness failed to support the finding that Monica Pearson identified the accused to the witness as erroneously found.

[599] Trial transcript, 6th March 2008 pgs 53, 55,62,63,67.

[600] Trial Transcript21 April 2005 pgs 29-31

[601] Trail transcript, TF1-042 dated 20 June 2006, pgs 25-26, and 34.

[602] Trial transcript-Ngondi 28 March 2006,pgs 126, 128-129

as a central issue in his defence. The Trial Chamber, we submit failed to apply the applicable legal standards laid down in Krupreskic to evaluate identifieation evidence[603].

Error with regard to mens rea:

270. The Chamber found that Foday Sankoh was against the disarmament process and expressed these views publicly. And that in the months leading to May 2000, he repeatedly expressed his dissatisfaction with the disarmament process.[604] On the 3rd May the Leader sent a radio message to Mr. Sesay, copied all RUF radio stations claiming that the UNAMSIL Field Commander had stated over Radio France Internationale that UNAMSIL will forcefully disarm RUF.[605] All these took place in the heat of the conflict.

271. The Appellant submits that it is within this frame of mind and general disposition and publicly expressed hostility and opposition to the disarmament process by Foday Sankoh that the radio message to the appellant and the opposition of some RUF commanders to the process on the orders of Foday Sankoh ought to be assessed and evaluated and not in isolation and unreasonable inferences drawn from such acts detached from context. The Appellant submits therefore that the inference made at para.642 of the trial judgment that Kallon opposed the disarmament process was therefore unreasonable because it was not the only reasonable inference in the circumstances of this case.

272. A more plausible inference is that he supported and actively co-operated with the process judging from the content of exhibit 33 p.0008803,(letter from Mr Kallon through Sesay to Foday Sankoh dated 13 March 2000 seeking his favorable support on the establishment of DDR Camps in several locations in Sierra Leone).[606] The progression of events that transpired upon Mr Kallon receiving Foday Sankoh's injunction in exhibit 33 p.8896 reasonably explains Mr Kallon's decision not to join forces with Mr Gbao to storm the DDR Camp at Makump on the 17th April to halt the disarmament scheduled to

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[603] Krupreskic, APP.Judgement para.32-41 pgs 10-13.
[604] Trial Judgement para.1765-1767
[605] Trial Judgement para.1768 pg,925
[606] Exhibit 33, pg 0008803 is a radio message from Mr. Kalon to Survival; Infos Smile dated 14 March 2000. The message reads:- Sir, Be informed that the UN Peace Keeping Force are requesting to build Reception Centers for DDR Programmes as they may like to locate one at Matatoka,Mabonto and Ferry Junction. Sir, these centers are for reception of combatants and sereening before sending them to the DDR Camp. The Centre that will be at Matatoka is for both Combatants for Yele and Matattoka. Also, the one at Mabonto is for the combatants for Mabonto and Bubuna.Likewise the one at Ferry Junction is for both Combatants at Magburaka and Mile 91. Secondly sir, according to them, the observer will be visiting your point on Thursday along with two vehieles. Sir, in respect of this issue, I need your positive response.

start on that day. The testimony of Brigadier Ngondi that right from his assumption of duties in Makeni, he met many RUF commanders including Kallon and Gbao to discuss about the DDR programme including the movement of child combatants but the commander he met most was Gbao[607], underscores the fact that Mr Kallon was not in command of the operations that took place at the DDR Camp Makump from the 17 April 2000 to May 2000. The Prosecution Supplemental Pre-trial brief underscores this fact.[608]

273. This is further underscored by the finding that RUF combatants were scared to disarm because Gbao(not Kallon) threatened to execute any combatant found disarming clandestinely.[609] Prosecution witness TF1-174 testified about the existence of a serious state of acrimony between Colonel Augustin Gbao and Colonel Joe Poraj, the Milob team leader in Makeni in April 2000.[610] When Mr Gbao stormed that DDR Camp on the 17 April 200 when the project was to commence, he turned to Kailondo to give a briefing of the situation and not Mr Kallon.[611] Within the period the disturbances were taking place in Makeni, from 17 April 2000 to May 2000, Brigadier Ngondi testified that ***after 18 April*** he did not see Morris Kallon. And that it was alleged that the flat that was chosen for the reeeption centre belonged to Brigadier Kallon.[612] A reasonable trier of fact would have inferred from the fact that Mr Kallon's house was chosen as a reception centre as brigadier Ngondi testified[613] was inconsistent with opposition and obstruction of the disarmament.

Errors related to unpleaded locations

274. The Chamber found that no liability can be attributed to the accused in relation to crimes committed in Koinadugu, Bombali and Port Loko Districts.[614] The Appellant submits that

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[607] Trial Judgement para.1772-1775.pgs 526-527.
[608] Paragraph 572 (e) of the supplemental pre-trial brief alleged: - The Makeni DDR Camp was surrounded and attacked by RUF under the command of Augustine Gbao.
[609] Trial Judgement para.1780 pg 528 ft note 3409.
[610] Trial transcript, witness TF1-174 of 27 March 2006 pages 85,86, transcript of 28 March 2006, under cross-examination by counsel for Augustine Gbao, pgs 71, 76. This witness testified that during the first meeting called in April to discuss the relationship between Colonel Gbao and Colonel Joe Poraj, a British Milob there were heated arguments between the two, with Augustine Gbao accusing Colonel Joe Poraj of financing the Sandline Company, and this created embarrassment leading to the meeting ending acrimoniously. Thereafter, in May, Colonel Gbao and Colonel Dugbe took some of the children away in the first week of May. According to the witness, by this time, Morris Kallon was permanently residing in Maguraka.
[611] Trial Judgement para.574 pg 192.
[612] Trial Transcript pg 121.
[613] Trial Transcript of 31/03/2006 pg 4.
[614] Para.1692 pg 505 TCJ

despite this finding, the Trial Chamber proceeded to convict the Appellant on un-pleaded crimes allegedly committed in unpleaded locations within Bombali, Port Loko and Tonkolili Districts allegedly resulting from his personal commission even though it found that this was not pled as well (paras 1890-. 1904).

Errors relating to superior responsibility of the Appellant in relation to Count 15:

275. The Trial Chamber found Kallon guilty under article 6(3) relying mainly on the co-accused evidence tendered at trial, during the co-accused case, not forming part of the prosecution case against Kallon-exhibit 212.[615] The Appellant relies on the submissions on this issue at Ground 1 of this Brief.

DISCERNIBLE ERROR IN THE CONVICTION UNDER 6(3) FOR KNOWLEDGE OF ALLEGED CRIMES IN MAKENI AND MAGBURAKA:

276. The Appellant submits that by finding that the accused incurred superior command responsibility for the crimes of alleged subordinates in Magburaka and Makeni, for which he did not personally participate[616], the Chamber erred in failing to apply the legal "that a Superior must have effective control over the persons committing the underlying crimes".[617] In this regard, the Chamber made contradictory findings at Paragraph 2268 p 662 that Kallon was a subordinate commander under Sesay and Sankoh, that the chain of command between Kallon, Sesay and Sankoh functioned prior to Sankoh's arrest and that that commanders by-passed Kallon and sent messages directly to Sankoh through Sesay on the critical issue of disarmament,[618] yet convicted under article 6(3) for the crimes purportedly committed by alleged subordinates under his orders or for failing to punish such subordinates once he was aware that they had committed crimes,[619] without a showing that the Appellant knew about the participation of the alleged subordinates in the specified attacks at paragraph stated 2290 of the judgment. Additionally, the conviction of the Appellant for Superior Criminal responsibility at paragraph 2290 on the

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[615] Trial Jndgement para.s2260-2290 pgs667-669 The Chamber found at paragraph 2285 pg 667 relying on its finding at paragraphs 928-929 that in his role as a BGC from February 1999 to September 2000, Magburaka and Makeni were under Kallon's area of responsibility and the chain of Command between him Sesay and Foday Sankoh functioned effectively at the times of the UNAMSIL attacks relying on its findings at paragraphs 924-926,929-930.

[616] Paras.2287-2292,pg668-669,

[617] Blaskic App. Ch. Judgement para.67

[618] Para 2268

[619] Trial Judgement para.2286, pg 667. Para.928-933 pgs 293-294, 2285-2292 pgs667-669.

finding that he knew of the attacks in Makeni and Magburaka on 1, 2,4 and 7 May 2000 is a discernible error invalidating the conviction..[620]

ERROR IN THE LEGAL AND FACTUAL FINDINGS ON EFFECTIVE CONTROL OVER ALLEGED SUBORDINATES:

277. The Chamber found that Foday Sankoh addressed a press conference in Freetown on 1 May 2000[621] and issued a press release on May 2, in Freetown,[622] which in unmistakable terms established that he was personally directing the operations against UNAMSIL. The Chamber also found that on 1 May 2000, Sankoh sent Sesay to move to Makeni to ascertain the cause of events but prior to his departure; he contacted "The Brigade Commander in Bombali District, Komba Gbundema and Commanders in Tongo field to send re-enforcements". [623]

278. Despite the above findings the Trial Chamber, improperly found Kallon liable as a superior for crimes committed by several RUF commanders amongst them, Gilbril Massaquoi, Alfred Turay, Kailondo and others.[624] Regarding Augustine Gbao the Chamber never found him to be the Appellant's subordinate, therefore the Appellant's conviction on the events charged and attributable to Gbao as a Superior commander and perpetrated under him in locations in Makeni should be vacated.[625] Augustine Gbao received orders from and reported to Sankoh. For example, on the 14 April 2000, he sent

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[620] See Prosecutor v Oric ICTY Appeals Judgement 3 July 2008 paras 57-60 op cit It is the established Jurisprudence of International Tribunals that an accused is liable not out of general knowledge of crimes but knowledge of the involvement of his subordinates in the crimes.
[621] Trial Judgement para.1767 pg 524
[622] Trial Judgement paras.18545-1846 pg 546
[623] Para. 1844 pg 564.
[624] Trial Judgement para.2286 pgs 667-668.
[625] See Paragaraph 2262-4 p 661,2297 p 670. And also para 940 p 296 of the judgement where the Chamber concludes that Gbao was heavily involved in the disarmament process and was the amin link between RUF and Unamsil.There is no similar findings against Kallon. See further Paragraph 936 p 295 where the Chamber concludes that Gbao in Makeni enjoyed substantially increased authority over RUF fighters could initiate his own investigations and if found guilty woul punish fighters severely.No such concrete findings are made in relation to Kallon. See further the Supplemental Pre-trial brief at Para 572 (e) which gave notice that the DDR Camp at Makeni was surrounded and attacked by RUF under the command of Augustine Gbao.

a radio report of a mission about a mission he carried out in Lunsar per the Leader's (Foday Sankoh) instructions.[626]

279. In respect of a finding of guilt under 6(3) flowing from the Appellant's alleged command position of "Battle ground commander"(BGCM) in Makeni from February 1999 to Septemb 293er 2000 [627]at paragraphs 2285 and 2286 the appellant submits, that the reference in the footnote[628] is totally misplaced and misconceived as those paragraphs do not support the finding as such in that within the same time frame he was found to be Battle Ground Commander, the Chamber rather found that he was promoted to Brigadier and moved to Makeni as a Brigade Commander. [629] The Chamber's finding that Kallon had the ability to inflict punishments, citing instances and acts unconnected to the acts and conducts of his alleged subordinates whose unpleaded and unspecified transgressions he was found as a Superior Commander[630]was unsupported by the trial records in respect of the acts and conduct of the alleged subordinates.[631] For example, the evidence established that Mr Kallon did not have effective command over Kailondo [632] and that he

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[626] Radio message page 0008826 dated 14 April 2000. From Col.Gbao to Smile. See another radio message at pg 0008793,

[627] Para.2285 and 2286 p667-668,footnote 3958 p 557,

[628] Footnote 3958 refers to and relies on para.928-930 p

[629] The Trial judgement at paragraph 928 of the trial judgment pg 293 found that Kallon was a BFI and was Sesay's deputy and that he was a Brigadier and deployed to Magburaka following attack on Isa which position he held from March to October 1999.

Paragraph 929: Kallon was in direct contact with Sankoh and in 2000 he was reporting to Sesay and Sankoh regarding the situation in Makeni.

Paragraph 932: Kailondo was also a Brigade Commander for Makeni.

The defence submits that the above findings are inconsistent with the finding of guilt in paras.2285-2289 pgs 667-669 under article 6(3)

Paragraph 931:Kallon remained in Magburaka until April 2000 when he moved to Makeni as 5th Brigade Commander and promoted Brigadier.

Paragraph 930:-Kallon continued to serve as Sesay's deputy after assuming the position of BGC.

[630] Para 2287,p668

[631] Exhibit 32 page 0008832 dated 28 April 2000.Mr Gbao radio message to Survival and Smile titled report about the crisis in St Francis dated the 28 April 2000 involving the movement of children associated with conflict and CARITAS. The Appellant submits that the Trial Chamber disregarded favourable Prosecution evidence which established that Gilbril Massaquoi was not a subordinate of the appellant at the material time to this case because from 1999, Gilbril Massaquoi was with the Superman faction and was in Freetown during the events that took place in Makeni. And that one of the reasons that set the appellant and Gilbril Massaquoi apart was his mistreatment of civilians which the appellant disapproved. That the enumerated individuals above were subordinates of Kallon was therefore wrong at law and factually deficient. Kailondo reported to Foday Sankoh. Indeed on the 29-12-1999 Kailondo in his capacity as Commander of the regional head quarter Makeni addressed a radio message to Foday Sankoh on matters relating to the disarmament of combatants in his location and their welfare.

[632] Exhibit 34, pg 0000877, 2nd message from Regional Headquarter, Makeni to Smile, through Survival form Colonel Vannicions Vanny-aka-Kailondo, dated 29/12/1999.

took orders from and reported directly to Foday, in particular in relation to the disarmament process in Makeni.[633]

280. The Chamber also found, based on exhibit 212 tendered by Sesay, that Komba Gbudema reported directly to Foday Sankoh through Mr Sesay bypassing Morris Kallon.[634] The appellant submits that Melosky Kallon who was Brigade Commander at Lunsar where the Zambatt were abdueted reported directly to Foday Sankoh bypassing the Appellant.[635]

281. Considering the above, the Chamber finding that it was "highly unlikely"[636] that Kallon would be afraid to arrest Kailondo, acting on Sankoh's instruetions, is therefore erroneous as there is more than sufficient evidence to infer the alternative reasonable inference that indeed Kallon it was never established that Kallon had effective control over him and so could not and had no authority defacto or dejure to arrest him.[637] *The*

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[633] Exhibit 34:Page 00008771 = Second Message Regional Headquarters – Makeni
To: Smile – Through Survival From: Col. Vannicious Vanny – aka – Kailondo
Date: 29-12-1999, Sir, with reference to my last message sent to you, pertaining already disarmed combatants with me in the Barracks, there is still a shortage of food, eondiment, drugs and other basic needs. Secondly, there is complain by all unarmed men that nothing was done about them as the UNAMSIL Personnel were only concerned with the armed men.
Sir, according to the combatants, they expect to live a happy life after the disarmament and not to experience distress eondition of living (empty bag can't stand). The above problems need authority's attention"

[634] Example, exhibit 32 radio messages at pages 0008793,datcd 9th Feb.2000, pg 00008808, Smile to Komba, pg 0008808 dated 24 /3/2000,Smile to Lt Col. Komba

[635] The Appellant further draws the attention of the Appeals Chamber to other radio messages from RUF field commanders elearly negating the inference that by mere fact of an alleged de jure position, the accused had effective eommand over RUF field commanders in Makeni,Tonkolili,Port-Loko and other RUF controlled areas. These messages demonstrate that many of these commanders, if not all, by- passed Kallon and were under the direct command of Foday Sankoh to whom they reported. Page. 00008766 To: Smile From: Mr. Melosky Kallon Sub: Respond
Date: 23-12-1999 :Message in respect of the looting of Lunsar
Page 00008771 = Second Message Regional Headquarters – Makeni
To: Smile – Through Survival: From: Col. Vannicious Vanny – aka – Kailondo
Date: 29-12-1999:- Sir, with referenee to my last message sent to you, pertaining already disarmed combatants with me in the Barracks. there is still a shortage of food, eondiment, drugs and other basic needs. Secondly, there is eomplain by all unarmed men that nothing was done about them as the UNAMSIL Personnel were only coneerned with the armed men. Sir, according to the eombatants, they expect to live a happy life after the disarmament and not to experience distress condition of living (empty bag can't stand). The above problems need authority's attention.
Page. 00008774 = Seeond message: To: Survival, Infos: Smile
From Melosky M. Kallon: Sub: Information
Date: 2-1-2000: Sir, be informed that we fell in an ambush between Port Loko and Gberi Junction while heading for Lunsar. During that eourse, one of my personnel... .
Page 00008784 = Seeond Message: To: Survival, Infos Smile
From: Mr. Melosky M. Kallon: Date: 2-2-2000
Sir, I received a report of hand grenade incident which took place on the 1-2-2000 at around. 09:00hours in the DDR camp at Port Loko.

[636] Paragraph 609 p 202 of the Judgement.

[637] Trial Judgement paras.670-673, pgs 222 and 223. The Appellant reealls the findings by the Trial Chamber that in the R assignment took precedenee over rank.

above finding is inconsistent with established Jurisprudence that superior responsibility does not arise solely from de jure authority conferred through official appointment.[638] *The Appellant submits therefore that trial Chamber finding that he incurred Superior Responsibility by his mere position of command was erroneous in law.*[639] The Appellant submits that no such position was pleaded in the indictment and was never proved to exist within the RUF command structure[640].

Error in applying the wrong legal standard in determining the credibility of prosecution and defence evidence (Sub-grounds 24.9 and 24.10):

282. The Chamber selectively pre-determined the question of credibility of UNAMSIL and victim witnesses in a general manner removed from the specific evidence of each individual witness and removed from the accused..[641] The Trial Chamber has discretion in its assessment of evidence but this discretion is tempered by the Trial Chamber's duty to provide a reasoned opinion and this has been considered by International Tribunals as a fair trial requirement.[642] The appellant submits that the integrity of the entire judicial process against him was irredeemably undermined rendering the trial unfair. Proseeution witnesses gave material inconsistent and contradictory testimony on identification regarding the position the Appellant held at the material moment relevant to the UNAMSIL counts.[643] Identification of the accused in the context of Several Morris

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[638] ICTR -40-1-AA, 3 July 2002, Prosecutor Vs Ignace Bagilishema para.50 pg 26. The Trial Judgement consistently found that the appellant was a "battle ground commander" in Makeni or battleground commander [638] which made him "the highest ranking RUF officer in the Makeni area during the period the alleged crimes were committed and as a result bore responsibility for the acts and conduct of alleged subordinates..

[639] Trial Judgement para.640 pg 212 para.609 p 202,para.640 p.212.

[640] Trial Judgement paras.657-703, pg 217-231. Chamber found that Kallon remained in Magburaka until April 2000, when he moved to Makeni as the 5th Brigade Commander by which time, he had been promoted to Brigadier. Kallondo was also the Brigade Commander for Makeni and the BFI, although the later post was dormant as there was no fighting in Makeni at the time. Relying on its finding above the Chamber based it finding of the Command role of Kallon in the Magburaka/ Makeni area from February 1999 to September 2000, when it found Kallon was RUF Commander in Magburaka from October 1999 during which he received orders from Bockarie. However the Chamber also found that Kallon remained in Magburaka until April 2000 when he moved to Makeni as Brigade Commander.

[641] See Paragraph 644 p 213 where the Chamber gives a general clean bill of health respecting UNAMSIL witnesses. This pre determination of the credibility of these witnesses blurred the Chamber's objective assessment of the serious contradictions and inconsistencies in many of the UNAMSIL prosecution witnesses in particular their inability to positively identify the accused Kallon in relation to various events they attributed to him.

[642] Kupreskic, App. Judgement para.32.

[643] Trial Judgement para.931 pg 294,Trial Transcript, testimony of Brigadier Ngondi, 28/3/2006 pg 7, in which he testified, «Colonel Alfred was in charge of Magburaka area because, initially Brigadier Kallon was in charge of Magburaka. TF1-042 Major Ganase testified Morris Kallon who came to Makump Camp on 1 May 2000 was the 5th Brigade Commander in Magburaka –trial judgement transcript pg 24. Witness under cross-examination stated that

Kallons in the RUF movement[644] was a crucial distinguishing element that appropriately raised but not considered by the Chamber in a reasoned opinion as mandated by the statute and the rules.

283. For example, Brigadier Ngondi testified that Major Maroa reported to him that Kallon assault and arrested Major Jaganathan. Jaganathan testified that Kallon assaulted Salahuedin and ordered him (Jaganathan) arrested [645]. According to Lt Colonel Mendy Jaganathan told him that it was Gbao "secured" him (Jaganathan) and took him to Teko Barrack.[646]This materially contradicts the account that Kallon arrested and forced Jaganathan into his car and drove him to Teko barracks. Jaganathan testified that he never met Brigadier Kallon in Magburaka or Makeni. And that apart from what Major Maroa had told him, there was no way he can really say he was arrested by Brigadier Kallon[647]. The Witness was challenged about his ability to ascertain which Kallon arrested him in the light of the presence of other Kallons like AS Kallon the MP Commander at with offices at the MP office in Makeni[648]. Witness was therefore unable to say whether the Commander involved in the incident Makeni at the DDR Camp Makump was AS Kallon and not Brigadier Kallon[649]

284. Major Jaganathan said on 1 May 2000, 10 combatants who had previously disarmed came and demobilized but shortly a group of RUF combatants 30-40 led by Col Gbao came to the camp, surrounded it.[650] Witness testified that it was at this point in time that Brigadier Kallon, 5th brigade and the 4th Brigade commander in Magburaka whom he had not previously known and had never seen before came in a Mercedes pink colour

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Morris Kallon was 4th Brigade Commander at Magburaka pg 85. In his evidence in chief and under cross-examination, he said he had never seen him before.19/04/2006,TF1-362 testified (trial transcript of 20/4/2005) that the Brigade Commander of Magburaka was Base Marine who was one of three RUF Commanders who visited her location during the period material to these counts. The two others are Sesay and Lansana. This contradicts TF1-228 Kasoma who testified that in at least 4 occasions she introduced Morris Kallon to him and General Mulinge. General Mulinge denied knowledge of any such introduction. TF1-288 Lt Colonel Kasoma testified , trial transcript of 22/03/2006 pgs 1-4 that at Lunsar "I was taken to a small shelter where I found this gentleman who later identified as the Commander of the area",TF1-041 testified ,trial transcript of 17/07/2006,that the Brigade Commander of Lunsar was Melosky Kallon, pg 28,and not Morris Kallon as wrongly found by the Trial Chamber

[644] For instance exhibit 338 –Rule 68 disclosure-which states there were other Kallons within the RUF,

[645] Trial Judgement para 1790-1791-pg 531

[646] Trial Transcript of 28 June 2006 pg 6.

[647] Trial transcript of 20 June 2006 pg 87.

[648] Trial transcript of 20 June 2006 pg 87-88.

[649] Trail Transcript 20 June 2006 pg 89.

[650] Trial Transcript 20 June 2006pg 21.

came and ordered his men to arrest him[651]. The Appellant appropriately challenged his hearsay alleged identification by proxy.[652]And the witness agreed that but for that information he would never in any way be able to say it was Kallon who arrested him.[653]

285. The Appellant submits therefore that his conviction by proxy and on the hearsay identification testimony of Major Jaganathan,[654]un undated radio message from Sesay to Kallon asking Kallon to collect him with "a Benz Jeep Car",[655] and the inadmissible and unreliable testimony of DAG 111,[656]was erroneous in fact and in law. These witnesses supported the alibi of the appellant and also supported his defense of identification. They were among the workers at the DDR Camp to whom the Trial Chamber found, accused address his criticism of the beds made for the combatants to be demobilized.[657]

Count 15:-error with regard to conviction.

286. The Chamber convicted the appellant in count 15 of committing and ordering attacks on peacekeepers pursuant to article 6(1) in Bombali District and pursuant to 6(3) in Bombali, Port Loko and Tonkolili districts. The appellant submits that as a matter of law, the Trial Chamber erred in convicting the appellant on two distinct modes of participation conjunctively for the same crime and based on the same set of facts. The Chamber held at paragraph 2311 held that it is inappropriate to convict under both article 6(1) and 6(3) of the statute. Although the Chamber found that the mens rea of count 15 was specific intent mens rea, [658]the court made no finding on this element of the crime and this constitutes a discernible error invalidating the judgment.

Error regarding pleading of Count 17 crimes:

287. The Appellant submits that he was convicted under count 17 for murders which were neither pleaded nor found to have been cured..The identities of the victims were never pleaded. Also the particulars underlying the Appellants responsibility for the murders were never pleaded. The Appellant objected to this count in the oral motion of acquittal

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[651] Para.1791of trial judgement pg 53,footnote 3429

[652] Trial Transcript of 26,6,2006 pgs 85-87 : Asked at pg 87: So really, to be honest with you Mr Witness, apart from what Major Maroa may have told you there is no way you can really say it was Morris Kalon- I mean Brigadier Kallon that arrested you"? Answer: Yes.

[653] Trial transcript June 20 2006 pgs 25, 26, 34.

[654] Trial Judgement paras.1789-1791, pg 531 footnotes 3427, 3428.

[655] The Trial Judgement relied on Sesay defence exhibit 212, RUF radio log book page 2045.

[656] Para.609 p 202

[657] Trial Judgement at para.1781 pg 529 para.663, pg 210.

[658] Para.232 p.75.

but the Chamber failed to rule on his objections in that regard[659] and in the Motion to exclude evidence outside the scope of the indictment. The Appellant further submits that the alleged murder of the UNAMSIL peacekeepers was not part of the Prosecution case during presentation of his case.

288. The Chamber found that it would limit its findings on count 17 (Murder of Peacekeepers) only to Bombali and Port Loko Districts.[660] The Appellant submits that despite the findings above, the Trial Chamber nevertheless convicted him for the unlawful killings at the DDR Camp Waterworks in Magburaka, Tonkolili district.[661]. The Appellant submits that the above findings were inconsistent with the Chamber finding that no liability can be attributed to the accused in relation to crimes committed in Koinadugu, Bombali and Port Loko districts.[662] The Appellant respectfully urges the Hon. Appeal Chamber to reverse the conviction for the above reasons. The appellant submits that the Chamber erred in convicting him for unlawful killings without providing him with notice of the charges against him and without establishing his role in the said crimes and without affording him an opportunity to confront his accusers as mandated by article 17 of the statute, thus causing him irreparable prejudice. The Chamber also erred in convicting the accused under 6(3) when it was not established that the accused knew or had reason to know that his subordinates had committed the killings.[663]

289. The appellant submits that the Trial Chamber found that at the material moment to this case, there was no fighting in Makeni, as a result; the position of Battle Field Inspector occupied by Kailondo was dormant.[664] The appellant therefore respectfully submits that the conditions for the application of Article 3 Common to the Geneva Convention and additional Protocol 2 were not established and that there must exist a nexus between the attack and armed conflict for a conviction of the Appellant in Count 17 to be sustained. The appellant urges the Appeals Chamber to reverse the conviction in this count in favor of acquittal as a matter of law.

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[659] Oral motion of acquittal page 54 - 59
[660] Para.1945 pgs 572-3.
[661] Trial Judgement paras.1958 (ii) pg576 and paras.1828-1829 pgs540-541.
[662] Trial Judgement at para.1692pg 505.
[663] See Oric ICTY Appeals judgment 3 July 2008 para 59 p22.
[664] Trial Judgement para.932 pg 294.

GROUND 25: ERROR RELATING TO SPECIFIC INTENT 6(1), 6(3):

290. The Chamber erred in law by failing to make any finding as to the specific intent of the Appellant in the conviction under Article 6(1) and 6(3) although the chamber had found that these were specific intent crimes:[665] The Trial Chamber convicted the Appellant for events in Bombali District under Count 15 pursuant to Article 6(1) responsibility for "committing" and "ordering" attacks on peacekeepers and for events in Bombali, Port Loko, Kono and Tonkolili Districts pursuant to Article 6(3) responsibility for the outlined Article 6(1) offences. The Chamber defined the elements of the offence of "intentionally directing attacks against personnel involved in peacekeeping mission" as including: **1)** that the accused directed the attack against, inter alia, the personnel involved in humanitarian assistance or peacekeeping; **2)** that the accused intended such personnel etc. to be the object of the attack; **3)** that the personnel ete. were entitled to protection under international law of armed conflict; and **4)** that the accused knew or had reason to know that the personnel etc. were protected.[666] In discussing the *mens rea* element of the offence under the second limb above, the Court held that it is one of "a specific intent *mens rea*" and that "the accused must have intended the personnel to be the primary object of the attack".

291. At paragraph 2248 p.657 of the Trial Judgment where the Chamber found that "Kallon instructed various RUF fighters to carry out the assault and abduction of Jaganathan", the Chamber used an Article 6(3) mode to arrive at its findings in the sense that it held that "Kallon used his position as senior RUF Commander and BGC to compel his subordinates to commit the offence" and that he "intended his orders to be obeyed". The Chamber used the same 6(3) mode of liability (to wit, "position of authority over fighters") to convict Kallon for directing an attack against Maroa pursuant to Article 6(1) of the Statute.[667] The same holds for the Chamber's finding on the abduction of Mendy and Gjellesdad[668] as well as for the abduction of Kasoma and ten peacekeepers,[669] and for

[665] See para. 232 p75; para. 2248 p657; para. 2250 p658; para. 2253 p658; para. 2255 p659; para. 2258 p660; para. 2260 p660; and para. 2263 p669 of the Trial Judgment.
[666] Para. 219, pp.70-71 of the Trial Judgment.
[667] See paras. 2249-2250, p.658 of the Trial Judgment.
[668] Paras. 2251-2253, p.658 of the Trial Judgment.
[669] Paras. 2254-2255, pp.658-659 of the Trial Judgment.

ordering the attack against Kasoma's convoy of about 100 peacekeepers on May 2000.[670] In view of the fact that the Chamber found these offences to be specific intent offences committed under Article 6(1), it is contended that it ought to have shown how Kallon personally intended to make the specified peacekeepers "the primary objects of the attacks directed by him" as stated in paragraph 232 of the Trial Judgment, rather than how he used his subordinates to commit the offences through an Article 6(3) mode. In the case of *Rutaganda*, the Court held that "the *dolus specialis* is a key element of an intentional offence, which offence is characterized by a psyehological nexus between the physical result and the mental state of the perpetrator".[671]

292. The foregoing contention is compounded by the fact that the Chamber sought to separate the two modes of 6(1) and 6(3) liabilities when it failed to find evidence that Kallon "ordered, planned, instigated or aided and abetted the attack directed against ZAMBATT peacekeepers at Lunsar on 4 May 2000". In view of the glaring lack of evidence under Article 6(1) here, including the absence of a specific intent *mens rea*, the Chamber concluded that "it will accordingly consider Kallon's liability for this attack pursuant to Article 6(3) of the Statute", and rightly refrained from using Article 6(3) mode to convict for Article 6(1). It is therefore strange and inexplicable that the Chamber used the Article 6(3) mode of responsibility in convicting for Article 6(1) for the specified crimes against Jaganathan, Maroa, Mendy, Gjellesdad, Kasoma and other peacekeepers under Count 15 above. It is submitted that the Chamber's findings, conclusion and conviction on the foregoing events, especially in view of the fact that they were found to have occurred

[670] Paras. 2256-2258, p.659-660 of the Trial Judgment.

[671] *Rutaganda Trial Judgement*, paras. 61-63 (ICTR). Also, regarding the issue of 'specific intent', the Court applied the reasoning in the *Akeyesu Trial Judgement* (at para. 523), where it was held, inter alia, that "[...] intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact", such as, in the case of genocide, the scale of atrocities committed, their general nature, the systematic targeting of victims etc. Also, in the *Kayishema and Ruzindana Judgement*, (Trial Judgement, para. 93) the Trial Chamber found that '**intent can be inferred either from words or deeds and may be determined by a pattern of purposeful action**". In particular, the Chamber considered evidence such as the methodical way of planning, the systematic manner of killing and so forth in order to arrive at a finding for specific intent

predominantly in Bombali District,[672] gravely undercuts the Court's holding at Paragraph 1972 of its Trial Judgment.[673]

Ground 27: ERROR RELATING TO CIVILIAN STATUS OF UNAMSIL

293. The Appellant submits that the leadership of UNAMSIL acted in a belligerent manner in dealing dealing with the RUF, hence stripping itself of any international protection accorded civilians or peacekeepers. The Appellant would therefore rely on Trannscript references in **ANNEX III** filed herewith to illustrate and throw light on this Ground.

Ground 29: ERROR RELATING TO AFRC/RUF RESPONSIBILITY IN UNAMSIL CRIMES

294. The Appellant relies on his submissions and references in his Amended Notice and Grounds of Appeal in arguing this ground.

GROUND 30: CUMULATIVE CONVICTIONS:

Cumulative conviction for murder, extermination and collective punishments and terrorism.

295. The Trial Chamber convicted Kallon of "extermination", a crime against humanity, through a JCE between AFRC and RUF under Count 3 for various events in parts of Bo, Kenema, Kono and Kailahun Districts. It also convicted Kallon of "murder", a crime against humanity, through a JCE between AFRC and RUF under Count 4 for the same or similar events in parts of Bo, Kenema, Kono and Kailahun Districts. It is submitted that the conduct found by the Trial Chamber against Kallon for both Counts 3 and 4 are the

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[672] The Chamber, in its disposition and contrary to para. 1972, p.580 of its Trial Judgment, convicted Kallon under both 6(1) and 6(3) liabilities for events in Bombali Distrcit under Count 15.

[673] Para. 1972 of the Trial Judgment states: "The Chamber is of the opinion that it would be inappropriate to hold a superior criminally responsible for ordering, planning, instigating or aiding and abetting the commission of crimes and at the same time reproach the superior for failing to prevent or punish the perpetrators.[673] The Chamber's position on this issue is fortified by the Prosecution's pleading that superior responsibility under Article 6(3) of the Statute is only pleaded "in addition, or alternatively" to the individual responsibility under Article 6(1) of the Statute".

same; the conduct touches and concerns events in various parts of the outlined Districts of Bo, Kenema, Kono and Kailahun for which Kallon is said to be responsible *through a JCE between the RUF and AFRC*. At Bo District, the unlawful killings were said to have been perpetrated by AFRC/RUF fighters through a JCE in which Kallon, according to the Trial Chamber, participated and shared the *mens rea* of the perpetrators[674] – Kallon was, however, not found to have personally committed any crimes in Bo District[675]; the same holds for Kenema,[676] Kono[677] and Kailahun[678] Districts. Each case or circumstance only alluded to a conduct deduced from a JCE on the part of Kallon, and nothing more. Consequently, it is submitted that the cumulative conviction of Kallon for murder and extermination on the basis of the same conduct, as outlined above, breaches the Trial Chamber's decision in its Trial Judgment, namely, that "it is impermissible to convict for both murder and extermination under Count 4 and 3 based on the same conduct".[679]

1. Error relating to collective punishment and terrorism

296. The Trial Chamber has convicted Kallon of "collective punishment" and "terrorism" as war crimes, as well as various other war crimes (murder, outrages upon personal dignity, mutilations and pillage).[680] The general test for cumulative convictions is that "multiple convictions entered under different statutory provisions, but based on the same conduct, are permissible only if each statutory provision has a materially distinct element not contained within the other." "Where this test is not met, only the conviction under the more specific provision will be entered,"[681] namely the one with the "materially distinct element."[682]

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[674] See paras. 1017-1025, pp.317-319 of the Trial Judgment.
[675] Para. 1976, p.581 of the Trial Judgment.
[676] Paras. 1098-1108 pp.338-314 & at para. 2053, p.605 of the Trial Judgment.
[677] Paras. 1268-1281 pp.384-387 & at para. 2066, p.612 of the Trial Judgment.
[678] Paras. 1446-1458 pp.433-436 & at para. 2157, p.635 of the Trial Judgment.
[679] Para. 2304, p.673 of the Trial Judgment. See also the *Ntakirutimana Appeal Judgement*, para. 542.
[680] TCJ, pp. 680-84
[681] *See Semanza*, (Appeals Chamber), May 20, 2005, para. 315: "The general test for cumulative convictions was recently reaffirmed in the [ICTY's] *Krstić* Appeal Judgement:
The established jurisprudence of the Tribunal is that multiple convictions entered under different statutory provisions, but based on the same conduct, are permissible only if each statutory provision has a materially distinct element not contained within the other. An element is materially distinct from another if it requires proof of a fact not required by the other element. Where this test is not met, only the conviction under the more specific provision will be entered. The more specific offence subsumes the less specific one, because the commission of the former necessarily entails the commission of the latter."

297. Here, the convictions for "collective punishment" and "terrorism" are entirely based on other convictions with added findings of (a) intent to punish collectively, and (b) intent to terrorise, respectively. For example, the terrorism conviction as to Bo District rests almost entirely on other crimes as to which convictions were entered.[683] The terrorism and collective punishment convictions as to Kenema District rest entirely on other crimes as to which convictions were entered.[684] The terrorism and collective punishment convictions as to Kono District rest almost entirely on other crimes as to which convictions were entered.[685] Thus, "collective punishment" and "terrorism" each have a materially distinct element from the other war crimes.[686] Yet, the other war crimes (which are encompassed within the convictions for collective punishment and terrorism) do not have additional materially distinct elements, rendering the convictions as to them impermissibly cumulative.

298. Respectfully, to the extent that the Appeals Chamber in its *CDF Appeals Judgment* finds that collective punishment is not impermissibly cumulative with convictions for murder, cruel treatment and pillage—apparently an issue of first impression there—the logic appears erroneous. The Appeals Chamber held:

> The crime of collective punishments requires proof of an intention to punish collectively, which murder, pillage and cruel treatment do not. In addition, murder requires the death of the victim, which collective punishments does not and pillage requires proof of appropriation which the crime of collective punishments does not. Finally, cruel treatment requires proof of serious mental or physical suffering or injury, which collective punishments does not. Thus, because each of these crimes requires proof of materially distinct elements, cumulative convictions are permissible in this instance.[687]

See also Bisengimana, (Trial Chamber), April 13, 2006, para. 96; *Musema*, (Appeals Chamber), November 16, 2001, paras. 361, 363 (similar); *Kamuhanda*, (Trial Chamber), January 22, 2004, paras. 578. 581 (similar); *Kajelijeli*, (Trial Chamber). December 1, 2003, paras. 746, 749-50 (similar).

[682] *Bisengimana*, (Trial Chamber), April 13, 2006, para. 97: "The *Celebici* Judgement explains that when facts are regulated by two different provisions, a conviction should be entered only under the provision that contains an additional materially distinct element."

[683] *See* TCJ, paras. 1031-37 (killing, mutilation and burning were basis for terrorism conviction).

[684] *See* TCJ, paras. 1122-30, paras.1131-35 (killing, beating, ill-treatment and enslavement were basis for terrorism and collective punishment convictions).

[685] *See* TCJ, paras. 1340-65 (killing, rape, sexual slavery, forced marriage, outrages upon personal dignity, physical violence and burning were basis for terrorism conviction). TCJ, paras. 1366-78 (killing, physical violence and burning were basis for collective punishment conviction). It is only "burning" that does not appear to be an independent count.

[686] There is no claim that the collective punishments and terrorism convictions (which are war crimes) are impermissibly cumulative with any of the crimes against humanity convictions, because of the different "chapeau" elements.

[687] CDF Appeals Chamber Judgment, para. 225.

299. With all due respect, if murder is part of collective punishment, then the entirety of the elements of the crime of murder are part of the collective punishment conviction—there is no added element of the death of the victim that is part of murder, but not part of the collective punishment when *murder* is a form of collective punishment. (It makes no sense to say that the death of the victim is not required for murder as a form of collective punishment—as if the murder victim might still be alive?) Similarly, if pillage is part of collective punishment, it is all the elements of pillage (including that property is being appropriated) that are being considered as a collective punishment. (It makes no sense to say that pillage as a collective punishment does not require the appropriation of property; then it would not be pillage.) The same would hold true for other war crimes that underlie a conviction for collective punishment.

300. An identical analysis would apply to terrorism where the terrorism conviction rests in part, as it does here, on other war crimes convictions. The crime of terrorism may have a materially distinct element (the intent to terrorize), but the underlying crimes do not have materially distinct elements when they are encompassed within the terrorism conviction. For these reasons, the convictions of collective punishment and terrorism are impermissibly cumulative with the war crimes convictions encompassed within them and those war crimes convictions should be vacated or reversed.

301. Convicting the accused under 6 (1) and 6 (3) in relation to UNAMSIL for the crimes committed in Bombali based on the same conduct.

GROUND 31: SENTENCING ERRORS:

302. The Trial Chamber appropriately acknowledged the defense argument "that there is a danger that when so few are prosecuted for the harms that befell the people of Sierra Leone, it may be tempting for the court to try and serve a broader function, by expressing the outrage of the international community, and placing the blame on the nine individuals prosecuted by this court."[688] The Trial Chamber committed precisely this error in its Sentencing Judgement, by considering the gravity of the crimes (many by AFRC forces)

[688] RUF Sentencing Judgement, para. 78.

but not considering the "form and degree of participation" of Kallon as to those crimes.[689] In fact, he is sometimes extremely tenuously linked, if at all. Thus, the Trial Chamber has included in evaluating gravity some extremely heinous crimes as to which there is minimal or even no linkage to Kallon.

303. For example, in evaluating gravity, the Trial Chamber makes frequent reference to crimes by Staff Alhaji of the AFRC,[690] as does Judge Itoe,[691] but the Trial Chamber Judgement found that Alhaji was *not* a member of the JCE as to which it convicted Kallon.[692] The Trial Chamber also never found that Kallon had a command relationship as to Alhaji, nor that Kallon was personally involved in the crimes of Alhaji. We argue elsewhere that the imputation to the JCE of crimes by a non-JCE members (such as Alhaji) was error (see above); if the Appeals Chamber accepts that, then none of the crimes of Alhaji (or other non-JCE members), should be considered in sentencing Kallon. Alternatively, if the Appeals Chamber does not agree and continues to hold Kallon responsible for crimes of non-JCE members, at minimum, the Appeals Chamber should find that the Trial Chamber erred in failing to consider Kallon's (extremely remote) "form and degree of participation" with respect to most crimes (such as those of Alhaji). Thus, to consider Alhaji's crimes in evaluating the gravity of Kallon's conduct is either completely inappropriate,[693] or needs to be discounted,[694] to reflect this attenuated connection.

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[689] *See Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 815 ("Despite the enormity of the crime base that underlies this case, the Trial Chamber must remember that in this case, as in all cases before the Tribunal, it is called upon to determine a sentence for two individuals, based solely on their particular conduct and circumstances."); *Obrenovic*, (Trial Chamber), December 10, 2003, para. 78 ("It is recalled that the basis of [responsibility] for crimes within the jurisdiction of the Tribunal is *individual* criminal responsibility. An accused shall be held liable for *his* actions and omissions – no more and no less. In crimes as massive as those committed following the fall of Srebrenica, the Trial Chamber finds that it must be particularly vigilant in ensuring that its consideration of the gravity of the offence focuses on those acts or omissions of the individual accused for which he is personally responsible.").

[690] RUF Sentencing Judgment para. 108.

[691] Judge Itoe Sentencing Judgement ("Itoe SJ"), paras. 50-55.

[692] Trial Judgment, para. 2080.

[693] *See Deronjic*, (Appeals Chamber), July 20, 2005, para. 124 ("Only those circumstances directly related to the commission of the offence charge *and* to the offender himself when he committed the offence, such as the manner in which the offence was committed, may be considered in aggravation. . . . [A] person cannot be held responsible for an act unless something he himself has done or failed to do justifies holding him responsible.").

[694] *See Krstic*, (Trial Chamber), August 2, 2001, para. 714 ("Indirect participation is one circumstance that may go to mitigating a sentence. An act of assistance to a crime is a form of participation in a crime often considered less serious than personal participation or commission as a principal and may, depending on the circumstances, warrant a lighter sentence than that imposed for direct commission.").

A. Gravity of the Offenees:

1. Failure to consider the Appellant's form and degree of participation:

304. The Trial Chamber appropriately acknowledged that the examination as to gravity involves consideration of (1) the nature or "objective gravity of the offences" and (2) the "form and degree of participation of each individual accused."[695]

2. Failure to consider the limited instances where the Appellant was found to have personally committed crimes:

305. The Trial Chamber found the Appellant to have personally committed three types of crimes: (a) conduct leading to the death of a Nigerian female called Waikyoh, killed under Rocky's orders;[696] (b) a role in recruitment of child soldiers, by bringing a group of children to Bunumbu for training in 1998, and being the senior RUF Commander on 3 May 2000 at Moria where child soldiers were used to ambush UNAMSIL forces;[697] and (c) involvement in UNAMSIL attacks.[698] The Trial Chamber never considered the *lack* of personal involvement in all the other crimes of which it convicted the Appellant, which showed that his participation was less significant.[699]

3. Failure to consider Kallon's remote "form & degree of participation" for most JCE crimes:

306. As to virtually all crimes, the Trial Chamber found the Appellant responsible on a JCE theory,[700] and a few through command responsibility.[701] In evaluating the gravity of the JCE crimes, the Trial Chamber considered the "high number of crimes" that were part of the JCE, that many "were particularly heinous and brutal" and were "committed over a long period of time and over a large geographical area."[702] It did not, however, considered the "form and degree of participation" of the Appellant regarding most JCE crimes. The Trial Chamber did not consider that it convicted the Appellant (through JCE)

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[695] RUF Sentencing Judgment para., 102; *see also* RUF Sentencing Judgment, para. 20 (the Trial Chamber acknowledges that it must consider "the nature and degree of [the accused's] participation in the commission of the offence."). The Trial Chamber later refers to this as "form and degree of responsibility." SJ, p. 79 *et seq.*
[696] RUF Sentencing Judgment para. 235. Furthermore, we show above that the conviction regarding the death of Waikyoh is the result of legal error.
[697] RUF Sentencing Judgment para. 236.
[698] RUF Sentencing Judgment para. 237.
[699] *See Jokic – Miodrag*, (Trial Chamber), March 18, 2004 , para. 55 ("The gravity of the crimes committed by the convicted person also stems from the degree of his participation in the crimes.").
[700] RUF Sentencing Judgment paras. 238-40.
[701] RUF Sentencing Judgment paras. 241-45.
[702] RUF Sentencing Judgment para. 104.

of crimes (a) solely committed by AFRC forces;[703] (b) by RUF forces *not* under his command and control;[704] and (c) in Kenema District, as to which the Trial Chamber never found he had any direct role in crimes.[705] As we demonstrate elsewhere, this is an overbroad and improper use of JCE that erroneously imputes the crimes of non-members to members and erroneously finds a JCE (or finds it for longer than it existed), and thus the Trial Chamber considered the gravity of crimes as to which the Appellant should not have been convicted. (See above). Alternatively, should the Appeals Chamber not agree, it should at minimum reeognize that the Trial Chamber failed to consider the Appellant's "form and degree of participation" as to most JCE crimes.[706]

4. Improper consideration of unlawful killings by others in evaluating gravity of Kallon's crimes

307. Specifically, the Trial Chamber cited numerous instances of egregious unlawful killings,[707] but mentions no linkage of the Appellant to them.[708] In terms of perpetrators, the Trial Chamber cited to murders by Rocky, Savage and Alhaji;[709] Superman and Rambo;[710] and Boekarie.[711] We do not deny the egregious nature of the killings nor their impact on victims and socicty, but for the Trial Chamber to have considered the crimes without sufficiently considering the Appellant's "form and degree of participation" as to them is legal error.[712] Rocky (RUF), Rambo (RUF), Savage (AFRC) and Alhaji (AFRC)

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[703] *See, e.g.*, See for instance the Killings committed in Kono primarily by Savage and Staff Alhaji par 2063 pp 608-609 who the Chamber at para 2080 states were not members of the JCE during the period when they committed crimes in KONO.

[704] In virtually all the crime locations,there is no evidence that those committing crimes were under the command and control of the accused.Notable examples are the crimes committed in BO at a time when the Appellant had not been posted there and thus had no command or control over fighters ther paras1974-2008pp580-587,Crimes committed in Kenema primarily by Bockerie and fighters under him over whom the Apellant had no controlparas 2050-2056 pp603-606,crimes committed in Kahilahun by Bockarie and fighters under him over whom the Appellant had no control,paras 2156-2163 pp636-637 and crimes in Kono committed by Rocky over whom the appellant had no control paras 2063 pp608-611

[705] *See* TCJ, p. 603 et seq. (discussing crimes committed in Kenema District and omitting any discussion of Kallon).

[706] The Trial Chamber considered Kallon's membership on the AFRC Supreme Conncil in considering his role in the JCE, but as to the Supreme Council, we show above that the Trial Chamber's findings. TCJ, para. 2004, are based on speculation and are not the only reasonable inference that could be reached. (See above.) The Trial Chamber also considered two instances where Kallon was involved in crimes committed in diamond mining areas, RUF Sentencing Judgment 239, but failed to consider his "form and degree of responsibility" as to most JCE crimes.

[707] RUF Sentencing Judgment, p. 43 *et seq*.

[708] *See* RUF Sentencing Judgment paras. 107-14.

[709] RUF Sentencing Judgment para. 112.

[710] RUF Sentencing Judgment para. 113.

[711] RUF Sentencing Judgment para. 114.

[712] *See Nikolic-Momir*, (TC), Dec. 2, 2003, para. 114 ("[W]hen assessing the gravity of the offence the Trial Chamber *must* ... consider the role that Momir Nikolic played in the commission of the crime.") (emphasis added).

were found by the Trial Chamber *not* to be members of the JCE.[713] The Chamber found that the Appellant had no effective control over Superman (or Mongor or Rambo).[714] It is absolutely unfair to consider the gravity of the conduct of others over which the defendant had no control.[715] Additionally, to the extent certain murders were "on the orders of Sam Bockarie," (as the Chamber found),[716] The Appellant was acting "under orders" as to them, which should have been seen by the Chamber as a mitigating factor.

5. Improper consideration of sexual violence crimes by others in evaluating gravity of Kallon's crimes

308. The Trial Chamber cites numerous instances of egregious sexual violence crimes,[717] but mentions no linkage of the Appellant to any of them.[718] In terms of perpetrators, the Trial Chamber cites particularly to Alhaji,[719] and states that it considered sexual violence crimes "committed over a long period of time and a large geographical area."[720] The defense does not deny the egregious nature of the crimes, but by considering all these crimes as to which the Appellant was only remotely connected (if at all), the Trial Chamber erroneously failed to evaluate his "form and degree of participation."

6. Improper consideration of physical violence crimes by others in evaluating gravity of Kallon's crimes

309. In evaluating gravity, the Trial Chamber also examined various crimes of physical violence,[721] but again mentioned no linkage of the Appellant to any of them.[722] Specifically, the Trial Chamber mentioned the branding of individuals with "RUF" and/or "AFRC,"[723] crimes by Rocky,[724] and several instances involving Alahaji.[725] The Trial Chamber also noted the "large scale" nature of the crimes.[726] While not to deny the egregious nature of the crimes, once again, by considering all these crimes as to which Kallon was only remotely connected (if at all), the Trial Chamber erroneously failed to evaluate his "form and degree of participation."

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[713] Trial Judgment, para. 2080. We argue above that imputation of their crimes to the JCE was erroneous.
[714] Trial Judgment, para. 2138; RUF Sentencing Judgment para. 242.
[715] *See Deronjic*, (Appeals Chamber), July 20, 2005, para. 124.
[716] RUF Sentencing Judgment para. 114.
[717] RUF Sentencing Judgment, p. 46, *et seq.*
[718] *See* RUF Sentencing Judgment paras. 117-22.
[719] RUF Sentencing Judgment para. 120.
[720] RUF Sentencing Judgment para. 130.
[721] RUF Sentencing Judgment, p. 52 *et seq.*
[722] *See* RUF Sentencing Judgment para. 137-40.
[723] RUF Sentencing Judgment para. 141, 146.
[724] RUF Sentencing Judgment para. 145.
[725] RUF Sentencing Judgment paras. 147-49.
[726] RUF Sentencing Judgment para. 151.

7. Improper consideration of enslavement by others in evaluating gravity of Kallon's crimes

310. In evaluating gravity, the Trial Chamber examined the crime of enslavement[727]—finding that "hundreds of civilians" were enslaved[728]—but mentioned no linkage of Kallon to the crimes.[729] While not to deny the scale and brutality of such crimes, by considering all such crimes, as to many of which Kallon was only remotely connected (if at all), the Trial Chamber erroneously failed to evaluate his "form and degree of participation."

8. Improper consideration of pillage and burning by others in evaluating gravity of Kallon's crimes

311. In evaluating gravity, the Trial Chamber cited to instances of pillage and burning,[730] but mentions no linkage of Kallon to any of the crimes.[731] While not to deny the scale and brutality of such crimes, by considering all of the crimes as to which Kallon was only remotely connected (if at all), the Trial Chamber erroneously again fails to evaluate his "form and degree of participation." Furthermore, as Judge Itoe explained, the Trial Chamber impermissibly counted "burning" as part of terrorism, when "burning" is distinct from "pillage" and only "pillage," but not "burning" was charged in the Indictment.[732] This is an additional error.)

9. Improper consideration of use of child soldiers by others in evaluating gravity of Kallon's crimes

312. In evaluating gravity, the Trial Chamber cited to the use of child soldiers.[733] While the Trial Chamber does discuss Kallon's responsibility regarding certain uses of child soldiers,[734] it fails to consider that he is only remotely connected to other uses. For instance, the Trial Chamber mentioned crimes by Rocky.[735] But, Rocky was found by the Trial Chamber not to be a member of the JCE.[736] We argue that this is the reason why Kallon should not be held responsible under a JCE theory for *any* of his crimes.(See above.) While not to deny the scale and brutality of these crimes, by considering all these

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[727] RUF Sentencing Judgment, p. 57 *et seq.*
[728] RUF Sentencing Judgment para. 159.
[729] *See* RUF Sentencing Judgment para. 159.
[730] RUF Sentencing Judgment, p. 60 *et seq.*
[731] *See* RUF Sentencing Judgment para. 172 *et seq.*
[732] Itoe RUF Sentencing Judgment paras. 24-29.
[733] *See* RUF Sentencing Judgment paras. 180 *et seq.*
[734] *See* RUF Sentencing Judgment, para 236 (discussing his bringing a group of children to Bunumbu for training in 1998, and being the senior RUF Commander on 3 May 2000 at Moria where child soldiers were used to ambush UNAMSIL forces).
[735] RUF Sentencing Judgment para 181.
[736] Trial Judgment, para. 2080.

crimes committed "throughout the territory of Sierra Leone"[737] as to which Kallon was only remotely connected (if at all), the Trial Chamber erroneously failed to consider his "form and degree of participation." Furthermore, the Trial Chamber's mentioning of the use of child soldiers "*throughout the territory of Sierra Leone,*"[738] shows that the Trial Chamber is not in fact considering the gravity of the use of child soldiers as to which it convicted Kallon (pertaining to particular locations within Sierra Leone), but is going beyond that—considering the gravity of the use of child soldiers "throughout the territory of Sierra Leone."[739] The Trial Chamber did not convict Kallon of the use of child soldiers "throughout the territory of Sierra Leone" and it is error for the Trial Chamber to have considered crimes as to which it never convicted him in evaluating gravity.

B. Aggravating Factors:

i) Impermissible double-counting:

313. In evaluating aggravating factors, the Trial Chamber appropriately recognized "the impermissibility of 'double-counting' meaning that the factors considered in assessing the gravity of the offence cannot be used or considered as aggravating circumstances."[740] The Trial Chamber also stated: "when a particular circumstance is an element of the underlying offenee, it cannot be taken into account as an aggravating factor"[741] - arguably also a form of double-counting. Judge Itoe also recognized this second point: "if a particular circumstance is an element of the underlying offence, it cannot and in fact should not be taken into aecount as an aggravating factor."[742]

314. The Trial Chamber considered "acts of terrorism or collective punishments as faetors which increase the gravity of" other offenses.[743] Judge Itoe found that the majority erred in using elements of thc offences of terrorism and collective punishments to enhance the gravity of othcr offences: "If the prosecution sueeeeds in establishing the guilt of the Aecused on all or some of the counts, it appear[s] to me, legally anomalous, in the sentencing process, to decide or to direct that the gravity of one offence should aggravate

[737] *See* RUF Sentencing Judgment paras 180, 183.
[738] RUF Sentencing Judgment paras 180, 183) (emphasis added).
[739] RUF Sentencing Judgment paras 180, 183.
[740] RUF Sentencing Judgment para 23.
[741] RUF Sentencing Judgment para 24.
[742] Itoe Sentencing Judgment, paras 22, citing Blaskic Appeal Judgement, para 693.
[743] RUF Sentencing Judgment paras 106.

or enhance the gravity of the other which stands independently on its own . . ."[744] Judge Itoe was correct. The Trial Chamber impermissibly double-counted (the second type) because the infliction of terror and collective punishments were fully counted as elements of *those* crimes; to also consider them as aggravating other crimes is duplicative.[745]

ii. Erroneously counting Rocky's actions aggravating Kallon's convictions:

315. Under the heading "aggravating factors,"[746] the Trial Chamber also listed an instance where Rocky and a group of rebels arrived at the Sunna Mosque in Koidu and captured a large group of civilians, some of whom were taken away and some executed and beheaded.[747] The Trial Chamber notes that, *later*, Kallon arrived at the Mosque, and they voted on whether a certain individual, TFI-015, should be killed.[748] It was error to consider Rocky's actions at the Mosque, which occurred *prior* to the arrival of Kallon, as an aggravating factor regarding Kallon.[749] Additionally, voting on whether someone should be killed (who was not killed), while admittedly callous, is not an aggravating factor as to a crime, and should not have been considered.[750]

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[744] *See* Itoe RUF Sentencing Judgment paras 32.

[745] *See Ndindabahizi*, (Appeals Chamber), January 16, 2007, para 137 ("[T]he Appeals Chamber recalls that 'where an aggravating factor for the purposes of sentencing is at the same time an element of the offence, it cannot also constitute an aggravating factor for the purposes of sentencing.'"); *see also Rugambarara*, (Trial Chamber), November 16, 2007, para 22 (same language quoted); *Nzabirinda*, (Trial Chamber), February 23, 2007, para 60 (same as *Rugambarara*); *Nchamihigo*, (Trial Chamber), November 12, 2008, para 389 ("Any particular circumstance that is included as an element of the crime for which an accused is convicted will not be considered as an aggravating factor."); *see also Seromba*, (Trial Chamber), December 13, 2006, para 388 (similar); *Karera*, (Trial Chamber), December 7, 2007, para 576 (similar); *Simba*, (Trial Chamber), December 13, 2005, para 438 (similar); *Ndindabahizi*, (Trial Chamber), July 15, 2004, para 502 (similar).
See, e.g., Ndindabahizi, (Appeals Chamber), January 16, 2007, para 137 ("[T]he Trial Chamber convicted the Appellant for instigating and aiding and abetting genocide at Gitwa Hill [in the Bisesero Hills (Kibuye Prefecture)], as well as for committing, instigating and aiding and abetting extermination at Gitwa Hill. These convictions were based on the factual finding that the Appellant transported assailants at Gitwa Hill, distributed weapons there and encouraged the killing of Tutsi. The Trial Chamber could not also refer to these same factual findings as aggravating circumstances. Accordingly, the Trial Chamber erred in finding that the fact that the Appellant 'actively influenced others to commit crimes, by distributing machetes and money' constituted an aggravating circumstance.").

[746] RUF Sentencing Judgment para, p. 84.

[747] RUF Sentencing Judgment para 247.

[748] RUF Sentencing Judgment para 247.

[749] *See Deronjic*, (Appeals Chamber), July 20, 2005, para. 124 ("Only those circumstances directly related to the commission of the offence charge *and* to the offender himself when he committed the offence, such as the manner in which the offence was committed, may be considered in aggravation. . . . [A] person cannot be held responsible for an act unless something he himself has done or failed to do justifies holding him responsible.").

[750] *See Limaj et al.*, (Trial Chamber), November 30, 2005, para. 729 ("Aggravating circumstances must be directly related to the commission of the offence. . .").

C. Mitigating Factors

316. The Trial Chamber (correctly) acknowledged the following mitigating factors: the expression of remorse or acknowledgement of responsibility; lack of education or training; good character prior to conviction; personal and family circumstances; behavior and conduct subsequent to the conflict, particularly with respect to promoting peace and reconciliation; good behavior in detention; assistance to detainees or victims.[751] The Trial Chamber should have also recognized acting under orders and duress as mitigating factors.[752] As the Trial Chamber recognized,[753] it also had the flexibility to determine other factors to be mitigating.[754] The Trial Chambers errors as to mitigating factors can be grouped into two types: (i) those that the Trial Chamber erroneously failed to consider; and (ii) those given insufficient weight.

i. Mitigating factors erroneously not considered

317. The Trial Chamber conflated Kallon's separate arguments of "duress" and "acting under orders" into one mitigating factor, which it calls "executing orders."[755] The Trial Chamber failed to recognize that Kallon advanced two separate, independent arguments. As explained by the ICTY: "Duress and superior orders are separate, but related, concepts and either may count in mitigation of sentence."[756]

318. **ii. Duress:** Kallon operated under duress with regard to UNAMSIL events when he was forced to obey Foday Sankoh's orders to arrest peacekeepers. For the Trial Chamber to have found (as it did) that Kallon did not act under "duress and/or superior orders with respect to the UNAMSIL events" because Sankoh had been arrested,[757] and that he had not established that "his life was under actual threat in [the] event that he failed to obey

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[751] RUF Sentencing Judgment para 29.

[752] As the ICTR stated in *Rutaganira,* reflecting the principle established in the ICTY's *Erdemović* decision: The Chamber fully endorses the finding by the Appeals Chamber of ICTY [in *Erdemović*] that "*duress does not afford a complete defence to a soldier charged with a crime against humanity and/or war crime involving the killing of innocent human beings.*" However, it is the Chamber's opinion that duress may be considered as a mitigating circumstance. *Rutaganira,* (Trial Chamber), March 14, 2005, para. 161 (emphasis in original). That acting "under orders" is a mitigating factor is set forth in the Special Court's Statute, Article 6(4).

[753] RUF Sentencing Judgment para 27.

[754] *See Simba,* (Appeals Chamber), November 27, 2007, para.328 ("The Appeals Chamber recalls that neither the Statute nor the Rules exhaustively define the factors which may be considered as mitigating factors.").

[755] RUF Sentencing Judgment, p. 86.

[756] *Bralo,* (Trial Chamber), December 7, 2005, para. 53. *See also Mrdja,* (Trial Chamber), March 31, 2004, ¶ 654 ("[F]rom a legal standpoint . . . , superior orders may be pleaded in mitigation independently of duress, and vice versa.").

[757] RUF Sentencing Judgment para 262.

these orders,"[758] ignored the power that Sankoh could still exert even from prison as well as the fact that Kallon and Sankoh were still in contact when Sankoh was in prison, so that Sankoh in fact was able to give him orders and exert influence over him. Prosecution witness TF1-362 testified that disobeying Foday Sankoh in the RUF could lead to death. She was a senior commander in the RUF and close to Foday Sankoh. The ultimate order to arrest and detain the Peacekeepers thus came from Foday Sankoh, and Kallon was forced to obey because of the threats that accompanied the message: "If the disarmament takes place in that location, you will be held responsible." For a man who had executed his own deputy, such a threat to Kallon was real.

319. **iii. Under Orders:** As set forth above, case law has considered acting under superior orders to be an independent mitigating factor from duress. Here, in fact, the order from Sankoh regarding the UNAMSIL peacekeepers was *both* a superior order, and an order given under duress, doubly warranting mitigation.[759] Kallon was acting under Sankoh's orders when he arrested the peacekeepers. Kallon also at various points acted under orders of Bockarie and Sesay. The Trial Chamber erred in holding that because Kallon was "personally in a superior position, issuing orders [of his own]," *his responsibility "under Article 6(3) negates him from raising these defences."*[760] The Trial Chamber cites not a single case in support of this position, nor are we aware of any saying that "under orders" only applies to the lowest level of military/rebel movements. In fact, the Special Court's Statute states: "The fact that an *accused person acted pursuant to an order of a Government or of a superior* shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Trial Chamber determines that justice so requires."[761] To find that defense essentially unavailable to a mid-level commander ignores the plain language of the Statute. Accordingly, acting under orders and duress should have been considered as mitigating factors, and the Trial Chamber erroneously failed to do so.[762]

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[758] RUF Sentencing Judgment para 259.
[759] *Mrdja*, (Trial Chamber), March 31, 2004, paras. 65, 67 ("[A] subordinate may be granted mitigation where he has executed an order without having been directly threatened . . . . Conversely, a person with no superior authority over another may compel him to commit a crime by means of threats.").
[760] RUF Sentencing Judgment para 259 (emphasis added).
[761] Statute Of The Special Court For Sierra Leone, Article 6(4) (emphasis added).
[762] *See Jokic-Miodrug*, (Appeals Chamber), August 30, 2005, para. 476 ("Trial Chambers are 'required as a matter of law to take account of mitigating circumstances.'").

320. Judge Itoe correctly found that Kallon's "plea for executing '[e]xeeutive orders'" is "very well founded."[763] Judge Itoe correctly found that instructions from Sankoh "had to be taken seriously" because he was described "as being very erratic."[764] Judge Itoe appropriately recognizes that Kallon "was acting under duress, and pursuant to superior orders and that he faced a real and indeed a possible execution if he had not executed those orders."[765] Lastly, it is important to note that the lack of any finding of mitigation regarding duress and/or acting under orders regarding the UNAMSIL attacks resulted in actual sentencing error, because Kallon was sentences to the longest prison term (40 years) as to that crime.[766]

321. **iv. Conduct subsequent to the crimes:** In Kallon's sentencing brief, it was argued that conduct subsequent may also be considered a mitigating factor.[767] Thus, in *Babic,* the ICTY Trial Chamber considered alleviating the suffering of victims,[768] and in *Plavsic*, the ICTY Trial Chamber considered her post-conflict conduct as a mitigating factor, particularly, her support for the peace process in Bosnia-Herzegovina.[769] In fact, not only is subsequent conduct in furthering peace a mitigating factor, *the ICTY Appeals Chamber found it erroneous not to take it into account in that case:*

> The Appeals Chamber is satisfied that the Appellant attempted to further peace after the commission of the crime of persecution. The Appeals Chamber finds that the Trial Chamber erred in law in categorically refusing to take these attempts to further peaee into account as a mitigating factor on the basis that they did not direetly alleviate the suffering of the vietims.[770]

322. In Kallon's sentencing brief,[771] it was argued that a variety of witnesses and several reports introduced at trial highlight the contribution Mr. Kallon made towards peace efforts in Sierra Leone, particularly Mr. Kallon's peace initiatives towards the end of the crisis. The evidence at trial showed that Mr. Kallon and Mr. Sesay, at risk to their lives, later disobeyed the leader Foday Sankoh and hardliners opposed to the peace process and not only supported but helped the heads of state of ECOWAS, UNAMSIL and the

[763] Itoe Sentencing Judgment para 78.
[764] Itoe Sentencing Judgment para76.
[765] Itoe Sentencing Judgment para 79.
[766] RUF Sentencing Judgment, p. 96.
[767] Kallon Sentencing Brief, para.35.
[768] *Babic*, (Trial Chamber), June 29, 2004, paras. 94-95.
[769] *Prosecutor v. Plavsic*, Trial Chamber, February 27, 2003, para. 85.
[770] *Babic*, (Appeals Chamber), July 18, 2005, para. 59.
[771] Kallon Sentencing Brief, para. 79.

government of Sierra Leone in ensuring that peace returned. Mr. Kallon made powerful enemies in wilfully renouncing violence and the objectives of the revolution and embracing the path of peace, reconciliation and democracy for the good of his people, and did so at risk of life and limb.

323. In Kallon's sentencing brief,[772] it was argued that the Trial Chamber received evidence regarding the Lomé Peace Accord and several other exhibits and heard evidence from the highest level of command of UNAMSIL, notably those from countries whose soldiers were victims of the attack for which the accused was found guilty. The mitigating testimony at trial in favour of Mr. Kallon, despite the crimes he has been found guilty of, underscores the substantial contributions he made towards the successful execution of their mission. The court heard mitigating evidence from ECOMOG commanders who were former adversaries of Mr. Kallon during the war. These senior commanders later joined the UNAMSIL mission in Sierra Leone. The Trial Chamber heard evidence about entreaties made by Mr. Kallon towards them to allow supplies of basic food supplies to get to the area under his command to ease human suffering in the Makeni and Tonkolili districts. The Trial Chamber admitted that "behavior and conduct subsequent to the conflict, particularly with respect to promoting peace and reconciliation" is a mitigating factor,[773] but erroneously failed to consider it.

324. v. **Young age at the time of the crimes.** In Kallon's sentencing brief, it was argued that young age at the time of crimes is also a mitigating factor.[774] Thus, the ICTY Trial Chamber in *Mrdja* stated: "[T]he jurisprudence of the Tribunal has taken into consideration various personal circumstances as mitigating factors in sentencing, such as the young age of an accused ..."[775] The ICTY Trial Chamber in Blaskic explained:

> The case-law of the two *ad hoc* criminal Tribunals on rehabilitation takes the young age of the accused into account as a mitigating circumstance. The assessment of youth varies – whilst the ICTY considers accused aged between 19 and 23 at the time of the facts as being young, the ICTR selects ages from 32 to 37.[776]

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[772] Kallon Sentencing Brief, para. 80.
[773] RUF Sentencing Judgment para 29.
[774] Kallon Sentencing Brief, paras. 45-46.
[775] *Mrdja*, (Trial Chamber), March 31, 2004, para. 91. *See also Banovic*, (Trial Chamber), October 28, 2003, para. 75 ("The Trial Chamber observes that, in certain cases, age has been considered a relevant factor in mitigation of sentence.").
[776] *Blaskic*, (Trial Chamber), March 3, 2000, para. 778.

325. (In fact, the ICTY appears to consider ages up to 33 at the time of the crimes to be young in age).[777] In 1996, Mr. Kallon was thirty-one years old. The Trial Chamber erroneously also did not take account of this mitigating factor.

326. **vi. Serving sentence outside Sierra Leone.** The Trial Chamber admitted that "in general terms, sentences served abroad, where family visits are likely to be few, may be harder to bear" and "*would normally amount to a factor in mitigation of sentence.*"[778] The Trial Chamber found that mitigating factors need only be established by a balance of probabilities, meaning that it is *more probable than not* that the circumstances in question did exist."[779] It noted: "it is a much lower burden of proof than that required by the Prosecution."[780] Even though the Trial Chamber found that it was *"more likely than not"* "that the convicted persons in the trial will serve sentences outside of Sierra Leone,"[781] it failed to give any weight to this acknowledge mitigating factor which was proven to be "more probable than not." Accordingly, failure to consider this constituted error.[782]

327. **vii. Good behavior in detention.** The defense argued that Kallon's "good conduct while in detention" should be taken into account.[783] The Trial Chamber admitted that this is a mitigating factor,[784] but erroneously appears not to have considered it.

328. **viii. Lack of education or training.** The Trial Chamber held that Kallon's "forced recruitment into the RUF" was not a mitigating factor.[785] But Kallon argued that it was not the "forced recruitment" alone, but the fact that it caused him to leave secondary school at an early age, and that he was brainwashed by the RUF's ideology at a young

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[777] *See Simic, Tadic and Zaric*, (Trial Chamber), October 17, 2003, para. 1088 ("The Trial Chamber takes into account the age of Blagoje Simic at the time he committed the offences, 33 years old."); *Stakic*, (Trial Chamber), July 31, 2003, para. 923 ("This Trial Chamber takes into account [*inter alia*] the young age of Dr. Stakic at the time he committed the offences [approximately 29-30] . . . ."); *Erdemovic*, (Trial Chamber), March 5, 1998, para. 16: The Trial Chamber held that the combination of [Erdemovie's] young age [23 years when he committed the crimes], evidence that he is "not a dangerous person for his environment," and "his circumstances and character indicate that he is reformable and should be given a second chance to start his life afresh upon release, whilst still young enough to do so.").

[778] RUF Sentencing Judgment para 206 (emphasis added).

[779] RUF Sentencing Judgment para 28 (emphasis added)

[780] RUF Sentencing Judgment para 28.

[781] RUF Sentencing Judgment para 206 (emphasis added).

[782] [Actually, there is also law that this is not a mitigating factor at all, but the Trial Chamber seems to have found it was, so I would accept that.]

[783] RUF Sentencing Judgment para 85.

[784] RUF Sentencing Judgment para 29.

[785] RUF Sentencing Judgment para 250.

age.[786] The Trial Chamber admitted that "lack of education or training" is a mitigating factor,[787] but erroneously appears not to have considered it.

329. **ix. Attempts to prevent brutal crimes**. In Kallon's sentencing brief, it was argued that Mr. Kallon also attempted to prevent brutal crimes, which is also a mitigating factor.[788] Again, the Trial Chamber appears not to have considered this.

330. **x. Renunciation of violence and Commitment to Peace and Democracy.** In Kallon's sentencing brief, it was also argued that the Trial Chamber should consider Mr. Kallon's renunciation of violence and work to transform the RUF into a political party as mitigating factors.[789] Again, the Trial Chamber appears not to have considered this. Accordingly, the Trial Chamber appears to have failed to take into account various mitigating factors.[790]

D. Mitigating factors given insufficient weight

331. **i. Sincere remorse.** The Trial Chamber did consider Mr. Kallon's remorse, and found it was sincere,[791] yet, while the Trial Chamber said it was taken into account,[792] this does not appear to have significantly reduced his sentence.

332. **ii. Lack of previous convictions.** The defense argued that "Kallon's lack of prior criminal conduct must be taken into account."[793] The Trial Chamber considered the factors, but held it gets "only very limited weight."[794]

333. **iii. Family circumstances.** The Trial Chamber noted that "Kallon is married with three wives and nine children" and noted that "punishment has an impact on the lives of persons other than the convicted person. The relatives of the convicted person, in particular are likely to suffer from the consequences of the sentence."[795] However, the Trial Chamber accorded family circumstances "only a minimal impact."[796]

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[786] Kallon Sentencing Brief, para 75.
[787] RUF Sentencing Judgment para 29.
[788] Kallon Sentencing Brief, para 99.
[789] Kallon Sentencing Brief, para 100.
[790] *See Jokic-Miodrag*, (Appeals Chamber), August 30, 2005, para 476 ("Trial Chambers are 'required as a matter of law to take account of mitigating circumstances.'").
[791] RUF Sentencing Judgment para 255-56.
[792] RUF Sentencing Judgment para 256.
[793] RUF Sentencing Judgment para 85.
[794] RUF Sentencing Judgment para 251.
[795] RUF Sentencing Judgment para 254.
[796] RUF Sentencing Judgment para 254.

334. **iv. Assistance to detainees or victims.** The Trial Chamber considered Kallon's efforts to improve the well-being of the civilian population by providing social amenities like schools, mosques churches and markets" and concluded that "this evidence demonstrates that Kallon on occasion gave assistance to civilians,"[797] but that it "should not be given undue weight."[798] Many cases, however, consider that selective assistance should be given weight,[799] and the Trial Chamber admits that "assistance to detainees or victims" is a mitigating factor.[800]

Accordingly, the Trial Chamber erroneously appears to have given little or no weight to a variety of recognized mitigating factors.

v. **Reduction in Sentences.**To the extent that errors are found in the Chamber Judgement (as we argue above) and Kallon is found not responsible on Counts, as to crime locations, or regarding forms of responsibility, his sentence should accordingly be reduced.

CONCLUSION

335. **Prayer:**

THE APPEALS CHAMBER IS RESPECTFULLY PRAYED TO:

1. Set aside the Conviction of the Appellant on all Counts or in the alternative reduce the Sentence substantially as may be appropriate;
2. Enter a Judgement of Acquittal; or
3. Order a retrial before a differently constituted Chamber.

Dated this 1st day of June 2009

Signature: .....

CHARLES TAKU
Lead Counsel

.....

KENNEDY OGETTO
Lead Counsel

[797] RUF Sentencing Judgment para 252.
[798] RUF Sentencing Judgment para 252.
[799] *See Rugambarara*, (Trial Chamber), November 16, 2007, para. 37; *Nzabirinda*, (Trial Chamber), February 23, 2007, para. 77; *Ntakirutimana and Ntakirutimana*, (Trial Chamber), February 21, 2003, para. 909 (considering that Gerard Ntakirutimana provided or offered shelter to several Tutsi, including a colleague and friends, a house-help and orphaned children); *Ruggiu*, (Trial Chamber), June 1, 2000, paras. 73-74 (considering Ruggiu's assistance to victims); *Serushago*, (Trial Chamber), February 5, 1999, para. 38 (considering Serushago's assistance to certain Tutsi victims).
[800] RUF Sentencing Judgment para 25229.

ANNEX 1

THE APPELLANT REFERS TO THE FOLLOWING TRANSCRIPT REFERENCES IN SUPPORT OF GROUND 7, SUB GROUND 8.1-6 :

The Kallon Defence relies on the testimonies of the stated witnesses especially with regards where specific portions of the transcripts are cited.

1. DMK 444 - Transcript dated 19 and 20 May 2008 and 05 June 2008 – specific portion to the UNAMSIL attacks of May 2000 pages 47 -52 of 19 May ,2008 transcript.

2. DMK -147 –Transcript dated 4,6-7 March 2008 about UNAMSIL's role in the attacks on the RUF in May 2000 and the force commander Jetley's disregard for dialogue with the RUF.Also that Kallon was not involved in the abduction of the UNAMSIL personnel in pages 55-56,62-63,67-68,72 and 74

3. DMK- 130- Transcript dated 10-11 March 2008

4. DMK 144 –Transcript dated 11-12 March 2008

5. DMK 160 -21 April 2008 refers to Morris Kallon's good character and cordial and respectful way in which he interacted with civilians in pages 53-55 and 73-75

6. DMK 161 22 April 2008

DMK 047 25 April 2008- page 62 According to this witness MK was not present in Makeni at the time of the UN abductions neither did MK participate in the attack and abduction of UN personnel.

7. DMK 163 25 April 2008

8. DMK 132 29 April 2008

9. DMK 108 29 April 2008

10. DMK 095 01 May 2008 page 33 this witness testifies about Morris Kallon 's commitment to sensitizing fellow combatants to put the war to an end

11. DMK 145 08 May 2008

12. DMK 159 12 May 2008 page 28 describes Morris Kallon as a moderate member of the RUF .also seen to be committed to the restoration of peace in Sierra Leone. As part of the UNAMSIL team in May 2000 ,this witness also says that he disagreed with Major Jetley's orders to attack the RUF

13. DMK 072 1 May 2008 pages 90-115.this witness attests that Morris Kallon was not in Tombodu between February and June of 1998 and also that he was not present during the retreat from Freetown to Makeni

ANNEX II

SUB GROUND 5.2

ERROR RELATING TO UNPLEADED LOCATIONS

28.1.The Trial Chamber found the Appellant guilty in respect of the following un pleaded locations: rape in the bush between Kainko and Gandorhun as charged in Count 6,[1] Carving RUF on civilian men in Tomandu in Kono District as charged in Counts 10 and 11,[2] forced labour of civilians in March 1998 at Guinea Highway in Koidu,[3]forced labour of civilians in the area surrounding Tombodu a crime against humanity as charged in Count 13,[4] treatment of civilians in RUF Camps in Superman Ground[5] and Kaidu a crime against humanity as charged in Count 13,[6] mining operations in Kono District including Papany Ground as charged in Count 13,[7] all locations of Government mining sites in Kono District as charged in Count 13,[8] sexual acts in Sawao, Penduma and Bumpeh,[9] outrages upon personal dignity, as charged in Count 9 in Bumpeh, Penduma and Bomboafuidu,[10] carving RUF and/or AFRC on the bodies of 18 in Kayima Counts 10 and 11 of the indictment,[11]mutilations and other inhuman acts Penduma as charged in Counts 10 and 11,[12] act of pillage in Tombodu as charged in Count 14,[13]looting of Tankoro Bank by group of AFRC and RUF fighters an act of pillage as charged in Count 14, amputations and carvings in Yardu, Sawao and Penduma as charged in Count 2 of the Indictment,[14] rapes and other forms of sexual violence in Kailahun District which the Chamber held the Prosecution did

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[1] Trial Chamber Judgment, para. 1180
[2] Trial Chamber Judgment, para. 1209
[3] Trial Chamber Judgment, para. 1216
[4] Trial Chamber Judgment, para. 1217
[5] Trial Chamber Judgment, para. 1224
[6] Trial Chamber Judgment, para. 1225
[7] Trial Chamber Judgment, para. 1241
[8] Trial Chamber Judgment, para. 1246
[9] Trial Chamber Judgment, para. 1289
[10] Trial Chamber Judgment, para. 1299
[11] Trial Chamber Judgment, para. 1315
[12] Trial Chamber Judgment, para. 1318
[13] Trial Chamber Judgment, para. 1335
[14] Trial Chamber Judgment, paras. 1372 & 1373

not plead but held that such acts are limited to their occurrence within the context of "forced marriage" and sexual slavery.[15]

[15] Trial Chamber Judgment, para. 1405

ANNEX III

In support of Ground 26

Civilian status of UNAMSIL.
The Appellant relies on various testimonies of Senior UNAMSIL commanders.

Major- General Garba who was the deputy force commander of UNAMSIL ,directly under Jetley the force commander stated that dialogue should have prevailed over the use of force but the force commander opted for belligerence. "I would have thought what we were doing is more of a peacekeeping operation and I would have thought...I thought and I said it to him (Major Jetley) at that time that: no ,we should exercise restraint ,caution and lets mediate and find out how we can solve issues. this is an issue that is less than 24 hours for you to send troops ..... subsequent dispatch of Zambatt aggravated the situation".[1]the witness further explained how Major Jetley ignored all pleas to exercise restraint for the sake of the possible implications not only to the peace process but also of a reaction from the RUF but still went ahead with his plans [2].

For him, Major Jetley was not expected to launch the attack against the RUF especially after he had been cautioned on the implication of that action .[3]

General Mulinge, the Brigade Commander for UNAMSIL and who was a victim of the abductions of 3 May 2000 near Makeni held hostage for 23 days stated that the problem between UNAMSIL and the RUF could have been resolved through dialogue and that the force commander ignored advice in this connection.[4]

Similar testimony was given by Prosecution witness Brigadier Ngondi [5]

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[1] 19 May 2008,RUF trial transcript page 49-50
[2] 19 May 2008,RUF trial transcript page 50 lines 22-29 ,page 51 lines 1-15
[3] 19 May 2008,RUF trial transcript page 51 lines 28-29 and page 52 lines 1-7 ".....we did not expect that he will do that ,having expressed to him the implications of it ,and he did not tell us his intention therein, ... so we presumed he accepted it. and of greatest concern is that for you to have just discussed an issue with your force commander of the implications of sending a force to a crisis spot is something that is operationally tactically unwise to do.....
[4] Transcript of 8 March 2006 page 72
[5] Transcript of 30th March 2006 page 103

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nonregistration may be necessary to an investigation or prosecution under the present Act.

6 The District Court nonetheless granted the motion to dismiss on two grounds: (1) the amended Act, like the version in Haynes violates the Self-Incrimination Clause of the Fifth Amendment; and (2) the conspiracy 'to possess destructive devices' and the possession charged do not allege the element of scienter. The case is here on direct appeal. 18 U.S.C. § 3731. And see United States v. Spector, 343 U.S. 169, 72 S.Ct. 591, 96 L.Ed. 863; United States v. Nardello, 393 U.S. 286, 89 S.Ct. 534, 21 L.Ed.2d 487.

7 * We conelude that the amended Act does not violate the Self-Incrimination Clause of the Fifth Amendment which provides that no person 'shall be compelled in any criminal case to be a witness against himself.' As noted, a lawful transfer of a firearm may be accomplished only if it is already registered. The transferor—not the transferee—does the registering. The transferor pays the transfer tax and receives a stamp[7] denoting payment which he affixes to the application submitted to the Internal Revenue Service. The transferor must identify himself, describe the firearm to be transferred, and the name and address of the transferee. In addition, the application must be supported by the photograph and fingerprints of the transferee and by a certificate of a local or federal law enforcement official that he is satisfied that the photograph and fingerprints are those of the transferee and that the weapon is intended for lawful uses.[8] Only after receipt of the approved application form is it lawful for the transferor to hand the firearm over to the transferee. At that time he is to give the approved application to the transferee.[9] As noted, the Solicitor General advises us that the information in the hands of Internal Revenue Service, as a matter of practiee, is not available to state or other federal authorities and, as a matter of law, cannot be used as evidence in a criminal proceeding with respeet to a prior or concurrent violation of law.[10]

8 The transferor—not the transferee—makes any incriminating statements. True, the transferee, if he wants the firearm, must cooperate to the extent of supplying fingerprints and photograph. But the information he supplies makes him the lawful, not the unlawful possessor of the firearm. Iudeed, the only transferees who may lawfully receive a firearm are those who have not committed crimes in the past. The argument, however, is that furnishing the photograph and fingerprints will incriminate the transferee in the future. But the claimant is not confronted by 'substantial and 'real" but merely 'trifling or imaginary, hazards of incrimination'—first by reason of the statutory barrier against use in a prosecution for prior or concurrent offenses, and second by reason of the unavailability of the registration data, as a matter of administration, to local, state, and other federal agencies. Marchetti v. United States, supra, 390 U.S., at 53—54, 88 S.Ct., at 705. Cf. Minor v. United States, 396 U.S. 87, 94, 90 S.Ct. 284, 287, 24 L.Ed.2d 283. Since the states and other federal agencies never see the iuformation, he is left in the same position as if he had not given it, but 'had claimed his privilege in the absence of a * * * grant of immunity.' Murphy v. Waterfront Comm'n, 378 U.S. 52, 79, 84 S.Ct. 1594, 1610, 12 L.Ed.2d 678. This, combined with the protection against use to prove prior or concurrent offenses, satisfies the Fifth Amendment requirements respecting self-incrimination.[11]

9 Appellees' argument assumes the existence of a periphery of the Self-Incrimination Clause which protects a person against incrimination not only against past or present transgressions but which supplies insulation for a career of crime about to be launched. We eannot give the Self-Inerimination Clause sueh an expansive

interpretation.

10 Another argument goes to the question of entrapment. But that is an issue for the trial, not for a motion to dismiss.

II

11 We also conclnde that the District Court erred in dismissing the indictment for absence of an allegation of scienter.

12 The Act requires no specific intent or knowledge that the hand grenades were unregistered. It makes it unlawful for any person 'to receive or possess a firearm which is not registered to him.'[12] By the lower court decisions at the time that requirement was witten into the Act the only knowledge required to be proved was knowledge that the instrument possessed was a firearm. See Sipes v. United States, 8 Cir., 321 F.2d 174, 179, and cases cited.

13 The presence of a 'vicious will' or mens rea (Morissette v. United States, 342 U.S. 246, 251, 72 S.Ct. 240, 243, 96 L.Ed. 288) was long a requirement of criminal responsibility. But the list of exceptions grew, especially in the expanding regulatory area involving activities affecting public health, safety, and welfare. Id., at 254, 72 S.Ct. at 245. The statutory offense of embezzlement, borrowed from the common law where scienter was historically required, was in a different category.[13] Id., at 260 261, 72 S.Ct., at 248—249.

14 '(W)here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of praetice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.' Id., at 263, 72 S.Ct., at 250.

15 At the other extreme is Labert v. California, 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d 228, in which a municipal code made it a crime to remain in Los Angeles for more than five days without registering if a person had been convicted of a felony. Being in Los Angeles is not per se blameworthy. The mere failure to register, we held, was quite 'unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed.' Id., at 228, 78 S.Ct., at 243. The fact that the ordinance was a convenient law enforcement technique did not save it.

16 'Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community.' Id., at 229—230, 78 S.Ct., at 243—244.

17 In United States v. Dotterweich, 320 U.S. 277, 284, 64 S.Ct. 134, 138, 88 L.Ed. 48, a case dealing with the imposition of a penalty on a corporate officer whose firm shipped adulterated and misbranded drugs in violation of the Food and Drug Act, we approved the penalty 'though eonsciousness of wrong-doing be totally wanting.'

18 The present case is in the category neither of Lambert nor Morissette, but is closer to Dotterweich. This is a regulatory measure in the interest of the public safety, which may well be premised on the theory that one would hardly be surprised to learn that

possession of hand grenades is not an innocent act.[14] They are highly dangerous offensive weapons, no less dangerous than the narcotics involved in United States v. Balint, 258 U.S. 250, 254, 42 S.Ct. 301, 303, 66 L.Ed. 604, where a defendant was convicted of sale of narcotics against his claim that he did not know the drugs were covered by a federal act. We say with Chief Justice Taft in that case:

19 'It is very evident from a reading of it that the emphasis of the section is in securing a close supervision of the business of dealing in these dangerous drugs by the taxing officers of the Government and that it merely uses a criminal penalty to secure recorded evidence of the disposition of such drugs as a means of taxing and restraining the traffic. Its manifest purpose is to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character, to penalize him. Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided.' Id., at 253—254, 42 S.Ct., at 302 303.

20 Reversed.

21 MR. JUSTICE BRENNAN, concurring in the judgment of reversal.

22 I agree that the amendments to the National Firearms Act, 26 U.S.C. §§ 5841—5872 (1964 ed., Supp. V), do not violate the Fifth Amendment's privilege against self-incrimination, and join Part I of the opinion of the Court. However, I do not join Part II of the opinion; although I reach the same result as the Court on the intent the Government must prove to convict, I do so by another route.

23 I join Part I on my understanding of the Act's new immunity provision. 26 U.S.C. § 5848 (1964 ed., Supp. V). The amended registration provisions of the National Firearms Act do not pose any realistic possibility of self-incrimination of the transferee under federal law. An effective registration of a covered firearm will render the transferee's possession of that firearm legal under federal law. It is only appellees' contention that registration or application for registration will incriminate them under California law that raises the Fifth Amendment issue in this case. Specifically, appellees assert that California law outlaws possession of hand grenades and that registration under federal law would, therefore, incriminate them under state law. Assuming that appellees correctly interpret California law, I think that the Act's immunity provision suffices to supplant the constitutional protection. Section 5848 provides in pertinent part:

24 'No information or evidence obtained from an application * * * shall * * * be used, directly or indirectly, as evidence against that person in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application * * *.'

25 In my judgment, this provision would prevent a State from making any use of a federal registration or application, or any fruits thereof, in connection with a prosecution under the State's possession law.[1] This would be true even if the State charged a transferee with possession of the firearm on a date after the date the application was filed, because possession is a continuing violation.[2] Therefore, for purposes of the State's possession law, a transferee's continued possession of a

registered firearm would constitute 'a violation of law occurring * * * concurrently with the filing of the application.'

26 I agree with the Court that the Self-Incrimination Clause of the Fifth Amendment does not require that immuuity be given as to the use of such information in connection with crimes that the transferee might possibly commit in the future with the registered firearm. The only disclosure rcquired under the amended Act is that the transferee has received a firearm and is in possession of it. Thus, in connection with the present general registration scheme, '(t)he relevant class of activities 'permeated with criminal statutes," Mackey v. United States, 401 U.S. 667, at 710, 91 S.Ct. 1160, at 1169, 28 L.Ed.2d 404 (1971) (Brennan, J., concurring in judgment), is limited to the class of activities relating to possession of firearms. Id., at 707—711, 91 S.Ct., at 1167—1169. Since I read the statute's immunity provision to provide immunity coextensive with the privilege in that regard, I find no Fifth Amendment bar to the enforcement of the federal statute.

27 The Court's discussion of the intent the Government must prove to convict appellees of violation of 26 U.S.C. § 5861(d) (1964 ed. Supp. V) does not dispel the confusion surrounding a difficult, but vitally important, area of the law. This case does not raise questions of 'consciousness of wrongdoing' or 'blameworthiness.' If the ancient maxim that 'ignorance of the law is no excuse' has any residual validity, it indicates that the ordinary intent requirement—mens rea—of the criminal law does not require knowledge that an act is illegal, wrong, or blameworthy. Nor is it possible to decide this case by a simple process of classifying the statute involved as a 'regulatory' or a 'public welfare' measure. To convict appellees of possession of unregistered hand grenades, the Government must prove three material elements: (1) that appellees possessed certain items; (2) tbat the items possessed were hand grenades; and (3) that the hand grenades were not registered. The Government and the Court agree that the prosecutor must prove knowing possession of the items and also knowledge that the items possessed were hand greuades. Thus, while the Court does hold that no intent at all need be proved in regard to one element of the offense—the unregistered status of the grenades—knowledge must still be proved as to the other two elements. Consequently, the National Firearms Act does not create a crime of strict liability as to all its elements. It is no help in deciding what level of intent must be proved as to the third element to declare that the offense falls within the 'regulatory' eategory.

28 Following the analysis of the Model Penal Code,[3] I think we must recognize, first, that '(t)he existence of a mens rea is the rnle of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.' Dennis v. United States, 341 U.S. 494, 500, 71 S.Ct. 857, 862, 95 L.Ed. 1137 (1951) (Vinson, C.J., announcing judgment); Smith v. California, 361 U.S. 147, 150, 80 S.Ct. 215, 217, 4 L.Ed.2d 205 (1959);[4] second, that mens rea is not a unitary concept, but may vary as to each element of a crime; and third, that Anglo-American law has developed several identifiable and analytically distinct levels of intent, e.g., negligence, recklessness, knowledge, and purpose.[5] To determine the mental element required for conviction, each material element of the offense must be examined and the determination made what level of intent Congress intended the Government to prove, taking into account constitutional considerations, see Screws v. United States, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945), as well as the common-law background, if any, of the crime involved. See Morissette v. United States, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288

(1952).

29 Although the legislative history of the amendments to the National Firearms Act is silent on the level of intent to be proved in connection with each element of the offense, we are not without some guideposts. I begin with the proposition stated in Morissette v. United States, 342 U.S., at 250, 72 S.Ct., at 243, that the requirement of mens rea 'is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.' In regard to the first two elements of the offense, (1) possession of items that (2) are hand grenades, the general rule in favor of some intent requirement finds confirmation in the case law under the provisions replaced by the present amendments. The cases held that a conviction of an individual of illegal possession of unregistered firearms had to be supported by proof that his possession was 'willing and conscious' and that he knew the items possessed were firearms. E.g., Sipes v. United States, 321 F.2d 174, 179 (CA8 1963); United States v. Decker, 292 F.2d 89 (CA6 1961). Congress did not disapprove these cases, and we may therefore properly infer that Congress meant that the Government must prove knowledge with regard to the first two elements of the offense under the amended statute.

30 The third element—the unregistered status of the grenades presents more difficulty. Proof of intent with regard to this element would require the Government to show that the appellees knew that the grenades were unregistered or negligently or recklessly failed to ascertain whether the weapons were registered. It is true that such a requirement would involve knowledge of law, but it does not involve 'consciousness of wrongdoing' in the sense of knowledge that one's actions were prohibited or illegal.[6] Rather, the definition of the crime, as written by Congress, requires proof of circumstances that involve a legal element, namely whether the grenades were registered in accordance with federal law. The knowledge involved is solely knowledge of the circumstances that the law has defined as material to the offense. The Model Penal Code illustrates the distinction:

31 'It should be noted that the general principle that ignorance or mistake of law is no excuse is usually greatly overstated; it has no application when the circumstances made material by the definition of the offense include a legal element. So, for example, it is immaterial in theft, when claim of right is adduced in defense, that the claim involves a legal judgment as to the right of property. It is a defense because knowledge that the property belongs to someone else is a material element of the crime and such knowledge may involve matter of law as well as fact. * * * The law involved is not the law defining the offense; it is some other legal rule that characterizes the attendant circumstances that are material to the offense.' Model Penal Code § 2.02, Comment 131 (Tent. Draft No. 4, 1955).

32 Therefore, as with the first two elements, the question is solely one of congressional intent. And while the question is not an easy one, two factors persuade me that proof of mens rea as to the unregistered status of the grenades is not required. First, as the Court notes, the case las under the provisions replaced by the current law dispensed with proof of intent in connection with this element. Sipes v. United States, supra. Second, the firearms covered by the Act are major weapons such as machineguns and sawed-off shotguns; deceptive weapons such as flashlight guns and fountain pen guns; and major destructive devices such as bombs, grenades, mines, rockets, and large caliber weapons including mortars, anti-tank guns, and bazookas. Without exception,

the likelihood of governmental regulation of the distribution of such weapons is so great that anyone must be presumed to be aware of it. In the context of a taxing and registration scheme, I therefore think it reasonable to conclude that Congress dispensed with the requirement of intent in regard to the unregistered status of the weapon, as necessary to effective administration of the statute.

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[1] See S.Rep.No.1501, 90th Cong., 2d Sess., 26, 42, 48, 52; H.R.Conf.Rep.No.1956, 90th Cong., 2d Sess., 35.

[2] 26 U.S.C. § 5845(f) (1964 ed., Supp. V) defines 'destructive device' to include 'grenades' which are involved in the present case.

[3] Title 26 U.S.C. § 5812(a) (1964 ed., Supp. V) provides:

'A firearm shall not be transferred unless (1) the transferor of the firearm has filed with the Secretary or his delegate a written application, in duplicate, for the transfer and registration of the firearm to the transferee on the application form prescribed by the Secretary or his delegate; (2) any tax payable on the transfer is paid as evidenced by the proper stamp affixed to the original application form; (3) the transferee is identified in the application form in such manner as the Secretary or his delegate may by regulations prescribe, except that, if such person is an individual, the identification must include his fingerprints and his photograph; (4) the transferor of the firearm is identified in the application form in such manner as the Secretary or his delegate may by regulations prescribe; (5) the firearm is identified in the application form in such manner as the Secretary or his delegate may by regulations prescribe; and (6) the application form shows that the Secretary or his delegate has approved the transfer and the registration of the firearm to the transferee. Applications shall be denied if the transfer, receipt, or possession of the firearm would place the transferee in violation of law.'

Title 26 U.S.C. § 5812(b) (1964 ed., Supp. V) provides:

'The transferee of a firearm shall not take possession of the firearm unless the Secretary or his delegate has approved the transfer and registration of the firearm to the transferee as required by subsection (a) of this section.'

Title 26 U.S.C. § 5841(b) (1964 ed., Supp. V) provides:

'Each manufacturer, importer, and maker shall register each firearm he manufactures, imports, or makes. Each firearm transferred shall be registered to the transferee by the transferor.'

[4] 26 U.S.C. § 5861(d) (1964 ed., Supp. V).

[5] 26 U.S.C. § 5848 (1964 ed., Supp. V); and see 26 CFR § 179.202.

[6] Penal Code § 12303 (1970).

[7] 26 U.S.C. § 5811 (1964 ed., Supp V).

[8] 26 U.S.C. § 5812(a) (1964 ed., Supp. V); 26 CFR §§ 179.98 179.99.

[9] 26 CFR § 179.100.

[10] 26 U.S.C. § 5848 (1964 ed., Supp. V); 26 CFR § 179.202.

[11] We do not reach the question of 'use immunity' as opposed to 'transactional immunity,' cf. Pieeirillo v. New York, 400 U.S. 548, 91 S.Ct. 520, 27 L.Ed.2d 596, but only hold that, under this statutory scheme, the hazards of self-incrimination are not real.

[12] 26 U.S.C., § 5861(d) (1964 ed., Supp. V).

[13] As respects the Morissette case, J. Marshall, Intention In Law and Society 138 (1968), says:

'Thc defendant wished to take government property from a government bombing range, he had thc capacity to take it, he had the opportunity, he tried and succeeded in taking it (his wish was fulfilled, his act accomplished). For recovery in a tort action no more would have to be shown to establish liability, but the court held that to make his action criminal 'a felonious intent,' mens rea, had to be established. This could not be presumed from his actions, which were open, without concealment, and in the belief according to his statement—that the property bad been abandoned. In other words, for the happening to be criminal, the wish had to be to accomplish something criminal. So in diseussing intent we may have wishes of two different characters: one giving a basis for civil liability (the wish to take property not one's own), and another which would support criminal liability as well as civil (taking property with criminal inteut).'

[14] We need not decide whether a criminal conspiraey to do an act 'innocent in itself' and not known by the alleged conspirators to be prohibited must be actuated by some corrupt motive other than the intentiou to do the act which is prohibited and which is the object of the conspiracy. An agreement to acquire hand grenades is hardly an agreement innocent in itself. Therefore what we have said of the substantive offense satisfies on these speeial facts the requirements for a eonspiracy. Cf. United States v. Mack, 2 Cir., 112 F.2d 290.

[1] No question of transactional immnnity is raised here siuce the case involves incrimination under the laws of a jnrisdictiou different from the one compelliug the incriminating information. Piccirillo v. New York, 400 U.S. 548, 552, 91 S.Ct. 520, 522, 27 L.Ed.2d 596 (Brennan, J., dissenting).

[2] The result would be the same if a transferee moved from a State where possession was legal to a State where possession was illegal. The time when the possession became illegal eaunot affect the coutinuiug nature of the act of possession.

[3] ALI Model Penal Code § 2.02, Comment 123—132 (Tent. Draft No. 4, 1955).

[4] 'Still, it is doubtless competent for the (government) to create strict criminal liabilities by defining criminal offenses without any element of scienter—though * * * there is precedent in this Court that this power is not without limitations. See Lambert v. California, 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d 228.' Smith v. California, 361 U.S. 147, 150, 80 S.Ct. 215, 217, 4 L.Ed.2d 205 (1959). The situatious in which strict liability may be imposed were stated by Judge, now Mr. Justice, Blackmun: '(W)here a federal criminal statute omits mention of intent and where it seems to involve what is basically a matter of policy, where the standard

imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person, where the penalty is relatively small, where conviction does not gravely besmirch, where the statutory crime is not one taken over from the common law, and where congressional purpose is supporting, the statute can be construed as one not requiring criminal intent.' Holdridge v. United States, 282 F.2d 302, 310 (CA8 1960).

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[5] These different levels of intent are defined in the code. ALI Model Penal Code § 2.02 (Prop.Official Draft 1962). This Court has relied on the code's definitions. Leary v. United States, 395 U.S. 6, 46 n. 93, 89 S.Ct. 1532, 1553, 23 L.Ed.2d 57 (1969); Turner v. United States, 396 U.S. 398, 416 n. 29, 90 S.Ct. 642, 652, 24 L.Ed.2d 610 (1970).

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[6] Proof of some crimes may include a requirement of proof of actual knowledge that the act was prohibited by law, or proof of a purpose to bring about the forbidden result. See James v. United States, 366 U.S. 213, 81 S.Ct. 1052, 6 L.Ed.2d 246 (1961); Boyce Motor Lines v. United States, 342 U.S. 337, 72 S.Ct. 329, 96 L.Ed. 367 (1952). United States v. Murdock, 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed. 381 (1933). See generally Note, Counseling Draft Resistance: The Case for a Good Faith Belief Defense, 78 Yale L.J. 1008, 1022—1037 (1969). Cf. Model Penal Code § 2.02(2)(a) (Prop.Official Draft 1962) (definition of 'purposely').

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471 U.S. 419

105 S.Ct. 2084

85 L.Ed.2d 434

Frank LIPAROTA, Petitioner,
v.
UNITED STATES.

No. 84-5108.

Argued March 19, 1985.
Decided May 13, 1985.

Syllabus

The federal statute governing food stamp fraud provides in 7 U.S.C. § 2024(b)(1) that "whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [the statute] or the regulations" shall be guilty of a criminal offense. Petitioner was indicted for violation of § 2024(b)(1). At a jury trial in Federal District Court, the Government proved that petitioner on three occasions had purchased food stamps from an undercover Department of Agriculture agent for substantially less than their face value. The court refused petitioner's proposed jury instruction that the Government must prove that petitioner knowingly did an act that the law forbids, purposely intending to violate the law. Rather, over petitioner's objection, the court instructed the jury that the Government had to prove that petitioner acquired and possessed the food stamps in a manner not authorized by statute or regulations and that he knowingly and willfully acquired the stamps. Petitioner was convicted. The Court of Appeals affirmed.

Held: Absent any indication of a contrary purpose in the statute's language or legislative history, the Government in a prosecution for violation of § 2024(b)(1) must prove that the defendant knew that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulations. Pp. 423-434.

(a) Criminal offenses requiring no *mens rea* have a generally disfavored status. The failure of Congress explicitly and unambiguously to indicate whether *mens rea* is required does not signal a departure from this background assumption of our criminal law. Moreover, to interpret the statute to dispense with *mens rea* would be to criminalize a broad range of apparently innocent conduct. In addition, requiring *mens rea* in this case is in keeping with the established principle that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity. Pp. 425-428.

(b) The fact that § 2024(c), which is directed primarily at stores authorized to accept food stamps from program participants, differs in wording and structure from § 2024(b)(1) and provides that "[w]hoever presents, or causes to be presented, coupons for payment or redemption . . . knowing the same to have been received, transferred, or used in any manner in violation of [the statute] or the regulations," fails to show a congressional purpose not to require proof of the defendant's knowledge of illegality in a § 2024(b)(1) prosecution. Nor has it been shown that requiring knowledge of illegality in a § 2024(c), but not a § 2024(b)(1), prosecution is

supported by such obvious and compelling policy reasons that it should be assumed that Congress intended to make such a distinction. Pp. 428-430.

(c) *United States v. Yermian*, 468 U.S. 63, 104 S.Ct. 2936, 82 L.Ed.2d 53, does not support an interpretation of § 2024(b)(1) dispensing with the requirement that the Government prove the defendant's knowledge of illegality. Nor is the § 2024(b)(1) offense a "public welfare" offense that depends on no mental element but consists only of forbidden acts or omissions. Pp. 431-433.

735 F.2d 1044 (CA 7 1984), reversed.

William Thomas Huyck, Chicago, Ill., for petitioner.

Charles A. Rothfeld, Washington, D.C., for respondent, pro hac vice, by special leave of Court.

Justice BRENNAN delivered the opinion of the Court.

1 The federal statute governing food stamp fraud provides that "whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [the statute] or the regulations" is subject to a fine and imprisonment. 78 Stat. 708, as amended, 7 U.S.C. § 2024(b)(1).[1] The question presented is whether in a prosecution under this provision the Government must prove that the defendant knew that he was acting in a manner not authorized by statute or regulations.

2 * Petitioner Frank Liparota was the co-owner with his brother of Moon's Sandwich Shop in Chicago, Illinois. He was indicted for acquiring and possessing food stamps in violation of § 2024(b)(1). The Department of Agriculture had not authorized petitioner's restaurant to accept food stamps. App. 6-7.[2] At trial, the Government proved that petitioner on three occasions purchased food stamps from an undercover Department of Agriculture agent for substantially less than their face value. On the first occasion, the agent informed petitioner that she had $195 worth of food stamps to sell. The agent then accepted petitioner's offer of $150 and consummated the transaction in a back room of the restaurant with petitioner's brother. A similar transaction occurred one week later, in which the agent sold $500 worth of coupons for $350. Approximately one month later, petitioner bought $500 worth of food stamps from the agent for $300.

3 In submitting the case to the jury, the District Court rejected petitioner's proposed "specific intent" instruction, which would have instructed the jury that the Government must prove that "the defendant knowingly did an act which the law forbids, purposely intending to violate the law." *Id.*, at 34.[3] Concluding that "[t]his is not a specific intent crime" but rather a "knowledge case," *id.*, at 31, the District Court instead instructed the jury as follows:

4 "When the word 'knowingly' is used in these instructions, it means that the Defendant realized what he was doing, and was aware of the nature of his conduct, and did not act through ignorance, mistake, or accident. Knowledge may be proved by defendant's conduct and by all of the facts and circumstances surrounding the case." *Id.*, at 33.

5 The District Court also instructed that the Government had to prove that "the Defendant acquired and possessed food stamp coupons for cash in a manner not

authorized by federal statute or regulations" and that "the Defendant knowingly and wilfully acquired the food stamps." 3 Tr. 251. Petitioner objected that this instruction required the jury to find merely that he knew that he was acquiring or possessing food stamps; he argued that the statute should be construed instead to reach only "people who knew that they were acting uulawfully." App. 31. The judge did not alter or supplement his instructions, and the jury returned a verdict of guilty.

6 Petitioner appealed his conviction to the Court of Appeals for the Seventh Circuit, arguing that the District Court erred in refusing to instruct the jury that "specific intent" is required in a prosecution under 7 U.S.C. § 2024(b)(1). The Court of Appeals rejected petitioner's arguments. 735 F.2d 1044 (1984). Becanse this decision conflicted with recent decisions of three other Courts of Appeals,[4] we granted certiorari. 469 U.S. 930, 105 S.Ct. 322, 83 L.Ed.2d 260 (1984). We reverse.

II

7 The controversy between the parties concerns the mental state, if any, that the Government must show in proving that petitioner acted "in any manner not authorized by [the statute] or the regulations." The Government argues that petitioner violated the statute if he knew that he acquired or possessed food stamps and if in fact that acquisition or possession was in a manner not authorized by statute or regulations. According to the Government, no *mens rea*, or "evil-meaning mind," *Morissette v. United States*, 342 U.S. 246, 251, 72 S.Ct. 240, 244, 96 L.Ed. 288 (1952), is necessary for conviction. Petitioner claims that the Government's interpretation, by dispensing with *mens rea*, dispenses with the only morally blameworthy element in the definition of the crime. To avoid this allegedly untoward result, he claims that an individual violates the statute if he knows that he has acquired or possessed food stamps *and* if he also knows that he has done so in an unauthorized manner.[5] Our task is to determine which meaning Congress intended.

8 The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute. *United States v. Hudson*, 7 Cranch 32, 3 L.Ed. 259 (1812).[6] With respect to the element at issue in this case, however, Congress has not explicitly spelled out the mental state required. Although Congress certainly intended by use of the word "knowingly" to require *some* mental state with respect to *some* element of the crime defined in § 2024(b)(1), the interpretations proffered by both parties accord with congressional intent to this extent. Beyond this, the words themselves provide little guidance. Either interpretation would accord with ordinary usage.[7] The legislative history of the statute contains nothing that would clarify the congressional purpose on this point.[8]

9 Absent indication of contrary purpose in the language or legislative history of the statute, we believe that § 2024(b)(1) requires a showing that the defendant knew his conduct to be unauthorized by statute or regulations.[9] "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette v. United States, supra*, 342 U.S., at 250, 72 S.Ct., at 243. Thus, in *United States v. United States Gypsum Co.*, 438 U.S. 422, 438, 98 S.Ct. 2864, 2874, 57 L.Ed.2d 854 (1978), we noted that "[c]ertainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement" and that criminal offenses requiring

no *mens rea* have a "generally disfavored status." Similarly, in this case, the failure of Congress explicitly and unambiguously to indicate whether *mens rea* is required does not signal a departure from this background assumption of our criminal law.

10 This construction is particularly appropriate where, as here, to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct. For instance, § 2024(b)(1) declares it criminal to use, transfer, acquire, alter, or possess food stamps in any manner not authorized by statute or regulations. The statute provides further that "[c]oupons issued to eligible households shall be used by them only to purchase food in retail food stores which have been approved for participation in the food stamp program *at prices prevailing in such stores*." 7 U.S.C. § 2016(b) (emphasis added); see also 7 CFR § 274.10(a) (1985).[10] This seems to be the *only* authorized use. A strict reading of the statute with no knowledge-of-illegality requirement would thus render criminal a food stamp recipient who, for example, used stamps to purchase food from a store that, unknown to him, charged higher than normal prices to food stamp program participants. Such a reading would also render criminal a nonrecipient of food stamps who "possessed" stamps because he was mistakenly sent them through the mail[11] due to administrative error, "altered" them by tearing them up, and "transferred" them by throwing them away. Of course, Congress *could* have intended that this broad range of conduct be made illegal, perhaps with the understanding that prosecutors would exercise their discretion to avoid such harsh results. However, given the paucity of material suggesting that Congress did so intend, we are reluctant to adopt such a sweeping interpretation.

11 In addition, requiring *mens rea* is in keeping with our longstanding recognition of the principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812, 91 S.Ct. 1056, 1059, 28 L.Ed.2d 493 (1971). See also *United States v. United States Gypsum Co.*, *supra*, 438 U.S., at 437, 98 S.Ct., at 2873; *United States v. Bass*, 404 U.S. 336, 347-348, 92 S.Ct. 515, 522-523, 30 L.Ed.2d 488 (1971); *Bell v. United States*, 349 U.S. 81, 83, 75 S.Ct. 620, 622, 99 L.Ed. 905 (1955); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222, 73 S.Ct. 227, 229-230, 97 L.Ed. 260 (1952). Application of the rule of lenity ensures that criminal statntes will provide fair warning eoncerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability. See *United States v. Bass*, *supra*, 404 U.S., at 348, 92 S.Ct., at 523 ("[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity"). Although the rule of lenity is not to be applied where to do so would conflict with the implied or exprcssed intent of Congress, it provides a time-honored interpretive guideline when the congressional purpose is unclear. In the instant case, the rule directly supports petitioner's contention that the Government must prove knowledge of illegality to convict him under § 2024(b)(1).

12 The Government argues, however, that a comparison between § 2024(b)(1) and its companion, § 2024(c), demonstrates a congressional purpose not to require proof of the defendant's knowledge of illegality in a § 2024(b)(1) prosecution. Section 2024(c) is directed primarily at stores authorized to accept food stamps from program participants. It provides that "[w]hoever presents, or causes to be presented, coupons for payment or redemption . . . *knowing* the same to have been received, transferred, or used in any manner in violation of [the statute] or the regulations" is subject to fine

and imprisonment (emphasis added).[12] The Government contrasts this language with that of § 2024(b)(1), in which the word "knowingly" is placed differently: "whoever *knowingly* uses, transfers . . ." (emphasis added). Since § 2024(c) undeniably requires a knowledge of illegality, the suggested inference is that the difference in wording and structure between the two sections indicates that § 2024(b)(1) does not.

13 The Government urges that this distinction between the mental state required for a § 2024(e) violation and that required for a § 2024(b)(1) violation is a sensible one. Absent a requirement of *mens rea*, a grocer presenting food stamps for payment might be criminally liable under § 2024(c) even if his customer or employees have illegally proeured or transferred the stamps without the grocer's knowledge. Requiring knowledge of illegality in a § 2024(c) prosecution is allegedly necessary to avoid this kind of vicarious, and non-fault-based, criminal liability. Since the offense defined in § 2024(b)(1)—using, transferring, acquiring, altering, or possessing food stamps in an unauthorized manner—does not involve this possibility of vicarious liability, argues the Government, Congress had no reason to impose a similar knowledge of illegality requirement in that seetion.

14 We do not find this argument persuasive. The difference in wording between § 2024(b)(1) and § 2024(e) is too slender a reed to support the attempted distinction, for if the Government's argument were accepted, it would lead to the demise of the very distinction that Congress is said to have desired. According to the Government, Congress *did* intend a knowledge of illegality requirement in § 2024(c), while it *did not* intend such a requirement in § 2024(b)(1). Anyone who has violated § 2024(c) has "present[ed], or caus[ed] to be presented, coupons for payment or redemption" in an unauthorized manner. Such a person would seemingly have also "use[d], transfer[red], acquir[ed], alter[ed], or possess[ed]" the coupons in a similarly unauthorized manner, and thus to have violated § 2024(b)(1). It follows that the Government will be able to prosecute any violator of § 2024(c) under § 2024(b)(1) as well. If only § 2024(c)—and not § 2024(b)(1)—required the Government to prove knowledge of illegality, the result would be that the Government could *always* avoid proving knowledge of illegality in food stamp fraud cases, simply by bringing its prosecutions under § 2024(b)(1). If Congress wanted to require the Government to prove knowledge of illegality in some, but not all, food stamp fraud cases, it thus chose a peculiar way to do so.

15 For similar reasons, the Government's arguments that Congress could have had a plausible reason to require knowledge of illegality in prosecutions under § 2024(c), but not § 2024(b)(1), are equally unpersuasive. Grocers are participants in the food stamp program who have had the benefit of an extensive informational campaign concerning the authorized use and handling of food stamps. App. 7-8. Yet the Government would have to prove knowledge of illegality when prosecuting such grocers, while it would have no such burden when prosecuting third parties who may well have had no opportunity to acquaint themselves with the rules governing food stamps. It is not immediately obvious that Congress would have been so concerned about imposing strict liability on grocers, while it had no similar concerns about imposing strict liability on nonparticipants in the program. Our point once again is not that Congress could not have chosen to enact a statute along these lines, for there are no doubt policy arguments on both sides of the question as to whether such a statute would have been desirable. Rather, we conclude that the policy underlying such a construction is neither so obvious nor so compelling that we must assume, in the

absence of any discussion of this issue in the legislative history, that Congress *did* enact such a statute.[13]

16 The Government advances two additional arguments in support of its reading of the statute. First, the Government contends that this Court's decision last Term in *United States v. Yermian*, 468 U.S. 63, 104 S.Ct. 2936, 82 L.Ed.2d 53 (1984), supports its interpretation. *Yermian* involved a prosecution for violation of the federal false statement statute, 18 U.S.C. § 1001.[14] All parties agreed that the statute required proof at least that the defendant "knowingly and willfully" made a false statement. Thus, unlike the instant case, all parties in *Yermian* agreed that the Government had to prove the defendant's *mens rea*.[15] The controversy in *Yermian* centered on whether the Government also had to prove that the defendant knew that the false statement was made in a matter within the jurisdiction of a federal agency. With respect to this element, although the Court held that the Government did not have to prove actual knowledge of federal agency jurisdiction, the Court explicitly reserved the question whether *some* culpability was necessary with respect even to the jurisdictional element. 468 U.S., at 75, n. 14, 104 S.Ct., at 2943, n. 14. In contrast, the Government in the instant case argues that *no mens rea* is required with respect to any element of the crime. Finally, *Yermian* found that the statutory language was unambiguous and that the legislative history supported its interpretation. The statute at issue in this case differs in both respects.

17 Second, the Government contends that the § 2024(b)(1) offense is a "public welfare" offense, which the Court defined in *Morissette v. United States*, 342 U.S., at 252-253, 72 S.Ct., at 244-245, to "depend on no mental element but consist only of forbidden acts or omissions." Yet the offense at issue here differs substantially from those "public welfare offenses" we have previously recognized. In most previous instances, Congress has rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety. Thus, in *United States v. Freed*, 401 U.S. 601, 91 S.Ct. 1112, 28 L.Ed.2d 356 (1971), we examined the federal statute making it illegal to receive or possess an unregistered firearm. In holding that the Government did not have to prove that the recipient of unregistered hand grenades knew that they were unregistered, we noted that "one would hardly be surprised to learn that possession of hand grenades is not an innocent act." *Id.*, at 609, 91 S.Ct., at 1118. See also *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 564-565, 91 S.Ct. 1697, 1701-1702, 29 L.Ed.2d 178 (1971). Similarly, in *United States v. Dotterweich*, 320 U.S. 277, 284, 64 S.Ct. 134, 138, 88 L.Ed. 48 (1943), the Court held that a corporate officer could violate the Food, Drug, and Cosmetic Act when his firm shipped adulterated and misbranded drugs, even "though consciousness of wrongdoing be totally wanting." See also *United States v. Balint*, 258 U.S. 250, 42 S.Ct. 301, 66 L.Ed. 604 (1922). The distinctions between these cases and the instant case are clear. A food stamp can hardly be compared to a hand grenade, see *Freed*, nor can the unauthorized acquisition or possession of food stamps be compared to the selling of adulterated drugs, as in *Dotterweich*.

III

18 We hold that in a prosecution for violation of § 2024(b)(1), the Government must prove that the defendant knew that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulations.[16] This holding does not put an unduly heavy burden on the Government in prosecuting violators of § 2024(b)(1). To

prove that petitioner knew that his acquisition or possession of food stamps was unauthorized, for example, the Government need not show that he had knowledge of specific regulations governing food stamp acquisition or possession. Nor must the Government introduce any extraordinary evidence that would conclusively demonstrate petitioner's state of mind. Rather, as in any other criminal prosecution requiring *mens rea*, the Government may prove by reference to facts and circumstances surrounding the case that petitioner knew that his conduct was unauthorized or illegal.[17]

19 *Reversed.*

20 Justice POWELL took no part in the consideration or decision of this case.

21 Justice WHITE, with whom THE CHIEF JUSTICE joins, dissenting.

22 Forsaking reliance on either the language or the history of § 2024(b)(1), the majority bases its result on the absence of an explicit rejection of the general principle that criminal liability requires not only an *actus reus*, but a *mens rea*. In my view, the result below is in fact supported by the statute's language and its history, and it is the majority that has ignored general principles of criminal liability.

23 * The Court views the statutory problem here as being how far down the sentence the term "knowingly" travels. See *ante*, at 424-425, n. 7. Accepting for the moment that if "knowingly" does extend to the "in any manner" language today's holding would be correct—a position with which I take issue below I doubt that it gets that far. The "in any manner" language is separated from the litany of verbs to which "knowingly" is directly connected by the intervening nouns. We considered an identically phrased statute last Term in *United States v. Yermian*, 468 U.S. 63, 104 S.Ct. 2936, 82 L.Ed.2d 53 (1984). The predecessor to the statute at issue in that case provided: " '[W]hoever shall knowingly and willfully . . . make . . . any false or fraudulent statements or representations . . . in any matter within the jurisdiction of any department or agency of the United States . . . shall be fined.' " *Id.*, at 69, n. 6, 104 S.Ct., at 2940, n. 6 (quoting Act of June 18, 1934, ch. 587, 48 Stat. 996). We found that under the "most natural reading" of the statute, "knowingly and willfully" applied only to the making of false or fraudulent statements and not to the fact of jurisdiction. 468 U.S., at 69, n. 6, 104 S.Ct., at 2940, n. 6. By the same token, the "most natural reading" of § 2024(b)(1) is that "knowingly" modifies only the verbs to which it is attached.[1]

24 In any event, I think that the premise of this approach is mistaken. Even accepting that "knowingly" does extend through the sentence, or at least that we should read § 2024(b)(1) as if it does, the statute does not mean what the Court says it does. Rather, it requires only that the defendant be aware of the relevant aspects of his conduct. A requirement that the defendant know that he is acting in a particular manner, coupled with the fact that that manner is forbidden, does not establish a defense of ignorance of the law. It creates only a defense of ignorance or mistake of fact. Knowingly to do something that is unauthorized by law is not the same as doing something knowing that it is unauthorized by law.

25 This point is demonstrated by the hypothetical statute referred to by the majority, which punishes one who "knowingly sells a security without a permit." See *ante*, at 424-425, n. 7. Even if "knowingly" does reach "without a permit," I would think that a

defendant who knew that he did not have a permit, though not that a permit was required, could be convicted.

26 Section 2024(b)(1) is an identical statute, except that instead of detailing the various legal requirements, it incorporates them by proscribing use of coupons "in any manner not authorized" by law. This shorthand approach to drafting does not transform knowledge of illegality into an element of the crime. As written, § 2024(b)(1) is substantively no different than if it had been broken down into a collection of specific provisions making crimes of particular improper uses. For example, food stamps cannot be used to purchase tobacco. 7 CFR §§ 271.2, 274.10(a), 278.2(a) (1985). The statute might have said, *inter alia,* that anyone "who knowingly uses coupons to purchase cigarettes" commits a crime. Under no plausible reading could a defendant then be acquitted because he did not know cigarettes are not "eligible food." But in fact, that is exactly what § 2024(b)(1) does say; it just does not write it out longhand.

27 The Court's opinion provides another illustration of the general point: someone who used food stamps to purchase groceries at inflated prices without realizing he was overcharged.[2] I agree that such a person may not be convicted, but not for the reason given by the majority. The purchaser did not "knowingly" use the stamps in the proscribed manner, for he was unaware of the circumstances of the transaction that made it illegal.

28 The majority and I would part company in result as well as rationale if the purchaser knew he was charged higher than normal prices but not that overcharging is prohibited. In such a case, he would have been aware of the nature of his actions, and therefore the purchase would have been "knowing." I would hold that such a mental state satisfies the statute. Under the Court's holding, as I understand it, that person could not be convicted because he did not know that his conduct was illegal.[3]

29 Much has been made of the comparison between § 2024(b)(1) and § 2024(c). The Government, like the court below, see 735 F.2d 1044, 1047-1048 (1984), argues that the express requirement of knowing illegality in subsection (c) supports an inference that the absence of such a provision in subsection (b)(1) was intentional. While I disagree with the majority's refutation of this argument,[4] I view most of this discussion as beside the point. The Government's premise seems to me mistaken. Subsection (c) does not impose a requirement of knowing illegality. The provision is much like statutes that forbid the receipt or sale of stolen goods. See, *e.g.,* 18 U.S.C. §§ 641, 2313. Just as those statutes generally require knowledge that the goods were stolen, so § 2024(c) requires knowledge of the past impropriety. But receipt-of-stolen-goods statutes do not require that the defendant know that receipt itself is illegal, and similarly § 2024(c) plainly does not require that the defendant know that it is illegal to present coupons that have been improperly used in the past. It is not inconceivable that someone presenting such coupons—again, like someone buying stolen goods—would think that his conduct was above-board despite the preceding illegality. But that belief, however sincere, would not be a defense. In short, because § 2024(c) does not require that the defendant know that the conduct for which he is being prosecuted was illegal, it does not create an ignorance-of-the-law defense.[5]

30 I therefore cannot draw the Government's suggested inference. The two provisions are nonetheless fruitfully compared. What matters is not their difference, but their similarity. Neither contains any indication that "knowledge of the law defining the

offense [is] an element of the offense." See ALI, Model Penal Code § 2.02, Comment 11, p. 131 (Tent.Draft No. 4, 1955). A requirement of knowing illegality should not be read into either provision.

31 I do agree with the Government that when Congress wants to include a knowledge-of-illegality requirement in a statute it knows how to do so, even though I do not consider subsection (c) an example. Other provisions of the United States Code explicitly include a requirement of familiarity with the law defining the offense—indeed, in places where, under the majority's analysis, it is entirely superfluous. *E.g.*, 15 U.S.C. §§ 79z-3, 80a-48. See also Model Penal Code, *supra*, at 139. Congress could easily have included a similar provision in § 2024(b)(1), but did not. Cf. *United States v. Turkette*, 452 U.S. 576, 580-581, 101 S.Ct. 2524, 2527-2528, 69 L.Ed.2d 246 (1981).

32 Finally, the lower court's reading of the statute is eonsistent with the legislative history. As the majority points out, the history provides little to go on. Significantly, however, the brief discussions of this provision in the relevant congressional Reports do not mention any requirement of knowing illegality. To the contrary, when the Food Stamp Act was rewritten in 1977, the House Report noted that "*[a]ny* unauthorized use, transfer, aequisition, alteration, or possession of food stamps . . . may be prosecuted under" § 2024(b)(1). H.R.Rep. No. 95-464, p. 376 (1977), U.S.Code Cong. & Admin.News p. 2305 (emphasis added).

II

33 The broad principles of the Court's opinion are easy to live with in a case such as this. But the application of its reasoning might not always be so benign. For example, § 2024(b)(1) is little different from the basic federal prohibition on the manufacture and distribution of controlled substances. Title 21 U.S.C. § 841(a) provides:

34 "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

35 "(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance. . . ."

36 I am sure that the Members of the majority would agree that a defendant charged under this provision could not defend on the ground that he did not realize his manufacture was unauthorized or that the particular substance was controlled. See *United States v. Balint*, 258 U.S. 250, 42 S.Ct. 301, 66 L.Ed. 604 (1922). On the other hand, it would be a defense if he could prove he thought the substance was something other than what it was. By the same token, I think, someone in petitioner's position should not be heard to say that he did not know his purchase of food stamps was unauthorized, though he may certainly argue that he did not know he was buying food stamps. I would not stretch the term "knowingly" to require awareness of the absence of statutory authority in either of these provisions.

37 These provisions might be distinguished because of the different placements of the "except as authorized" and the "in any manner not authorized" clauses in the sentences. But see *United States v. Yermian*, 468 U.S., at 69, and n. 6, 104 S.Ct., at 2940, and n. 6. However, nothing in the majority's opinion indicates that this difference is relevant. Indeed, the logic of the Court's opinion would require knowledge of illegality for conviction under any statute making it a crime to do

something "in any manner not authorized by law" or "unlawfully." I suspect that if a case arises in the future where such a result is unacceptable, the Court will manage to distinguish today's decision. But I will be interested to see how it does so.

III

38 In relying on the "background assumption of our criminal law" that *mens rea* is required, *ante,* at 426, the Court ignores the equally well founded assumption that ignorance of the law is no excuse. It is "the conventional position that knowledge of the existence, meaning or application of the law determining the elements of an offense is not an element of that offense. . . ." Model Penal Code, *supra,* at 130.

39 This Court's prior cases indicate that a statutory requirement of a "knowing violation" does not supersede this principle. For example, under the statute at issue in *United States v. International Minerals & Chemical Corp.,* 402 U.S. 558, 91 S.Ct. 1697, 29 L.Ed.2d 178 (1971), the Interstate Commerce Commission was authorized to promulgate regulations regarding the transportation of corrosive liquids, and it was a crime to "knowingly violat[e] any such regulation." 18 U.S.C. § 834(f) (1970 ed.). Viewing the word "regulations" as "a shorthand designation for specific acts or omissions which violate the Act," 402 U.S., at 562, 91 S.Ct., at 1700, we adhered to the traditional rule that ignorance of the law is not a defense. The violation had to be "knowing" in that the defendant had to know that he was transporting corrosive liquids and not, for example, merely water. *Id.,* at 563-564, 91 S.Ct., at 1700-1701. But there was no requirement that he be aware that he was violating a particular regulation. Similarly, in this case the phrase "in any manner not authorized by" the statute or regulations is a shorthand incorporation of a variety of legal requirements. To be convicted, a defendant must have been aware of what he was doing, but not that it was illegal.

40 In *Boyce Motor Lines, Inc. v. United States,* 342 U.S. 337, 72 S.Ct. 329, 96 L.Ed. 367 (1952), the Court considered a statute that punished anyone who "knowingly violates" a regulation requiring trucks transporting dangerous items to avoid congested areas where possible. In rejecting a vagueness challenge, the Court read "knowingly" to mean not that the driver had to be aware of the regulation, see *id.,* at 345, 72 S.Ct., at 333 (Jackson, J., dissenting), but that he had to know a safer alternative route was available. Likewise, in construing 18 U.S.C. § 1461, which punishes "[w]hoever knowingly uses the mails for the mailing . . . of anything declared by this section or section 3001(e) of Title 39 to be nonmailable," we held that the defendant need not have known that the materials were nonmailable. *Hamling v. United States,* 418 U.S. 87, 120-124, 94 S.Ct. 2887, 2909-2911, 41 L.Ed.2d 590 (1974). "To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law," and was not required by the statute. *Id.,* at 123-124, 94 S.Ct., at 2910-2911. Accord, *Rosen v. United States,* 161 U.S. 29, 16 S.Ct. 434, 40 L.Ed. 606 (1896). See also *United States v. Freed,* 401 U.S. 601, 91 S.Ct. 1112, 28 L.Ed.2d 356 (1971); *id.,* at 612-615, 91 S.Ct., at 1119-1121 (BRENNAN, J., concurring in judgment).

41 In each of these cases, the statutory language lent itself to the approach adopted today if anything more readily than does § 2024(b)(1).[6] I would read § 2024(b)(1) like those statutes, to require awareness of only the relevant aspects of one's conduct rendering it illegal, not the fact of illegality. This reading does not abandon the

"background assumption" of *mens rea* by creating a strict-liability offense,[7] and is consistent with the equally important background assumption that ignorance of the law is not a defense.

IV

42 I wholly agree that "[t]he contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion." *Morissette v. United States,* 342 U.S. 246, 250, 72 S.Ct. 240, 243, 96 L.Ed. 288 (1952); *ante,* at 425. But the holding of the court below is not at all inconsistent with that longstanding and important principle. Petitioner's conduct was intentional; the jury found that petitioner "realized what he was doing, and was aware of the nature of his conduct, and did not act through ignorance, mistake, or accident." App. 33 (trial court's instructions). Whether he knew which regulation he violated is beside the point.

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[1] The statute provides in relevant part:

"[W]hoever knowingly uses, transfers, acquires, alters, or possesses coupons or anthorization cards in any manner not authorized by this chapter or the regulations issued pursuant to this chapter shall, if sueh coupons or authorization cards are of a value of $100 or more, be guilty of a felony and shall, upon the first conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years, or both, and, upon the second and any subsequent conviction thereof, shall be imprisoned for not less than six months nor more than five years and may also be fined not more than $10,000 or, if such coupons or authorization cards are of a value of less than $100, sball be guilty of a misdemeanor, and, upon the first convietion thereof, shall be fined not more than $1,000 or imprisoned for not more than one year, or both, and upon the second and any subsequent conviction thereof, shall be imprisoned for not more tban one year and may also be fined not more than $1,000. In addition to such penalties, any person convieted of a felony or misdemeanor violation under this subsection may be suspended by the court from participation in the food stamp program for an additional period of up to eigbteen months consecutive to that period of suspension mandated by section 2015(b)(1) of this title."

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[2] Food stamps are provided by the Government to those who meet certain need-related criteria. See 7 U.S.C. §§ 2014(a), 2014(c). They generally may be used only to purchase food in retail food stores. 7 U.S.C. § 2016(b). If a restaurant reeeives proper authorization from the Department of Agriculture, it may reeeive food stamps as payment for meals under certain special circumstances not relevant here. App. 6-7.

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[3] The instruction proffered by petitioner was drawn from 1 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 14.03 (1977). The instruction reads in its entirety:

"The crime eharged in this case is a serious crime which requires proof of specific intent before the defendant can be convicted. Speeific intent, as the term implies, means more than the general intent to commit the aet. To establish speeifie intent the government must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case."

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[4] See *United States v. Pollard*, 724 F.2d 1438 (CA6 1984); *United States v. Marvin*, 687 F.2d 1221 (CA8 1982), cert. denied, 460 U.S. 1081, 103 S.Ct. 1768, 76 L.Ed.2d 342 (1983); *United States v. Faltico*, 687 F.2d 273 (CA8 1982), cert. denied, 460 U.S. 1088, 103 S.Ct. 1783, 76 L.Ed.2d 353 (1983); *United States v. O'Brien*, 686 F.2d 850 (CA10 1982).

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[5] The required mental state may of course be different for different elements of a crime. *United States v. Bailey*, 444 U.S. 394, 405-406, 100 S.Ct. 624, 631-633, 62 L.Ed.2d 575 (1980); *United States v. Freed*, 401 U.S. 601, 612-614, 91 S.Ct. 1112, 1119-1121, 28 L.Ed.2d 356 (1971) (BRENNAN, J., concurring in judgment). See generally Robinson & Grall, Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond, 35 Stan.L.Rev. 681 (1983). In this case, for instance, both parties agree that petitioner must have known that he acquired and possessed food stamps. They disagree over whether any mental element at all is required with respect to the unauthorized nature of that acquisition or possession.

We have also recognized that the mental element in criminal law encompasses more than the two possibilities of "specific" and "general" intent. See *United States v. Bailey, supra*, 444 U.S., at 403-407, 100 S.Ct., at 631-633; *United States v. United States Gypsum Co.*, 438 U.S. 422, 444-445, 98 S.Ct. 2864, 2877-2878, 57 L.Ed.2d 854 (1978); *United States v. Freed, supra*, 401 U.S., at 613, 91 S.Ct., at 1120 (BRENNAN, J., concurring in judgment). The Model Penal Code, for instance, recognizes four mental states purpose, knowledge, recklessness, and negligence. ALI, Model Penal Code § 2.02 (Prop.Off.Draft 1962). In this case, petitioner argues that with respect to the element at issue, knowledge is required. The Government contends that *no* meutal state is required with respect to that element.

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[6] Of course, Congress must act within any applicable constitutional constraints in defining criminal offenses. In this case, there is no allegation that the statute would be unconstitutional under either interpretation.

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[7] One treatise has aptly summed up the ambiguity in an analogous situation:

"Still further difficulty arises from the ambiguity which frequently exists concerning what the words or phrases in question modify. What, for instance, does 'knowingly' modify in a sentence from a 'blue sky' law criminal statute punishing one who 'knowingly sells a security without a permit' from the securities commissioner? To be guilty must the seller of a security without a permit know only that what he is doing constitutes a sale, or must he also know that the thing he sells is a security, or must he also know that he has no permit to sell the security he sells? As a matter of grammar the statute is ambiguous; it is not at all clear how far down the sentence the word 'knowingly' is iutended to travel—whether it modifies 'sells,' or 'sells a security,' or 'sells a security without a permit.' " W. LaFave & A. Scott, Criminal Law § 27 (1972).

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[8] See n. 12, *infra*.

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[9] The dissent repeatedly claims that our holding today creates a defense of "mistake of law." *Post*, at 436, 439, 441. Our holding today no more creates a "mistake of law" defense than does a statute making knowing receipt of stolen goods unlawful. See *post*, at 436. In both cases, there is a legal element iu the definition of the offense. In the case of a receipt-of-stolen-goods statute, the legal element is that the goods were stolen; in this case, the legal element is that the "use, transfer, acquisitiou,"

etc. were in a manner not authorized by statute or regulations. It is not a defense to a charge of receipt of stolen goods that one did not know that such receipt was illegal, and it is not a defense to a charge of a § 2024(b)(1) violation that one did not know that possessing food stamps in a manner unauthorized by statute or regulations was illegal. It *is*, however, a defense to a charge of knowing receipt of stolen goods that one did not know that the goods were stolen, just as it is a defense to a charge of a § 2024(b)(1) violation that one did not know that one's possession was unauthorized. See ALI, Model Penal Code § 2.02, Comment 11, p. 131 (Tent. Draft No. 4, 1955); *United States v. Freed, supra*, at 614-615, 91 S.Ct., at 1120-1121 (BRENNAN, J., concurring in judgment). Cf. *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952) (holding that it is a defense to a charge of "knowingly converting" federal property that one did not know that what one was doing was a conversion).

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[10] As the Committee Report in the House of Representatives noted when this provision in essentially its current form was first enacted, the provision "makes it clear that participants shall be charged the regular price prevailing in the retail store when they purchase food with stamps." H.R.Rep. No. 1228, 88th Cong., 2d Sess., 14 (1964). See also S.Rep. No. 1124, 88th Cong., 2d Sess., 15 (1964), U.S.Code Cong. & Admin.News 1964, pp. 3275, 3289.

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[11] The Department of Agriculture's regulations permit state agencies administering the food stamp program to mail the coupons directly to program participants. The regulations provide that "[t]he State agency may issue some or all of the coupon allotments through the mail." 7 CFR § 274.3(a) (1985).

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[12] The statute provides in full:

"Whoever presents, or causes to be presented, coupons for payment or redemption of the value of $100 or more, knowing the same to have been received, transferred, or used in any manner in violation of the provisions of this chapter or the regulations issued pursuant to this chapter, shall be guilty of a felony and, upon the first conviction thereof, shall be fined not more than $10,000 or imprisoned for not more than five years, or both, and, upon the second and any subsequent conviction thereof, shall be imprisoned for not less than one year nor more than five years and may also be fined not more than $10,000, or, if such coupons are of a value of less than $100, shall be guilty of a misdemeanor and, upon the first conviction thereof, shall be fined not more than $1,000 or imprisoned for not more than one year, or both, and, upon the second and any subsequent conviction thereof, shall be imprisoned for not more than one year and may also be fined not more than $1,000. In addition to such penalties, any person convicted of a felony or misdemeanor violation under this subsection may be suspended by the court from participation in the food stamp program for an additional period of up to eighteen months consecutive to that period of suspension mandated by section 2015(b)(1) of this title."

It is worth noting that the penalties under this section are virtually identical to those provided in § 2024(b)(1). See n. 1, *supra*.

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[13] Notwithstanding the absence of any explicit discussion of this issue in the legislative history, the Government argues that certain statements in the Committee Reports support its position. The statute originally was enacted as part of the Food Stamp Act of 1964, Pub.L. 88-525, § 14, 78 Stat. 708. The Committee Report accompanying the bill in the House of Representatives described both

sections together: "This section makes it a violation of Federal law to knowingly use, transfer, acqnire, or possess coupons in any manner not authorized hy this act or to present, or cause to be presented, such coupons for redemption knowing them to have been received, transferred or used in any manner in violation of the provisions of the act." H.R.Rep. No. 1228, 88th Cong., 2d Sess., 16 (1964). See also S.Rep. No. 1124, 88th Cong., 2d Sess., 18 (1964), U.S.Code Cong. & Admin.News p. 3291. The Government believes that the description of both sections in this single sentence emphasizes the differenee in meaning between them. We fail to see how this sentence, which merely parrots the terms of the statute, offers any enlightenment as to what those terms mean.

The Govcrnmcnt similarly points to the legislative history of the 1977 Act that snbstantially revised the previons food stamp program. The Honse Report explained that "[a]ny nnauthorized use, transfer, acqnisition, alteration, or possession of food stamps . . . hy any individual . . . may be prosecuted under the provisions of" § 2024(b)(1). H.R.Rep. No. 95-464, p. 376 (1977), U.S.Code Cong. & Admin.News pp. 1704, 2305. The Report continued that "under [§ 2024(c)] . . . the same penalties are prescribed for whoever presents or causes to be presented food stamps (for payment or redemption) knowing that they have been received, transferred or nsed in any manner violating the provisions of the Act or regnlations implementing the Act." *Ibid.*

Presumably relying on the omission of the word "knowingly" in its description of § 2024(b)(1), the Government argues that this language indicates that "the difference between Sections 2024(b) and 2024(c) was plainly visible to Congress and that Congress was fully aware of the scope of the former provision. . . ." Brief for United States 20. We do not believe that the omission of the word "knowingly" is evidence that Congress devoted its attention to the issne before the Court today; it is as likely that the Committee, unaware of the problem, simply did not realize the need to discuss the mental element needed for a conviction nnder § 2024(b)(1). Moreover, the omission of the word "knowingly" in the description of § 2024(b)(1) would indicate, if anything, an intent to dispense with any requirement of knowledge in § 2024(b)(1), an intent that is at odds with the language of the statute and the interpretation urged even by the Government today. The omission of the word "knowingly" thus provides no snpport for the argument that Congress intended not to require knowledge of illegality in a § 2024(b)(1) prosecution.

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[14] The statute provides:

"Whoever, in any matter within tbe jurisdiction of any department or agency of the United States knowingly and willfully falsifies, eonceals, or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or rcprcsentations, or makes or uscs any false writing or documcnt knowing the same to contain any false, fictitious or frandulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

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[15] The faet that both parties in *Yermian* agreed that the Govcrnment had to prove that the defendant had "kuowingly and willfully" made a false statement does not of course indicate that the parties agreed on the mental state applicable to other elements of the offense. See *post,* at 435 (WHITE, J., dissenting). What it docs mean is that in *Yermian,* unlike this case, all parties agreed that an "evil-meaning mind" was required with respect at least to one element of the erime.

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[16] Although we agree with petitioner concerning his interpretation of the statute, we express no opinion on the "specific intent" instruction he tendered, see n. 3, *supra*. This instruction has been criticized as too general and potentially misleading, see *United States v. Arambasich*, 597 F.2d 609, 613 (CA7 1979). A more useful instruction might relate specifically to the mental state required under § 2024(b)(1) and eschew use of difficult legal concepts like "specific intent" and "general intent."

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[17] In this case, for instance, the Government introduced evidence that petitioner bought food stamps at a substantial discount from face value and that he conducted part of the transaction in a back room of his restaurant to avoid the presence of the other patrons. Moreover, the Government asserts that food stamps themselves are stamped "nontransferable." Brief for United States 34. A jury could have inferred from this evidence that petitioner knew that his acquisition and possession of the stamps were unauthorized.

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[1] The majority's efforts to distinguish *Yermian* are unavailing. First, it points out that under the statute at issue there, the prosecution had to establish some *mens rea* because it had to show a knowing falsehood. *Ante*, at 431-432. However, as the majority itself points out elsewhere, *ante*, at 423-424, n. 5, different mental states can apply to different elements of an offense. The fact that in *Yermian mens rea* had to be proved as to the first element was irrelevant to the Court's holding that it did not with regard to the second. There is no reason to read this statute differently. Second, the majority states that the language in *Yermian* was "unambiguous." *Ante*, at 432. Since it is identical, the language at issue in this case can be no less so. Finally, the majority notes, *ibid.*, that the Court in *Yermian* did not decide whether the prosecution might have to prove that the defendant "should have known" that his statements were within the agency's jurisdiction. 468 U.S., at 75, n. 14, 104 S.Ct., at 2943, n. 14. However, that passing statement was irrelevant to the interpretation of the statute's language the Court did undertake.

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[2] Under the agency's interpretation of the statute, as evidenced in the regulations, it is not at all clear that such a person would in fact be violating the statute. The regulation referred to by the majority, 7 CFR § 274.10(a) (1985), states that "coupons may be used only by the household . . . to purchase eligible food for the household." The prevailing price requirement is mentioned only in a section that applies to participating stores: "Coupons shall be accepted for eligible foods at the same prices and on the same terms and conditions applicable to cash purchases of the same foods at the same store." § 278.2(b). For purposes of illustration, however, I will accept that not only overcharging, but also being overcharged, violates the statute.

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[3] The appropriate prosecutorial target in such a situation would of course be the seller rather than the purchaser. I have no doubt that every prosecutor in the country would agree. The discussion of this hypothetical is wholly academic.

For similar reasons, I am unmoved by the specter of criminal liability for someone who is mistakenly mailed food stamps and throws them out, see *ante*, at 426-427, and do not think the hypothetical offers much of a guide to congressional intent. We should proceed on the assumption that Congress had in mind the run-of-the-mill situation, not its most bizarre mutation. Arguments that presume wildly unreasonable conduct by Government officials are by their nature unconvincing, and reliance on them is likely to do more harm than good. *United States v.*

Dotterweich, 320 U.S. 277, 284-285, 64 S.Ct. 134, 138-139, 88 L.Ed. 48 (1943). No rule, including that adopted by the Court today, is immune from such contrived defects.

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[4] The Court asserts that the distinction would be meaningless because anyone who has violated subseetion (c) will necessarily have violated subsection (b)(1) as well by "present[ing], or caus[ing] to be presented, coupons for payment or redemption" iu an unauthorized manner. *Ante*, at 429. However, subsection (c) forbids presenting coupons knowing that they have been improperly used or acquired in the past. The manuer of acquisition and preseutation by the offender may be perfectly proper; the point is that the coupons are in a sense tainted by the prior transaction. Thus, if a check-out clerk accepts stamps for ineligible items, thereby violating § 2024(b)(1), and his employer collects the stamps and presents them for redemption in the normal course of business, it would not seem that thc latter has violated § 2024(b)(1). He has done nothing in a manner not authorized by law. He has violated subsection (c) if, but only if, he knew of the clerk's wrongdoing. It may be that merely by violating subsection (c) a grocer also violates subsection (b)(1); but absent the violation of subseetion (c), I do not see how the grocer would violate subsectiou (b)(1) in such a case.

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[5] Similarly, it is a valid defense to a charge of theft that the defendant thought the property legally belonged to him, even if that belief is incorrect. But this is not because ignorance of the law is an excuse. Rather, "the legal element involved is simply an aspect of thc attendant circumstances, with respect to which knowledge . . . is required for culpability. . . . The law involved is not the law defining the offense; it is some other legal rule that characterizes the attendant circumstances that are material to the offense." ALI, Model Penal Code § 2.02, Comment 11, p. 131 (Tent. Draft No. 4, 1955). Accord, *United States v. Freed*, 401 U.S. 601, 614-615, 91 S.Ct. 1112, 1120-1121, 28 L.Ed.2d 356 (1971) (BRENNAN, J., concurring in judgment). Cf. *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952).

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[6] The Court distiuguishes these as "public welfare offense" cases involving inherently dangerous articles of commerce whose users should have assumed were subject to regulation. *Ante*, at 432-433. But see *United States v. Freed*, 401 U.S., at 612, 91 S.Ct., at 1119 (BRENNAN, J., concurring in judgment). Apart from the faet that a reasonable person would also assume food stamps are heavily regulated and not subject to sale and exchange, this distinction is not related to the actual holdings in those cases. The Court's opinion in *Boyce* and the concurrence in *Freed* do not discuss this consideratiou. And the Court's refereuces to the dangerousness of the goods in *International Minerals* were directed to possible due process challenges to couvictions without uotice of criminality. 402 U.S., at 564-565, 91 S.Ct., at 1701-1702. As today's majority acknowledges, *onte*, at 424, n. 6, there is no constitutional defect with the holding of the court below. The only issue here is one of congressional intent.

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[7] Under a strict-liability statute, a defendant can be eonvicted even though he was unaware of the circumstances of his couduct that made it illegal. To take the example of a statute recently hefore the Court, a regulation forhidding hunting birds in a "baited" field can be read to have a scienter requirement, in which case it would be a defense to prove that one did not know the field was haited, or not, in which case someone hunting in such a field is guilty even if he did not know aud could not have known that it was baited. See *Catlett v. United States*, 47 1 U.S.

1074, 105 S.Ct. 2153, 85 L.Ed.2d 509 (1985) (WHITE, J., dissenting from denial of certiorari). I do not argue that the latter approach should be taken to this statute, nor would the statutory language allow it.

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522 U.S. 52
118 S.Ct. 469
139 L.Ed.2d 352

Mario SALINAS, Petitioner,
v.
UNITED STATES.

No. 96-738.

Supreme Court of the United States

Argued Oct. 8, 1997.
Decided Dec. 2, 1997.

***Syllabus** **

This federal prosecution arose from a scheme in which a Texas county sheriff accepted money, and his deputy, petitioner Salinas, accepted two watches and a truck, in exchange for permitting women to make so-called "contact visits" to one Beltran, a federal prisoner housed in the county jail pursuant to an agreement with the Federal Government. Salinas was charged with one count of violating the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1962(c), one count of conspiracy to violate RICO, §1962(d), and two counts of bribery, §666(a)(1)(B). The jury convicted him on all but the substantive RICO count, and the Fifth Circuit affirmed.

Held: 1.Section 666(a)(1)(B) does not require the Government to prove the bribe in question had a demonstrated effect upon federal funds. The enactment's plain language is expansive and unqualified, both as to the bribes forbidden and the entities covered, demonstrating by its reference to "any" business or transaction, §666(a)(1)(B), that it is not confined to transactions affecting federal funds; by its application to all cases in which an "organization, government, or agency" receives a specified amount of federal benefits, §666(b), that it reaches the scheme involved here; and by its prohibition on accepting "anything of value," §666(a)(1)(B), that it encompasses the transfers of personal property to petitioner in exchange for his favorable treatment of Beltran. Given the statute's plain and unambiguous meaning, petitioner is not aided by the legislative history, see, *e.g., United States v. Albertini,* 472 U.S. 675, 680, 105 S.Ct. 2897, 2902, 86 L.Ed.2d 536, or by the plain-statement rule set forth in *Gregory v. Ashcroft,* 501 U.S. 452, 460-461, 111 S.Ct. 2395, 2400-2401, 115 L.Ed.2d 410, and *McNally v. United States,* 483 U.S. 350, 360, 107 S.Ct. 2875, 2881-2882, 97 L.Ed.2d 292, see, *e.g., Seminole Tribe of Florida v. Florida,* 517 U.S. 609, ----, n. 9, 116 S.Ct. 1114, 1124, n. 9, 134 L.Ed.2d 252. Moreover, the construction he seeks cannot stand when viewed in light of the pre-§666 statutory framework-which limited federal bribery prohibitions to "public official[s]," defined as "officer[s] or employee[s] or person[s] acting for or on behalf of the United States, or any . . . branch . . . thereof," and which was interpreted by some lower courts not to include state and local officials-and the expansion prescribed by §666(a)(1)(B), which was designed to extend coverage to bribes offered to state and local officials employed by agencies receiving federal funds. Under this Court's construction, §666(a)(1)(B) is constitutional as applied in this case. Its application to petitioner did not extend federal power beyond its proper bounds, since the

preferential treatment accorded Beltran was a threat to the integrity and proper operation of the federal program under which the jail was managed. See *Westfall v. United States*, 274 U.S. 256, 259, 47 S.Ct. 629, 629-630, 71 L.Ed. 1036. Pp. ___-___.

2.To be convicted of conspiracy to violate RICO under §1962(d), the conspirator need not himself have committed or agreed to commit the two or more predicate acts, such as bribery, requisite for a substantive RICO offense under §1962(c). Section 1962(d)-which forbids "any person to conspire to violate" §1962(c)-is even more comprehensive than the general conspiracy provision applicable to federal crimes, §371, since it contains no requirement of an overt or specific act to effect the conspiracy's object. Presuming Congress intended the "to conspire" phrase to have its ordinary meaning under the criminal law, see *Morissette v. United States*, 342 U.S. 246, 263, 72 S.Ct. 240, 249-250, 96 L.Ed. 288, well-established principles and contemporary understanding demonstrate that, although a conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, it suffices that he adopt the goal of furthering or facilitating the criminal endeavor, and he need not agree to undertake all of the acts necessary for the crime's completion. Salinas' contrary interpretation of §1962(c) violates the foregoing principles and is refuted by *Bannon v. United States*, 156 U.S. 464, 469, 15 S.Ct. 467, 469-470, 39 L.Ed. 494. Its acceptance, moreover, is not required by the rule of lenity, see *United States v. Shabani*, 513 U.S. 10, 17, 115 S.Ct. 382, 386, 130 L.Ed.2d 225. Even if Salinas did not accept or agree to accept two bribes, there was ample evidence that the sheriff committed at least two predicate acts when he accepted numerous bribes and that Salinas knew about and agreed to facilitate the scheme, and this is sufficient to support Salinas' conviction under §1962(d). Pp. ___-___.

89 F.3d 1185, affirmed.

KENNEDY, J., delivered the opinion for a unanimous Court.

Francisco J. Enriquez, McAllen, TX, for petitioner.

Paul R.Q. Wolfson, Washington, DC, for respondent.

Justice KENNEDY delivered the opinion of the Court.

1 The case before us presents two questions: First, is the federal bribery statute codified at 18 U.S.C. §666 limited to cases in which the bribe has a demonstrated effect upon federal funds? Second, does the conspiracy prohibition contained in the Racketeer Influenced and Corrupt Organizations Act (RICO) apply only when the conspirator agrees to commit two of the predicate acts RICO forbids? Ruling against the petitioner on both issues, we affirm the judgment of the Court of Appeals for the Fifth Circuit.

2 * This federal prosecution arose from a bribery scheme operated by Brigido Marmolejo, the Sheriff of Hidalgo County, Texas, and petitioner Mario Salinas, one of his principal deputies. In 1984, the United States Marshals Service and Hidalgo County entered into agreements under which the county would take custody of federal prisoners. In exchange, the Federal Government agreed to make a grant to the county for improving its jail and also agreed to pay the county a specific amount per day for each federal prisoner housed. Based on the estimated number of federal prisoners to be maintained, payments to the county were projected to be $915,785

per year. The record before us does not disclose the precise amounts paid. It is uncontested, however, that in each of the two periods relevant in this case the program resulted in federal payments to the county well in excess of the $10,000 amount necessary for coverage under 18 U.S.C. §666. (We denied certiorari on the question whether the monies paid to the county were "benefits" under a "Federal program" under §666(b), and we assume for purposes of this opinion that the payments fit those definitions.)

3 Homero Beltran-Aguirre was one of the federal prisoners housed in the jail under the arrangement negotiated between the Marshals Service and the county. He was incarcerated there for two intervals, first for 10 months and then for 5 months. During both custody periods, Beltran paid Marmolejo a series of bribes in exchange for so-called "contact visits" in which he remained alone with his wife or, on other occasions, his girlfriend. Beltran paid Marmolejo a fixed rate of six thousand dollars per month and one thousand dollars for each contact visit, which occurred twice a week. Petitioner Salinas was the chief deputy responsible for managing the jail and supervising custody of the prisoners. When Marmolejo was not available, Salinas arranged for the contact visits and on occasion stood watch outside the room where the visits took place. In return for his assistance with the scheme, Salinas received from Beltran a pair of designer watches and a pickup truck.

4 Salinas and Marmolejo were indicted and tried together, but only Salinas' convictions are before us. Salinas was charged with one count of violating RICO, 18 U.S.C. §1962(c), one count of conspiracy to violate RICO, §1962(d), and two counts of bribery in violation of §666(a)(1)(B). The jury acquitted Salinas on the substantive RICO count but convicted him on the RICO conspiracy count and the bribery counts. A divided panel of the Court of Appeals for the Fifth Circuit affirmed. To resolve the case, we consider first the bribery scheme, then the conspiracy.

II

5 Salinas contends the Government must prove the bribe in some way affected federal funds, for instance by diverting or misappropriating them, before the bribe violates §666(a)(1)(B). The relevant statutory provisions are as follows:

6 " (a) Whoever, if the circumstance described in subsection (b) of this section exists-

7 " (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof-

8 .....

9 " (B) corruptly . . . accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; or

10 .....

11 "shall be fined under this title, imprisoned not more than 10 years, or both.

12 " (b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan,

guarantee, insurance, or other form of Federal assistance.

13 .....

14 " (d) As used in this section-

15 .....

16 " (5) the term "in any one-year period' means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense." 18 U.S.C. §666.

17 The enactment's expansive, unqualified language, both as to the bribes forbidden and the entities covered, does not support the interpretation that federal funds must be affected to violate §666(a)(1)(B). Subject to the five-thousand-dollar threshold for the business or transaction in question, the statute forbids acceptance of a bribe by a covered official who intends "to be influenced or rewarded in connection with any business, transaction, or series of transactions of [the defined] organization, government or agency." §666(a)(1)(B). The prohibition is not confined to a business or transaction which affects federal funds. The word "any," which prefaces the business or transaction clause, undercuts the attempt to impose this narrowing construction. See *United States v. James*, 478 U.S. 597, 604-605, and n. 5, 106 S.Ct. 3116, 3120-3121, and n. 5 92 L.Ed.2d 483 (1986); *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 529, 67 S.Ct. 1387, 1392, 91 L.Ed. 1646 (1947).

18 Furthermore, the broad definition of the "circumstances" to which the statute applies provides no textual basis for limiting the reach of the bribery prohibition. The statute applies to all cases in which an "organization, government, or ageney" receives the statutory amount of benefits under a federal program. §666(b). The language reaehes the scheme alleged, and proved, here.

19 Neither does the statute limit the type of bribe offered. It prohibits accepting or agreeing to accept "anything of value." §666(a)(1)(B). The phrase encompasses all transfers of personal property or other valuable consideration in exchange for the influence or reward. It includes, then, the personal property given to Salinas in exchange for the favorable treatment Beltran secured for himself. The statute's plain language fails to provide any basis for the limiting §666(a)(1)(B) to bribes affecting federal funds.

20 Salinas attempts to circumscribe the statutory text by pointing to its legislative history. "Courts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language. "[O]nly the most extraordinary showing of contrary intentions' in the legislative history will justify a departure from that language." *United States v. Albertini*, 472 U.S. 675, 680, 105 S.Ct. 2897, 2902, 86 L.Ed.2d 536 (1985) (citations omitted) (quoting *Garcia v. United States*, 469 U.S. 70, 75, 105 S.Ct. 479, 482-483, 83 L.Ed.2d 472 (1984)); see also *Ardestani v. INS*, 502 U.S. 129, 135, 112 S.Ct. 515, 519-520, 116 L.Ed.2d 496 (1991) (courts may deviate from the plain language of a statute only in " "rare and exceptional circumstances' ").

21 The construction Salinas seeks cannot stand when viewed in light of the statutory framework in existence before §666 was enacted and the expanded coverage

prescribed by the new statute. Before §666 was enacted, the federal criminal code contained a single, general bribery provision codified at 18 U.S.C. §201. Section 201 by its terms applied only to "public official[s]," which the statute defined as "officer[s] or employee[s] or person[s] acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch." §201(a). The Courts of Appeals divided over whether state and local employees could be considered "public officials" under §201(a). Compare *United States v. Del Toro*, 513 F.2d 656, 661-662(CA2), cert. denied, 423 U.S. 826, 96 S.Ct. 41, 46 L.Ed.2d 42 (1975), with *United States v. Mosley*, 659 F.2d 812, 814-816 (C.A.7 1981), and *United States v. Hinton*, 683 F.2d 195, 197-200 (C.A.7 1982), aff'd. *sub nom. Dixson v. United States*, 465 U.S. 482, 104 S.Ct. 1172, 79 L.Ed.2d 458 (1984). Without awaiting this Court's resolution of the issue in *Dixson*, Congress enacted §666 and made it clear that federal law applies to bribes of the kind offered to the state and local officials in *Del Toro*, as well as those at issue in *Mosley* and *Hinton*.

22 As this chronology and the statutory language demonstrate, §666(a)(1)(B) was designed to extend federal bribery prohibitions to bribes offered to state and local officials employed by agencies receiving federal funds. It would be incongruous to restrict §666 in the manner Salinas suggests. The facts and reasoning of *Del Toro* give particular instruction in this respect. In that case, the Second Circuit held that a city employee was not a "public official" under §201(a) even though federal funds would eventually cover 100% of the costs and 80% of the salaries of the program he administered. *Del Toro*, 513 F.2d, at 662. Because the program had not yet entered a formal request for federal funding, the Second Circuit reasoned, " [t]here were no existing committed federal funds for the purpose." *Ibid.* The enactment of §666 forecloses this type of limitation. Acceptance of Salinas' suggestion that a bribe must affect federal funds before it falls within §666(a)(1)(B) would run contrary to the statutory expansion that redressed the negative effects of the Second Circuit's narrow construction of §201 in *Del Toro*. We need not consider whether the statute requires some other kind of connection between a bribe and the expenditure of federal funds, for in this case the bribe was related to the housing of a prisoner in facilities paid for in significant part by federal funds themselves. And that relationship is close enough to satisfy whatever connection the statute might require.

23 Salinas argues in addition that our decisions in *Gregory v. Ashcroft*, 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991), and *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), require a plain statement of congressional intent before §666(a)(1)(B) can be construed to apply to bribes having no effect on federal funds. In so arguing, however, Salinas makes too much of *Gregory* and *McNally*. In each of those cases, we confronted a statute susceptible of two plausible interpretations, one of which would have altered the existing balance of federal and state powers. We concluded that, absent a clear indication of Congress' intent to change the balance, the proper course was to adopt a construction which maintains the existing balance. *Gregory, supra*, at 460-461, 111 S.Ct., at 2400-2401; see also *McNally, supra*, at 360, 107 S.Ct., at 2881-2882.

24 "No rule of construction, however, requires that a penal statute be strained and distorted in order to exclude conduct clearly intended to be within its scope . . . ." *United States v. Raynor*, 302 U.S. 540, 552, 58 S.Ct. 353, 359, 82 L.Ed. 413 (1938). As we held in *Albertini, supra*, at 680, 105 S.Ct., at 2902.

25 "Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature. *Heckler v. Mathews*, 465 U.S. 728, 741-742, 104 S.Ct. 1387, 1396-1397, 79 L.Ed.2d 646 (1984). Any other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, §1, of the Constitution. *United States v. Locke*, 471 U.S. 84, 95-96, 105 S.Ct. 1785, 1792-1794, 85 L.Ed.2d 64 (1985)."

26 These principles apply to the rules of statutory construction we have followed to give proper respect to the federal-state balance. As we observed in applying an analogous maxim in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), " [w]e cannot press statutory construction to the point of disingenuous evasion even to avoid a constitutional question." *Id.*, at ----, n. 9, 116 S.Ct., at 1124, n. 9 (internal quotation marks omitted). *Gregory* itself held as much when it noted the principle it articulated did not apply when a statute was unamhiguous. See *Gregory*, 501 U.S., at 467, 111 S.Ct., at 2404. A statute can be unambiguous without addressing every interpretive theory offered by a party. It need only be "plain to anyone reading the Act" that the statute encompasses the conduct at issue. *Ibid.* Compare *United States v. Bass*, 404 U.S. 336, 349-350, 92 S.Ct. 515, 523-524, 30 L.Ed.2d 488 (1971) (relying on Congress' failure to make a clear statement of its intention to alter the federal-state balance to construe an ambiguous firearm-possession statute to apply only to firearms affecting commerce), with *United States v. Lopez*, 514 U.S. 549, 561-562, 115 S.Ct. 1624, 1630-1631, 131 L.Ed.2d 626 (1995) (refusing to apply *Bass* to read a similar limitation into an unambiguous firearm-possession statute).

27 The plain-statement requirement articulated in *Gregory* and *McNally* does not warrant a departure from the statute's terms. The text of §666(a)(1)(B) is unambiguous on the point under consideration here, and it does not require the Government to prove federal funds were involved in the bribery transaction.

28 Furthermore, there is no serious doubt about the constitutionality of §666(a)(1)(B) as applied to the facts of this case. Beltran was without question a prisoner held in a jail managed pursuant to a series of agreements with the Federal Government. The preferential treatment accorded to him was a threat to the integrity and proper operation of the federal program. Whatever might be said about §666(a)(1)(B)'s application in other cases, the application of §666(a)(1)(B) to Salinas did not extend federal power beyond its proper bounds. See *Westfall v. United States*, 274 U.S. 256, 259, 47 S.Ct. 629, 629-630, 71 L.Ed. 1036 (1927).

29 In so holding, we do not address §666(a)(1)(B)'s applicability to intangible benefits such as contact visits, because that question is not fairly included within the questions on which we granted certiorari. See *Yee v. Escondido*, 503 U.S. 519, 533, 112 S.Ct. 1522, 1531-1532, 118 L.Ed.2d 153 (1992). Nor do we review the Court of Appeals' determination that the transactions at issue "involv[ed] any thing of value of $5,000 or more," since Salinas does not offer any cognizable challenge to that aspect of the Court of Appeals' decision. We simply decide that, as a matter of statutory construction, §666(a)(1)(B) does not require the Government to prove the bribe in question had any particular influence on federal funds and that under this construction the statute is constitutional as applied in this case.

III

30 Salinas directs his second challenge to his conviction for conspiracy to violate RICO. There could be no conspiracy offense, he says, unless he himself committed or agreed to commit the two predicate acts requisite for a substantive RICO offense under §1962(c). Salinas identifies a conflict among the Courts of Appeals on the point. Decisions of the First, Second, and Tenth Circuits require that, under the RICO conspiracy provision, the defendant must himself commit or agree to commit two or more predicate acts. See *United States v. Sanders*, 929 F.2d 1466, 1473 (C.A.10), cert. denied, 502 U.S. 846, 112 S.Ct. 143, 116 L.Ed.2d 109 (1991); *United States v. Ruggiero*, 726 F.2d 913, 921(CA2), cert. denied *sub nom. Rabito v. United States*, 469 U.S. 831, 105 S.Ct. 118, 83 L.Ed.2d 60 (1984); *United States v. Winter*, 663 F.2d 1120, 1136(CA1), cert. denied, 460 U.S. 1011, 103 S.Ct. 1249, 75 L.Ed.2d 479 (1983). Eight other Courts of Appeals, including the Fifth Circuit in this case, take a contrary view. See *United States v. Pryba*, 900 F.2d 748, 760(CA4), cert. denied, 498 U.S. 924, 111 S.Ct. 305, 112 L.Ed.2d 258 (1990); *United States v. Kragness*, 830 F.2d 842, 860 (C.A.8 1987); *United States v. Neapolitan*, 791 F.2d 489, 494-500(CA7), cert. denied, 479 U.S. 940, 107 S.Ct. 422, 93 L.Ed.2d 372 (1986); *United States v. Joseph*, 781 F.2d 549, 554 (C.A.6 1986); *United States v. Adams*, 759 F.2d 1099, 1115-1116(CA3), cert. denied, 474 U.S. 971, 106 S.Ct. 336, 88 L.Ed.2d 321 (1985); *United States v. Tille*, 729 F.2d 615, 619(CA9), cert. denied, 469 U.S. 845, 105 S.Ct. 156, 83 L.Ed.2d 93 (1984); *United States v. Carter*, 721 F.2d 1514, 1529-1531 (C.A.11), cert. denied *sub nom. Morris v. United States*, 469 U.S. 819, 105 S.Ct. 89, 83 L.Ed.2d 36 (1984).

31 Before turning to RICO's conspiracy provision, we note the substantive RICO offense, which was the goal of the conspiracy alleged in the indictment. It provides:

32 "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. §1962(c).

33 The elements predominant in a subsection (c) violation are: (1) the conduct (2) of an enterprise (3) through a pattern of racketeering activity. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496, 105 S.Ct. 3275, 3285, 87 L.Ed.2d 346 (1985). "Pattern of racketeering activity" is a defined term and requires at least two acts of "racketeering activity," the so-called predicate acts central to our discussion. 18 U.S.C. §1961(5). "Racketeering activity," in turn, is defined to include "any act . . . involving . . . bribery . . . which is chargeable under State law and punishable by imprisonment for more than one year." §1961(1)(A). The Government's theory was that Salinas himself committed a substantive §1962(c) RICO violation by conducting the enterprise's affairs through a pattern of racketeering activity that included acceptance of two or more bribes, felonies punishable in Texas by more than one year in prison. See Tex. Penal Code Ann. §36.02(a)(1) (1994). The jury acquitted on the substantive count. Salinas was convicted of conspiracy, however, and he challenges the conviction because the jury was not instructed that he must have committed or agreed to commit two predicate acts himself. His interpretation of the conspiracy statute is wrong.

34 The RICO conspiracy statute, simple in formulation, provides:

35 "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." 18 U.S.C. §1962(d).

36 There is no requirement of some overt act or specific act in the statute before us, unlike the general conspiracy provision applicable to federal crimes, which requires that at least one of the conspirators have committed an "act to effect the object of the conspiracy." §371. The RICO conspiracy provision, then, is even more comprehensive than the general conspiracy offense in §371.

37 In interpreting the provisions of §1962(d), we adhere to a general rule: When Congress uses well-settled terminology of criminal law, its words are presumed to have their ordinary meaning and definition. See *Morissette v. United States*, 342 U.S. 246, 263, 72 S.Ct. 240, 249-250, 96 L.Ed. 288 (1952). The relevant statutory phrase in §1962(d) is "to conspire." We presume Congress intended to use the term in its conventional sense, and certain well-established principles follow.

38 A conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253-254, 60 S.Ct. 811, 858-859, 84 L.Ed. 1129 (1940). The partners in the criminal plan must agree to pursue the same criminal objective and may divide up the work, yet each is responsible for the acts of each other. See *Pinkerton v. United States*, 328 U.S. 640, 646, 66 S.Ct. 1180, 1183-1184, 90 L.Ed. 1489 (1946) ("And so long as the partnership in crime continues, the partners act for each other in carrying it forward"). If conspirators have a plan which calls for some conspirators to perpetrate the crime and others to provide support, the supporters are as guilty as the perpetrators. As Justice Holmes observed: "[P]lainly a person may conspire for the commission of a crime by a third person." *United States v. Holte*, 236 U.S. 140, 144, 35 S.Ct. 271, 272, 59 L.Ed. 504 (1915). A person, moreover, may be liable for conspiracy even though he was incapable of committing the substantive offense. *United States v. Rabinowich*, 238 U.S. 78, 86, 35 S.Ct. 682, 684, 59 L.Ed. 1211 (1915).

39 The point Salinas tries to make is in opposition to these principles, and is refuted by *Bannon v. United States*. 156 U.S. 464, 15 S.Ct. 467, 39 L.Ed. 494 (1895). There the defendants were charged with conspiring to violate the general conspiracy statute, *id.*, at 464, 15 S.Ct. at 468, which requires proof of an overt act. See *supra*, at 476. One defendant objected to the indictment because it did not allege he had committed an overt act. See *Bannon, supra*, at 468, 15 S.Ct., at 469. We rejected the argument because it would erode the common-law principle that, so long as they share a common purpose, conspirators are liable for the acts of their co-conspirators. We observed in *Bannon:* "To require an overt act to be proven against every member of the conspiracy, or a distinct act connecting him with the combination to be alleged, would not only be an innovation upon established principles, but would render most prosecutions for the offence nugatory." *Id.*, at 469, 15 S.Ct., at 469. The RICO conspiracy statute, §1962(d), broadened conspiracy coverage by omitting the requirement of an overt act; it did not, at the same time, work the radical change of requiring the Government to prove each conspirator agreed that he would be the one to commit two predicate acts.

40 Our recitation of conspiracy law comports with contemporary understanding. When Congress passed RICO in 1970, see Pub.L. 91-452, §901(a), 84 Stat. 941, the American Law Institute's Model Penal Code permitted a person to be convicted of conspiracy so long as he "agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime." American Law

Institute, Model Penal Code §5.03(1)(a) (1962). As the drafters emphasized, "so long as the purpose of the agreement is to facilitate commission of a crime, the actor need not agree "to commit' the crime." American Law Institute, Model Penal Code, Tent. Draft No. 10, p. 117 (1960). The Model Penal Code still uses this formulation. See Model Penal Code §5.03(1)(a), 10 U.L.A. 501 (1974).

41 A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor. He may do so in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion. One can be a conspirator by agreeing to faeilitate only some of the acts leading to the substantive offensc. It is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself. See *Callanan v. United States,* 364 U.S. 587, 594, 81 S.Ct. 321, 325, 5 L.Ed.2d 312 (1961).

42 It makes no difference that the substantive offense under subsection (c) requires two or more predicate acts. The interplay between subsections (c) and (d) does not permit us to excuse from the reach of the conspiracy provision an actor who does not himself commit or agree to commit the two or more predicate acts requisitc to the underlying offense. True, though an "enterprise" under §1962(c) can exist with only one actor to conduct it, in most instances it will be conducted by more than one person or entity; and this in turn may make it somewhat difficult to determine just where the enterprise ends and the conspiracy begins, or, on the other hand, whether the two crimes are coincident in their factual circumstances. In some cases the connection the dcfendant had to the alleged enterprise or to the conspiracy to further it may be tenuous enough so that his own commission of two predicate acts may become an important part of the Government's case. Perhaps these were the considerations leading some of the Circuits to require in conspiracy cases that each conspirator himself commit or agree to commit two or more predicate acts. Nevertheless, that proposition cannot be sustained as a definition of the conspiracy offense, for it is contrary to the principles we have discussed.

43 In the case before us, even if Salinas did not accept or agree to accept two bribes, there was ample evidence that he conspired to violate subsection (c). The evidence showed that Marmolejo committed at least two acts of racketcering activity when he accepted numerous bribes and that Salinas knew about and agreed to facilitate the scheme. This is sufficient to support a conviction under §1962(d).

44 As a final matter, Salinas says his statutory interpretation is required by the rule of lenity. The rule does not apply when a statute is unambiguous or when invoked to engraft an illogical requirement to its text. See *United States v. Shabani,* 513 U.S. 10, 17, 115 S.Ct. 382, 386, 130 L.Ed.2d 225 (1994).

Thc judgment of the Court of Appeals is

45 Affirmed.

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* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of thc reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed.

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546 F.2d 658

2 Fed. R. Evid. Serv. 655, 2 Media L. Rep. 1971

UNITED STATES of America, Plaintiff-Appellee,
v.
Sidney LEVINE and MPD Film Productions, Inc., Defendants-Appellants.

No. 76-1543.

**United States Court of Appeals,
Fifth Circuit.**

Feb. 7, 1977.
Rehearing Denied May 2, 1977.
See 551 F.2d 687.

Joel Hirschhorn, Miami, Fla., Ralph J. Schwarz, Jr., New York City, Herald Price Fahringer, Buffalo, N. Y., for defendants-appellants.

Robert W. Rust, U. S. Atty., J. Daniel Ennis, Asst. U. S. Atty., Miami, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before TUTTLE, CLARK and RONEY, Circuit Judges.

CLARK, Circuit Judge:

1 Defendants, Sidney Levine and MPD Film Productions, Inc. (MPD), appeal from judgments of conviction and sentences entered by the district court for conspiracy and interstate shipment of obscene films. Because the indictment charged separate, distinct, and unrelated offenses by different defendants in contravention of Federal Rule of Criminal Procedure 8(b), we reverse and remand for a new trial. Since the cause must be tried again, we also reach and decide other assignments of error likely to recur.

2 In Count I of a five-count indictment, returned against Charles Solomon Abrams, Emile Alan Harvard, Sidney Levine, Raphael Jesus Remy, Cinecraft Industries Corp. (Cinecraft), MPD, and Pictograph Corporation (Pictograph), a United States Grand Jury charged all indictees with conspiracy under 18 U.S.C. § 371 (1970) to commit the substantive offenses alleged in the indictment. Counts II and III charged Abrams, Harvard, Remy, and Pictograph with interstate transportation of obscene film by common carrier under 18 U.S.C. § 1462 (1970) and interstate transportation of obscene film for sale and distribution under 18 U.S.C. § 1465 (1970). Counts IV and V charged Harvard, Levine, Remy, Pictograph, and MPD with these same substantive offenses.

3 Before the jury trial of Abrams, Levine, and MPD commenced, the charges against

Cinecraft and Pictograph were dismissed. Remy and Harvard pled guilty to the conspiracy count. The district court entered a judgment of acquittal as to Abrams at the close of the government's case; the jury returned verdicts of guilty on all three counts against Levine and MPD.

4 Rule 8 of the Federal Rules of Criminal Procedure governs joinder of offenses and of defendants in a single indictment. A claim of misjoinder under the rule is reviewable on appeal as a question of law. United States v. Park,531 F.2d 754, 760 (5th Cir. 1976); accord, United States v. Marionneaux,514 F.2d 1244, 1248 (5th Cir. 1975); Tillman v. United States, 406 F.2d 930, 933 n. 5 (5th Cir.), vacated and remanded in part on other grounds, 395 U.S. 830, 89 S.Ct. 2143, 23 L.Ed.2d 742 (1969). Joinder of offenses or defendants requires a balancing of the right of an accused to a fair trial and the public's interest in the efficacious administration of justice. United States v. Gentile, 495 F.2d 626, 630 (5th Cir. 1974). We have described rule 8 as an " 'attempt to set the limits of tolerance,' " for this process. United States v. Bova, 493 F.2d 33, 36 (5th Cir. 1974), quoting, King v. United States, 355 F.2d 700, 703 (1st Cir. 1966). Accordingly, misjoinder under the rule is prejudicial per se ; if the limits of the rule are exceeded, a grant of severance is mandatory. United States v. Marionneaux, 514 F.2d at 1248; United States v. Bova, 493 F.2d at 35-36.

5 Subdivision (a) of rule 8 applies when a single defendant is charged with multiple offenses. Our concern here is with the reqnirements of subdivision (b), which governs cases involving multiple defendants. United States v. Park, 531 F.2d at 760 n.4; United States v. Marionneaux, 514 F.2d at 1248-49; United States v. Gentile, 495 F.2d at 628 n. 2; United States v. Bova, 493 F.2d at 35. Rule 8(b) provides:

6 Joinder of Dcfendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

7 In United States v. Marionneaux, 514 F.2d at 1248-49, we defined the phrase "the same series of acts or transactions" as requiring a "substantial identity of facts or participants" between two offenses to make rule 8(b) joinder proper.

8 If Counts II and III had been the only counts charged in the indictment, their joinder would have been proper. The same would hold true if Counts IV and V had been the only counts charged. Since the same persons were charged in each pair of counts, substantial identity wonld exist among the alleged participants. Much of the evidence offered to prove the section 1462 offense would go to establish the section 1465 offense. Consolidating such charges against more than one defendant under rule 8(b) facilitates prosecution by requiring the government to prove its case only once. United States v. Gentile, 495 F.2d at 630. Of course the possibility exists that evidence introdueed to prove one count in an indictment will spill over and taint the case on another count. A jury might intertwine the evidence and thereby improperly lessen a defendant's prospects of being acquitted as to a joint count. Submission of proper, limiting instructions to the jury, accompanied by a strict charge as to what testimony it may and may not consider, and the continuing obligation of a trial court to grant a severance under rule 14 of the Federal Rules of Criminal Procedure if prejndice to any defendant appears, are considered to be adequate safeguards against these prospects. Schaffer v. United States, 362 U.S. 511, 515-16, 80 S.Ct. 945, 947-

48, 4 L.Ed.2d 921 (1960). Although "some prejudice almost necessarily results . . . when several defendants are jointly charged with a single offense or related offenses," Cupo v. United States, 123 U.S.App.D.C. 324, 359 F.2d 990, 993 (1966), cert. denied, 385 U.S. 1013, 87 S.Ct. 723, 17 L.Ed.2d 549 (1967), the presumptive benefits to the public as the result of the rule 8(b) joinder are thought to outweigh the possibility of prejudice accruing to the several defendants. United States v. Bova, 493 F.2d at 36-37.

9 Counts II, III, IV, and V could not have been charged in a single indictment, however, because the requisite substantial identity of facts or participants necessary for proper rule 8(b) joinder would no longer be present. The sole connection between the offenses charged in Counts II and III and the offenses charged in Counts IV and V are: (1) their mutual identity and (2) the presence of Harvard, Remy, and Pictograph. Otherwise Counts II and III on the one hand and Counts IV and V on the other arise from different factual matrices, implicating different defendants at different times. United States v. Gentile, 495 F.2d at 630-31; Compare United States v. Strand, 517 F.2d 711, 713-14 (5th Cir.), cert. denied, 423 U.S. 998, 96 S.Ct. 428, 46 L.Ed.2d 373 (1975), with United States v. Marionneaux, 514 F.2d at 1248-49.

10 When unrelated transactions involving several defendants are joined together, " '(i)t cannot be said . . . that all the defendants (would not be) . . . embarrassed and prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon the distinct and independent transactions." United States v. Bova, 493 F.2d 36, quoting McElroy v. United States, 164 U.S. 76, 81, 17 S.Ct. 31, 33, 41 L.Ed. 355 (1896). Especially when, as here, the nexus between the separate groups is the defendants common to each and a mutual identity of the counts charged, the transference of guilt from one group of defendants to the other is inexorable. The result is an inherent prejudice that no form of limiting instructions or cautionary charge could absolve, and joinder of the four counts would be improper. Indeed, the government has not attempted to establish that a bridge sufficient to satisfy rule 8(b) joinder existed between the defendants who went to trial as the result of these four counts.

11 Rather, the government relies on Count I, containing a ubiquitous conspiracy charge, to provide a common link between these otherwise unrelated transactions and to demonstrate the existence of a common scheme or plan among the several defendants. See United States v. Banks, 465 F.2d 1235, 1242-43 (5th Cir.), cert. denied, 409 U.S. 1062, 93 S.Ct. 568, 34 L.Ed.2d 514 (1972). The wording of the count is apt to describe a "wheel conspiracy" in which Harvard at the hub of the wheel might have conspired with Abrams, Levine, and others representing different spokes, in separate transactions to commit the substantive obscenity offenses charged.

12 For a wheel conspiracy to exist those people who form the wheel's spokes must have been aware of each other and must do something in furtherance of some single, illegal enterprise. Blumenthal v. United States, 332 U.S. 539, 556-57, 68 S.Ct. 248, 256-57, 92 L.Ed. 154 (1947). Otherwise the conspiracy lacks "the rim of the wheel to enclose the spokes." Kotteakos v. United States, 328 U.S. 750, 755, 66 S.Ct. 1239, 1243, 90 L.Ed. 1557 (1946). If there is not some interaction between those conspirators who form the spokes of the wheel as to at least one common illegal object, the "wheel" is incomplete, and two conspiracies rather than one are charged.

13 In the absence of an argument of prosecutorial bad faith, United States v. Nims, 524

F.2d 123, 126 (5th Cir. 1975), cert. denied, 426 U.S. 934, 96 S.Ct. 2646, 49 L.Ed.2d 385 (1976), allegations of an indictment will be accepted as true in deciding a rule 8(b) motion. The motion cannot be used as a device to force the government to prove its case prematurely, see Schaffer v. United States, 362 U.S. at 522, 80 S.Ct. at 951 (Douglas, J., dissenting). Where, however, the defendant can show that the charge of a joinder of defendants in conspiratorial action is based on a legal interpretation that is improper, the court cannot base its 8(b) ruling on the written words alone but must determine if, under correct legal theory, joint action was actually involved. See United States v. McDaniels, 57 F.R.D. 171, 174 (E.D.La.1972). See also 8 R. Cipes: Moore's Federal Practice P 8.06(3); at 8-41 (2d ed. 1976).

14 Applying these rules to the allegations of the indictment in the case at bar, we look first to see what the words used attempted to describe by retelling what the government knew when it drew the indictment. Harvard, who had been in the motion picture industry for 38 years, and Abrams, who was in show business, agreed that Harvard would make a 35 millimeter film entitled "Valley of the Nymphs" (Nymphs) so that Abrams could promote the career of a Puerto Rican female dancer. Harvard directed and produced an initial version of Nymphs in May of 1972. After finding that this version would not serve his purposes, Abrams came baek to Harvard in August, 1972, with a request to remake the film into one containing explicit sex seenes. Harvard shot additional film footage containing such scenes and spliced the new material into the negative of the original. Abrams aecepted this revised version and subsequently made an agreement with Harvard whereby Abrams would finance the film and Harvard would be compensated from a percentage of the movie's profits.

15 During this same period of time, Harvard met separately with Levine to discuss the production by Harvard of 16 millimeter simulated sex films for sale and distribution by Levine. Levine later asked Harvard to change the format of these movies from simulated to explieit sex because the market demanded "stronger" movies. Harvard subsequently produced 18 of these films for Levine. Harvard prepared trailer writeups and scripts for these movies. He was in charge of initial shooting and was the director and producer. Levinc was often present during shooting, however, and would sometimes advise how he wanted particular episodes to be shot. Levine paid Harvard a fixed sum for each of these films, though the amount agreed upon varied from film to film.

16 The same actors usually appeared in Levine's films. Some of these actors also appeared in Abram's Nymphs. The same processing laboratory in New York and the same sound studio in Miami worked on Nymphs and those films produced for Levine. Levine did not know Abrams or vice versa. Levine had no financial or other interest in Nymphs, and Abrams had no sort of interest in any of the films produced for Levine.

17 Count I of the indictment charges that from about April 11, 1972, and eontinuously through February, 1973, in Dade County, Florida, Abrams, Harvard, Levine, Remy, Cinecraft, MPD, and Pictograph willfully and knowingly conspired to commit the substantive offenses under 18 U.S.C. §§ 1462, 1465 (1970). The count sets forth 21 overt acts as allegedly being performed by the indictees in furtherauce of the conspiracy. Overt acts 1, 2, 3, and 13 are concerned solely with transactions among Abrams, Harvard, and Remy in producing "Nymphs." Overt acts 4, 5, 6, 7, 8, 9, 11, 12, 14, 18, 19, and 20 are eoncerned solely with transactions among Harvard, Levine, Remy, and MPD while making Levine's 16 millimeter films. Only overt act 10 mentions Abrams, Harvard, and Levine together. It avers that "(o)n or about

December 11, 1972 in Dade County . . . (they) contacted Radiant Laboratories, Inc., . . . with regard to photographic processing of a 35 millimeter film entitled 'Valley of the Nymphs.' "

18 Levine moved in advance of trial to dismiss or to sever on the ground that Count I pleaded two separate and distinct conspiracies in violation of rule 8(b). A United States Magistrate denied the motion without prejudice to renew it at the trial. The motions were renewed at the close of trial.

19 On appeal defendants Levine and MPD do not contend that the government acted in bad faith when drawing up the indictment. Though they dispute that the government ever knew a fact or inference which would support the assertion of joint action in overt act 10, they urge that this one overt act is insufficient to permit the joiner of what was two different conspiracies and should be properly disregarded in testing the indictment's validity for rule 8(b) purposes. Thus, our inquiry is limited to whether or not the conspiracy count as it stands was sufficient to satisfy rule 8(b)'s requirement that the defendants "have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Schaffer v. United States, 362 U.S. at 515, 80 S.Ct. at 947; see United States v. Cruz, 478 F.2d 408, 414 (5th Cir.), cert. denied sub nom., Aleman v. United States, 414 U.S. 910, 94 S.Ct. 259, 38 L.Ed.2d 148 (1973); United States v. Banks, 465 F.2d at 1242; Tillman v. United States, 406 F.2d at 934.

20 Defendants argue that if the indictment is read in a common sense fashion it is clear that no agreement or conspiracy among Abrams, Harvard, and Levine ever existed. They argue that Count I intended to and does allege facts which, in law, comprise two different conspiracies involving two completely unconnected transactions and that this total separation is confirmed by the substantive counts charged. They urge that even if overt act 10 is considered accurate, it does not satisfy the Marionneaux standard that there be a substantial identity of facts or participants in the same series of transactions to permit rule 8(b) joinder because it is too thin a thread to support the assertion that only one conspiracy is alleged.

21 In replying to the defendants' arguments, the government argues that our decision in United States v. Gentile, 495 F.2d at 631-32, establishes the principle that if a conspiracy is to tie separate series of transactions together so as to permit proper joinder of defendants, the sole requirement is that the substantive offenses alleged in the indictment fall within the scope of the conspiracy. Citing Schaffer v. United States, supra, and United States v. Cruz, supra, the government insists that the joinder was proper because the conspiracy count tied the defendants together on the face of the pleadings. It urges that the indictment conclusively demonstrates that the substantive offenses were inextricably woven into the conspiracy count due to the nature of the offenses, their close proximity in time and place, and the presence of common elements leading to their commission. It takes this position even while admitting in brief and at oral argument that no documentary or direct evidence ever existed to show that Abrams and Levine had any contact whatsoever with each other's films or were aware or should have been aware of each other's films or were aware or should have been aware of each other's activities during the period the alleged conspiracy took place.

22 Other than overt act 10, no facts are alleged that could support the conclusion that Abrams and Levine were ever cognizant of each other during the alleged conspiracy.

Indeed upon comparing the conspiracy count and its overt acts with the substantive counts, one ean only conclude that the insertion of Levine's name in connection with Abrams and the production of "Nymphs" in overt act 10 was the result of inadvertence on the government's part. This is espeeially borne out by comparing overt acts 10 and 13. The language of the two is identical except that Levine's name is omitted in overt act 13 which took plaec at a later date. The government conceded at oral argument that both overt acts were charged solely upon invoice receipts, now in evidence, containing identical information that were mailed for the film processor in New York to Harvard in Miami. Nothing is present in these receipts upon which one could reasonably conclude that Levine was connected with Abrams or the production of Nymphs in any way.

23 Furthermore, we agree with defendants that even assuming Levine properly appears in overt act 10, this is insufficient to satisfy United States v. Marionneaux, 514 F.2d at 1248-49. The presence of one allegation that Abrams, Harvard, and Levinc acted together in placing one telephone call among 20 other overt acts whieh point overwhelmingly to the existence of two unrelated conspiracies to distribute obscene films, is too tenuous to support the substantial identity of facts or participants necessary and justify rule 8(b) joinder.

24 The only real underpinning for the government's conspiracy count was the false legal premise that proof of proximate or simultaneous conspiracies with one common conspirator was sufficient to cstablish the existence of a single conspiracy. The government points out that hoth Abrams' 36 millimcter Nymphs and Levine's 16 millimeter films were produced by Harvard who used the same actors in the films' explicit sex scenes, were processed by Radiant Laboratories in New York, and were dubbed with sound by Warren Sound Studios in Miami, all of which took place at approximately the same time and in the same cities. The government argues that these facts establish that Abrams and Levine had to have conspired together.

25 This is simply not so. Harvard was in the business of making films. That Harvard's agreement to make and distribute an illicit film with Abrams was altogether separate from the combination he formed with Levine to film a series of pornographic episodes was confirmed by Abrams' judgment of acquittal at the close of the government's case and the district judge's action in having Nymphs excluded from the proof on the conspiracy count. "Thieves who dispose of their loot to a single receiver a single 'fencc' do not by that fact alone become confederates: they may, but it takes more than knowledge that he is a 'fence' to make them such." United States v. Lekacos, 151 F.2d 170, 173 (2d Cir. 1945), quoted with approval in Kotteakos v. United States, 328 U.S. at 755, 66 S.Ct. at 1243. It must be shown that each knew or must have known of their confederates and that they acted in the furtherance of a common plan. Blumenthal v. United States, 332 U.S. at 556-57, 68 S.Ct. at 258-57.

26 The governmcnt's reliance upon Schaffer v. United States, supra, United States v. Gentilc, supra ; and United States v. Cruz, supra, is misplaced. In none of thesc cases was it argued, as here, that proximate or simultaneous conspiracies had been alleged on the face of the conspiracy count to prove a single conspiracy. In each instance the conspiracy count before the court was held to allege a series of acts or transactions which were sufficiently connected to satisfy rule 8(b) joinder. In the instant case, since allegations of proximate conspiracies are legally insufficient to establish a single overall conspiracy, the conspiracy count could not "reasonably have been made." United States v. McDaniels, 57 F.R.D. at 174. "Numbers are vitally important in trial,

especially in criminal matters. Guilt with us remains individual and personal, even as respects conspiracies." Kotteakos v. United States, 328 U.S. at 772, 66 S.Ct. at 1252.

27 In the case at bar no substantial identity of facts or participants as is necessary to satisfy rule 8(b) exists between these alleged conspiracies. Compare United States v. Marionneaux, 514 F.2d at 1248-49 and United States v. Bova, 493 F.2d at 36-37, with United States v. Gentile, 495 F.2d at 630-32, and Kivette v. United States, 230 F.2d 749, 753 (5th Cir. 1956), cert. denied, 355 U.S. 935, 78 S.Ct. 419, 2 L.Ed.2d 418 (1958). The indictment as drawn contravenes rule 8(b) joinder. Our holding requires that their judgment of conviction and sentences be vacated and remanded for further proceedings.

28 Defendants have also raised a number of issues presenting matters likely to recur at retrial. In the interest of judicial economy, we reach and rule on those issues now. Counts IV and V charged defendants Levine and MPD and others, with interstate shipment from Dade County, Florida to New York City of "Ball and Chain," one of the 16 millimeter films produced by Harvard. The United States Magistrate granted Levine's pretrial motion for discovery of particulars of time and place as to this charge. The government complied by asserting that the substantive counts show that "the films were shipped from New York, but more specifically from Radiant Laboratories to (Harvard's corporations at) 12338 North Miami Avenue, Miami, Florida." At trial, Harvard testified that "Ball and Chain" was made for Levine and approved by him and that Harvard had formed a fictitious company called Flagler Sound at Levine's behest so that shipments of the 16 millimeter films could continue from Florida to New York without Harvard's name or his corporations being associated with them. Trial testimony and documentary evidence also established that after processing, these films were shipped by Radiant from New York to Florida. Defendants objected to the introduction of this proof on the grounds that the government's response to its discovery motion and the proof that the film was shipped both ways constituted a "material and substantial change from the indictment."

29 On appeal defendants contend that the government's response to their discovery motion constituted an improper "bill of particulars addition" to Counts IV and V, which allowed proof that the film was shipped both ways and created a material variance from the indictment. They also argue that defendant Levine did not ship any obscene film from Florida to New York because the only thing shipped from Florida to New York were the initial negatives for processing and not the final film.

30 Assuming without deciding that a discovery motion under Federal Rule of Criminal Procedure 16 will be treated as a motion for a bill of particulars under rule 7, no error was created in the instant case. The indictment clearly states that "Ball and Chain" was shipped from Florida to New York. The purpose of a bill of particulars is not to supplement or in any wise change or affect the indictment as an indictment. It is to apprise the defendant of what proof he is expected to meet. United States v. Martinez, 466 F.2d 679, 686 (5th Cir. 1972); Pipkin v. United States, 243 F.2d 491, 494 (5th Cir. 1957). The government's response to the defendant's discovery motion indicated that it would attempt to prove that "Ball and Chain" was shipped from Florida to New York circumstantially. From proof that after processing, "Ball and Chain" had been shipped by Radiant from New York to Florida back to Harvard, a jury could certainly infer that Harvard had shipped the initial negatives of the same film from Florida to New York. Moreover, as shown above, direct evidence was adduced at trial establishing the shipment of the film from Florida to New York via a fictitious

company formed at Levine's request with reshipment from New York to Florida.

31 Defendants were well apprised of the charge against which they would have to defend and suffered no prejudice to their defense as a result of the government's response. See United States v. Martinez, 466 F.2d at 686. We also note that that proof fully warranted the trial court's action in instructing the jury as to aiding and abetting. The evidence adduced at trial was suffieient to establish defendants' connection with the shipment of the films from Florida to New York and to support their judgment of conviction. See United States v. Young, 527 F.2d 1334, 1336 (5th Cir. 1976); United States v. Bullock, 451 F.2d 884, 888 (5th Cir. 1971); United States v. Gower, 447 F.2d 187, 192-93 (5th Cir.), eert. denied, 404 U.S. 850, 92 S.Ct. 84, 30 L.Ed.2d 88 (1971); Pereira v. United States, 202 F.2d 830, 836-37 (5th Cir. 1953), aff'd, 347 U.S. 1, 10-11, 74 S.Ct. 358, 364, 98 L.Ed. 435 (1954). The argument that the initial negative material of the final version of "Ball and Chain" shipped from Florida to New York for processing into dailies by Radiant does not constitute film is eristic sophistry. The statutes alleged to have been violated proscribe shipment of such materials whether finally proeessed or not. See Spillman v. United States, 413 F.2d 527, 530 (9th Cir.), cert. denied, 396 U.S. 930, 90 S.Ct. 265, 24 L.Ed.2d 228 (1969); United States v. Peller, 170 F.2d 1006 (2d Cir. 1948).

32 To understand the evidentiary objections raised by defendants, a brief explication of the film-making process proof introduced in this case is necessary. Upon shooting a 16 millimeter film for Levine, Harvard would ship the initial negative material to Radiant in New York for processing. This footage was processed and developed by Radiant into footage called "dailies." Radiant returned the dailies to Harvard who cut, edited, and prepared what is called the "cut negative." Musie and sound were then synchronized with the scenes in the cut negative and applied to the film. The resulting product is called a "work print." Harvard then shipped the work print of each film to Radiant for the making of what is called the "answer print." In New York, Levine would approve the answer print from which "release prints" were made for distribution of the final version of the film.

33 After a release print of "Ball and Chain" was exhibited to the jury in November, 1975, Harvard was asked whether he could testify that the scenes from the release print were identical to those contained in the work print he had shipped to Radiant in November, 1972. Although he admitted that it would be impossible for him to establish the two as identical in every respect, Harvard stated that he knew it was the film he had made iu November, 1972. He knew this from the film's title, credits, participants, props, and the fact that each of his films made for Levine had a joke or gag which served as the film's "story." The telling of the joke comprised 10 percent of the action with the remainder being explicit sex. A special agent of the FBI testified that he saw "Ball and Chain" in December, 1972 and that the film shown in the courtroom in November, 1975 was the same. At trial, defendants objected to the authentication of "Ball and Chain" as violating the best evidence rule. The objection was overruled.

34 Defendants now argue that since Counts IV and V charged shipment of the "Ball and Chain" work print from Florida to New York in November, 1972, admission and viewing a release print of the film violated the best evidence rule. They argue that the best evidence that the 1972 work print is obscene is the work print itself. They contend that the government's failure to account for not introdncing the 1972 work print precluded the introduction of the release print of "Ball and Chain" which is

merely secondary evidence. Fiually, they argue that assuming the government is excused for some reason from having to produce the 1972 work print, the release print of "Ball and Chain" was not properly authenticated.

35 As defendants' trial began after the effective date of the Federal Rules of Evidence and no party has argued that "application of the rules would not be feasible, or would work injustice . . .," the rules were properly applied to the proceedings below. Rules of Evidence, Pub.L. No. 93-595 § 1, 88 Stat.1948 (1975); accord, United States v. Cohen, 544 F.2d 781, 783 (5th Cir. 1977).

36 Federal Rule of Evidence 1002 provides: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in (the Federal Rules of Evidence) or by Act of Congress." Motion pictures are within the ambit of the definition of photograph, id. 1001(2), and an original of the motion picture " includes the negative or any print therefrom." Id. 1001(3). Accordingly, under the Federal Rules of Evidence, the 1972 work print or cut negative as well as the answer prints and release prints are regarded as originals of the film " Ball and Chain." Whether a motion picture film is obscene must he adjudged upon viewing it in its entirety. Roth v. United States, 354 U.S. 476, 489, 77 S.Ct. 1304, 1311, 1 L.Ed.2d 1498 (1956). The contents of the film are what is sought to be proved. Thus, the "best evidence" standard embodied in rule 1002 applies to the introduction of the film. See E. Cleary, McCormick on Evidenee §§ 230-32 (2d ed. 1972). Harvard's testimony that the release print of "Ball and Chain" viewed during trial was substantially the saine as the work print he shipped to Radiant in New York in November, 1972, provided sufficient authentication. Fed.R.Evid. 901(a), (b)(1); see id. 104(b).

37 Assuming, without deciding, however, that the release print of "Ball and Chain" should be treated as a copy of the November, 1972 "Ball and Chain" work print rather than as an original, such secondary evidence was still admissible. Defendants had been informed by letter in advance that the contents of "Ball and Chain" would be a subject of proof at the trial. Under rule 1004(3), this "secondary evidence" was admissible after it was adequately authenticated by Harvard's testimony. Id. 901(a), (b)(1); see id. 104(b).

38 Overt acts set forth in the conspiracy count charge that Harvard and Remy contacted Radiant in New York with regard to photographic processing of films entitled "Back Door", "Lollipops," "Two Hours on Sunday," "High Finance," among others. Testimony and documents introduced at trial established that Harvard produced a 16 millimeter film bearing each of these titles for Levine. The evidence further established that each of these films followed the same path from creation to distribution as "Ball and Chain": (1) filming in Miami; (2) shipment of initial negative to New York for processing into dailies; (3) dailies shipped to Florida and transformed into "cut negatives"; (4) synchronization of music and sound with cut negative to produce a "work print"; (5) shipment of work print to New York to make an answer print, some of which work prints were shipped to Radiant and some directly to Levine's corporation, MPD. Special agents of the FBI, Thomas E. Burg, Gerald Daigle, and James O. Janney, testified that together or individually, they saw "Two Hours on Sunday," "Back Door," "High Finance," and "Lollipops for Judy" in North Chicago, Illinois on July 18 and September 13 of 1973, in Chicago ou June 6, 1973, and in Lake Worth, Florida on February 9, 1973, respectively. They further testified that the film each viewed had the appropriate title, was of the 16 millimeter type, depicted explicit

sexual acts, had a joke or twist at the end, and ran for about an hour. None of the agents could testify that Levine had distributed the particular film they saw, but some testified that they saw Harvard's pseudonym, Emilio Porticci, among the film's credits.

39 Defendants argue that the admission of agents' testimony about these allegedly obscene films, other than "Ball and Chain" violated the "best evidence" rule and was improper proof of other crimes. Defendants assert that the films could not be adjudged obscene unless eaeh was introduced and shown to the jury. Moreover, they contend that the agents' testimony does not satisfy this court's rule that proof of other crimes must be plain, clear, and convincing to be admissible. See United States v. Broadway, 477 F.2d 991, 994-95 (5th Cir. 1973).

40 At the outset we note that the indictment did not allege and the jury was not required to find that these other 16 millimeter films of Levine's were obscene. See United States v. Hill, 5 Cir., 500 F.2d 733, (5th Cir. 1974) rehearing denied, 503 F.2d 1403, cert. denied, 420 U.S. 952, 95 S.Ct. 1336, 43 L.Ed.2d 430 (1975) (Brennan, Stewart, Marshall, JJ., dissenting). Exact proof of their contents under rule 1002 was not essential to proving that films distributed by Levine were seen elsewhere than New York. The "best evidence" rule does not apply in sueh instances, see E. Cleary, McCormick on Evidence, § 233 (2d ed. 1972), and the agents' testimony was sufficient to establish this. The prohlem, however, was that the agents could not identify the films they saw as having heen distributed hy Levine.

41 We expressly decline to rule on whether such identification was established. When considering whether to admit the agents' testimony about these other films on retrial, the district court should eonsider at the outset whether such testimony is sufficient to prove that the described activity was that of the defendants. If it is to be allowed, the court should limit the jury's consideration of such proof to the count which it is properly offered to support. If it relates to a conspiracy count, we have held that evidence of prior similar acts by a defendant is admissible to show intent, preparation, or plans relating to the conspiracy and also to show a common scheme, plan, design, or intent. United States v. Banks, 465 F.2d at 1243. If the proof is adduced to support a substantive count by establishing through evidence of prior similar acts a required mental ingredient of the offense, it is permissible only if the prior acts include "the essential physical elements of the offense charged, and (the) physical elements, but not necessarily the mental element of the offense, are clearly shown by competent evidence." United States v. Simmons, 503 F.2d 831, 835 (5th Cir. 1974).

42 Defendants' expert witnesses, Professor Aaron Lipman and Doctor Karl McGahee, testified about the effects that visual exposure to explicit sexual material has upon the average person, basing their conclusions in part, though not exclusively, on the studies and findings of the The Report of the Commission on Obscenity and Pornography (Commission Report). The expert witnesses testified that the recommendation of the Commission Report had been rejected. In purporting to explain the difference between empirical studies and findings and recommendations, however, Professor Lipman testified that the Commission Report's "specific empirical studies and findings certainly cannot be rejected." As rebuttal evidence, the government offered Senate Resolution 477, 91st Cong., 2d Sess. (1970), to prove that both the empirical studies and findings and recommendations contained in the Commission Report had been rejected by the Senate because it was "based on unscientific testing, inadequate review of such testing (and) . . . the Commission's own

findings indicate that its recommendations in many respects, are not based upon adequate research and information . . . ." Defendants argue that permitting the government to introduce Senate Resolution 477 violated their Sixth Amendment right of confrontation.

43 The district court did not err in permitting the resolution to be introduced as a means of impeaching defendants' expert witnesses' testimony, especially in light of Professor Lipman's statement that "the empirical studies and findings certainly cannot be rejected." See United States v. Taylor, 167 U.S.App.D.C. 62, 510 F.2d 1283, 1290-91, suggestion for rehearing en banc denied, 516 F.2d 1243 (1975); cf. Safeway Stores, Inc. v. Combs, 273 F.2d 295, 296-97 (5th Cir. 1960).

44 Defendants objected to the district court's refusal to give the following charge:

45 17. That fact that the defendant may profit from the distribution of the publications claimed by the government to be obscene does not afford a basis for finding that the defendants are guilty, because to sanction consideration of this fact might induce self-censorship and 'offend the frequently stated principle that commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment.' Ginzburg v. United States, 383 U.S. 463, 474 (86 S.Ct. 942, 16 L.Ed.2d 31); New York Times Co. v. Sullivan, 376 U.S. 254 (84 S.Ct. 710, 11 L.Ed.2d 686); Smith v. California, 361 U.S. 147, 150, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959).

46 The purpose of defendants' requested charge was to rebut the government's summation that Levine's films were not made for educational purposes as defendants contended but to make money. Defendants argue that the instruction was necessary properly to advise the jury that the fact money was being made from the films did not afford a basis for finding them obscene.

47 Evidence adduced at trial established that Levine asked Harvard to change the format of his films from simulated to explicit sex because the market required stronger pictures. In view of this proof, the charge would have been misleading, and it was properly refused by the district court. See Ginzburg v. United States, 383 U.S. 463, 474-75, 86 S.Ct. 942, 949, 16 L.Ed.2d 31 (1966).

48 Finally, defendants urge that the order of the United States Magistrate denying their motion to dismiss the indictment under the district court's Local Rule 10(G)(2), (G)(3) was an action required to be taken by a United States District Judge. They assert the action violates Article III of the United States Constitution, the Fifth Amendment due process clause, and the United States Magistrates Act, 28 U.S.C. § 636(b)(2) (1970). The error, if any, was harmless. Fed.R.Crim.Pro. 52(a). We discuss the point only to note that section 636(b) of the Act has been recently amended by Congress, 1976 Federal Magistrate Act Amendments, 90 Stat. 2729, Pub.L. No. 94-577 (Oct. 21, 1976), found in, No. 14 U.S.Code Cong. & Adm.News (Dec. 3, 1976); 20 Crim.L.Rep. (BNA) 2282-83 (Dec. 29, 1976), and sets forth detailed guidelines regarding the Magistrate's powers, which will doubtless be followed on retrial if the matter recurs.

49 REVERSED AND REMANDED.

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721 F.2d 743

UNITED STATES of America, Plaintiff-Appellee, v. Mario BRITO, Eduardo Garcia, Virgil Capote, Defendants-Appellants.

No. 82-5168.

United States Court of Appeals, Eleventh Cireuit.

Dec. 19, 1983.

Oscar S. Rodriguez, Miami, Fla., for Brito.

R. Jerome Sanford, Joel Kaplan, Miami, Fla., for Capote & Garcia.

Stanley Marcus, U.S. Atty., Samuel J. Smargon, James G. McAdams, III, Asst. U.S. Attys., Miami, Fla., for plaintiff-appellee.

Appeals from the United States District Court for the Southern District of Florida.

Before VANCE and JOHNSON, Circuit Judges, and PITTMAN* , District Judge.

JOHNSON, Circuit Judge:

1 On March 4, 1981, a Grand Jury in the Southern District of Florida returned an indictment against the appellants, Eduardo Garcia, Mario Brito, and Virgil Capote, along with nine others, charging them with conspiracy and attempt to import marijuana into the United States in violation of 21 U.S.C.A. Secs. 952 and 963. Count I, the conspiracy count, named all three appellants and seven others. Counts II through V, the attempt counts, alleged that various of the indictees partieipated in a number of failed marijuana importation schemes. Gareia was named in all of these attempt counts; Brito and Capote were named only in count IV. The government dismissed count III, and the district court renumbered counts IV and V as III and IV, respectively.

2 The appellants were tried before a jury,[1] which found Garcia guilty of conspiracy and one count of attempt and found Brito and Capote guilty only of conspiracy. The court sentenced Garcia to four years' imprisonment for conspiraey and five years' probation, to commeuce on his release, for attempt. The court sentenced Brito and Capote each to five years' imprisonment; it ordered each to serve six months in prison, the remainder of the sentence to be suspended, to be followed by a five-year term of probation.

3 Collectively, Garcia, Brito, and Capote raise three issues on appeal. First, all three claim that there existed a prejudicial variance between the evidenee offered at trial and the indictment in that the indictment alleged a single conspiracy and the evidence proved the existence of several independent conspiracies. Second, Garcia claims that

he was denied a fair trial because the government failed to disclose the whereabouts of a confidential informant. Finally, Capote claims that his conviction for couspiracy is invalid because it is inconsistent with his acquittal on the underlying attempt charge. We reject all three claims and affirm the convictions.

FACTS

4 The appellants' convictions were the product of a two-year DEA undercover operation code-named "Grouper." Beginning in 1978, DEA agents Theodore Weed and Pete Sarron represented themselves as marijuana offloaders who, for a substantial price, would meet "motherships" carrying large hauls of marijuana from Colombia, South America, at prearranged spots in the eastern Bahamas and would offload and transport the marijuana to a point in the western Bahamas. There they would deliver the cargo to the wholesale purchaser for final run into the United States. The agents claimed to have bribed Bahamian authorities so that they could carry on their operation with impunity.

5 The agents' initial contact was Thomas Mallos, a nightclub owner in Freeport, Grand Bahama, who served as a confidential informant. Mallos introduced the agents to Gus Barres on October 19, 1978. Barres discussed employing the agents to offload a 30,000 pound cargo of marijuana that was sailing to the Bahamas aboard an 80-foot tug, the DELMAR. Weed informed the Coast Guard of the approach of the DELMAR, and the Coast Guard seized the vessel. This seizure created a severe economic setback for Barres, who attempted to recoup his losses by acting as a broker, introducing transporters and wholesalers of marijuana to the agents. On December 6, 1978, Barres met with the agents to discuss the offloading of a tanker, the MINI I, which would soon be arriving in the Bahamas carrying a large load of marijuana.

6 Meanwhile, appellant Garcia had approached a DEA informant named Harrison in late September 1978 about piloting the MINI I from Aruba, Colombia, to the Bahamas. Acting on Harrison's tip, the Coast Guard intercepted the vessel in late December. This incident served as the basis for count II.

7 In July 1979, Barres introduced Weed to Garcia to discuss the possibility of the agent's offloading a large quantity of marijuana from a ship called the ANNA MARIE CLARK. Garcia and Weed met again in August, and, on August 13, Barres informed Weed that the departure of the ANNA MARIE CLARK from Colombia would be delayed. On September 17, Barres introduced Weed to appellant Capote and "Felo" Sanchez to discuss the ANNA MARIE CLARK operation. Capote described the boat and the size of the load, and generally conducted negotiations with Weed on behalf of the conspirators. In a series of meetings from mid-September to late January, Weed met with Barres, Capote and others to discuss the details of the operation. Apparent difficulties in obtaining a supply of marijuana continued to delay the departure of the ANNA MARIE CLARK. The principals soon made it clear to Weed that the shipment of marijuana was to be split between two groups, one represented by Capote and the other by Antonio Canaves. On February 1, 1980, Capote introduced Weed to appellant Brito, saying that Brito was "one of us." Barres told Weed that Brito had arranged the purchase of marijuana in Colombia for the two groups. On February 4, Brito, with other members of the Capote group, met with Weed and gave him $5,000 which Weed was to use to bribe a Bahamian official. On February 7, on the basis of information provided by Weed, the Coast Guard seized the ANNA MARIE CLARK. This episode served as the basis for the renumbered count III.

8 In mid-February, Barres approached Weed about offloading a marijuana haul that was to arrive on a sailing ship called the FENICIO. Weed met with Pedro Suarez, a member of the Canaves group, and Fidel Lorenzo, described as a partner of Garcia, to discuss the details. In the course of these meetings, the conspirators made clear that Garcia was organizing the transport of the marijuana aboard the FENICIO. When the shipment arrived, Weed offloaded the marijuana into his boat, the MELODY. By prearrangement, as the marijuana-filled MELODY came in, the Bahamian police arrived at the dock with a search warrant and "arrested" Weed. These events were the basis for the renumbered count IV.

9 In March 1980, Weed met with Barres, Brito, and others who had participated in the failed ANNA MARIE CLARK operation to discuss a large cargo of marijuana that would be coming in from Colombia to Louisiana. Brito had apparently been in Colombia arranging the purchase. On March 21, Barres called Weed to tell him that Garcia had organized a new group for the purpose of bringing a shipment of marijuana into Louisiana. Subsequently, Weed met with Barres and Garcia to discuss the project. At one point in these conversations Garcia related his participation in the FENICIO venture.

10 1. Prejudicial Variance Between the Evidence and the Indictment

11 All three appellants claim that these facts establish the existence of multiple conspiracies, not a single conspiracy as the jury found and the indictment charged. They claim that each of the attempts to import cargoes of marijuana constituted an individual conspiracy and that the collectivity of the various marijuana importation ventures is not in the pattern of any of the well-known models of a single conspiracy.

12 To prove the existence of a conspiracy, the government must show an agreement or common purpose to violate the law. United States v. Watson, 669 F.2d 1374, 1379 (11th Cir.1982); United States v. Michel, 588 F.2d 986, 994 (5th Cir.), cert. denied, 444 U.S. 825, 100 S.Ct. 47, 62 L.Ed.2d 32 (1979).[2] Each individual defendant must have joined the conspiracy intentioually. United States v. Becker, 569 F.2d 951, 961 (5th Cir.), cert. denied, 439 U.S. 865, 99 S.Ct. 188, 58 L.Ed.2d 174 (1978), although the individual need not be privy to all the details of the conspiracy, id., or be aware of all the other conspirators, or participate in every stage of the conspiracy. Watson, 669 F.2d at 1379.

13 Conspirators invite mass trials by their conduct. United States v. Perez, 489 F.2d 51, 65 (5th Cir.1973), cert. denied, 417 U.S. 945, 94 S.Ct. 3067, 41 L.Ed.2d 664 (1974). Nevertheless, fairness demands that alleged conspirators not be tried alongside the perpetrators of a wholly separate criminal scheme. In Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), the Supreme Court held that, where the evidence at trial proves the existence of multiple, independent conspiracies and the indictment alleges a single conspiracy, reversal of the defendants' conspiracy convictions is warranted if the defendants' substantial rights have been injured by the variance.

14 The necessity for drawing this distinction derives from our interest, clearly our duty, in jealously protecting those accused from the possible transference of guilt of others accused, at least in the eyes and minds of a jury, which so often is claimed to be encountered where en masse prosecutions are undertaken for a conglomeration of separate offenses.

15 Perez, supra, 489 F.2d at 57. In Kotteakos the Supreme Court likened the alleged conspiracy to a wheel. The central actors, who were involved in each of the separate criminal enterprises, were analogous to the wheel's hub. The various criminal undertakings in which they participated represented the spokes. The Court could find no "rim" enclosing these spokes, that is, no circumstances which bound the separate conspiracies together and made them one. In such a case, the Court held, it is improper to try the members of many separate conspiracies en masse. A year later, the Court endorsed another analogy in Blumenthal v. United States, 332 U.S. 539, 68 S.Ct. 248, 92 L.Ed. 154 (1947). That case involved a criminal distribution network. The Court concluded that, although this conspiracy could not be fit into the wheel model, it was nevertheless a single conspiracy. The Court compared the distribution network to a chain. Each link was necessary to carry out the conspiracy's ultimate objectives, and even though each conspirator may not have dealt with or even known other conspirators down the line of distribution, each must have known that someone else was fulfilling these necessary functions.

16 The appellants urge that the evidence adduced at their trial did not demonstrate the existence of either a wheel or a chain conspiracy. Our precedent recognizes that, although the wheel and chain models can be helpful in analyzing the structure of a conspiracy, they do not define the universe of criminal conspiracies. See United States v. Perez, supra, 489 F.2d at 64. The question we must ask is not whether the conspiracy resembled a functional wheel or an unbroken length of chain but "what is the nature of the agreement. If there is one overall agreement among the various parties to perform different functions in order to carry out the objectives of the conspiracy, then it is one conspiracy." Id. at 62. In reviewing the evidence to determine whether it supports the jury's verdict that a single conspiracy existed, we examine three factors: (1) whether a common goal existed, (2) the nature of the criminal scheme, and (3) the overlapping of the participants in the various dealings of the conspiracy. United States v. Watson, supra, 669 F.2d at 1379-80; United States v. Tilton, 610 F.2d 302, 307 (5th Cir.1980); United States v. Becker, supra, 569 F.2d at 960. The scope of our review is narrow. Whether there was one or were more conspiracies is a question for the jury. Michel, supra, 588 F.2d at 995; United States v. Rodriguez, 509 F.2d 1342, 1348 (5th Cir.1975). We may reverse a jury's finding that a single conspiracy existed only if the evidence, viewed in the light most favorable to the government, could not permit reasonable jurors to have found, beyond a reasonable doubt, that there was a single conspiracy. United States v. Bell, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (en banc).

17 Reviewing the evidence as it relates to the factors listed above, we conclude that there was sufficient support for the jury's conclusion that the appellants were involved in one multi-faceted conspiracy. The conspirators had as their common objective importation of marijuana into the United States. See United States v. Watson, supra, 669 F.2d at 1380. Several aspects of the nature of the conspiracy suggest a single, ongoing operation. The evidence indicates that Garcia operated an ongoing business dedicated to purchasing large loads of marijuana in Colombia, transporting them to the Bahamas aboard "motherships," and delivering them to Weed and the other DEA agents on behalf of various groups of wholesalers. The marijuana would then be handed over to the wholesalers who had been involved in each operation from the beginning. Although the identities of the wholesalers differed somewhat from load to load, each clearly knew of the scope of the illegal enterprise and knew of and even worked with other wholesalers. A single conspiracy exists where the "agreement ...

contemplates that the activity will be repeated sometimes with, sometimes not, the same actors." Perez, supra, 489 F.2d at 62. Finally, there was a considerable amount of overlap among the participants of the different ventures. Five separate importation plans are discernable: the DELMAR, the MINI I, the ANNA MARIE CLARK, the FENICIO, and the proposed Louisiana drop. Appellant Garcia had some part in all five; Gus Barres had a role in at least four; Fidel Lorenzo was involved in at least three; Pedro Suarez, Felo Sanchez, appellant Brito, and Juaquin Collazo all participated in at least two of the schemes. Taken as a whole, the evidence at trial provided sufficient support for the jury's finding that a single conspiracy existed.

18 Even if the evidence did show that multiple conspiracies existed, before we could reverse their convictions the appellants would have to demonstrate that the variance between the indictment and the evidence adversely affected their substantial rights. United States v. Tilton, supra, 610 F.2d at 307; United States v. Canales, 596 F.2d 664, 670 (5th Cir.1979). This they have failed to do. The appellants point to no specific prejudice; they argue generally that their trial en masse exposed them to the danger of a spill-over effect which prevented the jury from considering each defendant's guilt individually based on the evidence against him. In evaluating such claims, an important factor is the "number of defendants tried and the number of conspiracies proven," for the more of each the greater is the danger of prejudice. United States v. Solomon, 686 F.2d 863, 870 (11th Cir.1982). We have recently rejected a claim of prejudice where

19 [a]t trial there were only three defendants and the evidence as to each was clear and distinct. There were only six thefts and the evidence was clear as to the time of each theft and the goods stolen and sold.

20 Id. at 871. We concluded that in such a case the danger that the jury would transfer guilt from one defendant to another is minimal. The present case is similar. Only three defendants were on trial, and the goverument presented evidence of only five importation attempts. There was no confusion about which of the defendants was involved in which of the incidents. As in Solomon, the jury in this case should have been able to consider each defendant's guilt individually.

21 2. The Government's Failure to Divulge the Whereabouts of a Confidential Informant

22 On the first day of trial, counsel for appellant Garcia moved the court to order the government to produce Thomas Mallos, the informant who had introduced the agents to Gus Barres. The court initially reserved ruling on the motion and later denied it on the ground that Garcia had shown no need for Mallos's testimony. Several days later, after Garcia testified on direct examination that Mallos had been present when Garcia and Weed were introduced, the court granted Garcia's renewed motion that the government produce Mallos. The government informed the court that Mallos had left the country to visit his sick mother in Greece, but that it would try to locate him. The government was unable to do so.

23 Garcia points to Ashley v. Wainwright, 639 F.2d 258, 261 (5th Cir. Unit B 1981), for the proposition that, where a defendant has requested that the government serve compulsory process on an informant and where the prosecution is negligent in failing to discover the whereabouts of the informant, the negligent coneealment constitutes a violation of fundamental fairness. See also Roviaro v. United States, 353 U.S. 53, 60-

61, 77 S.Ct. 623, 627-628, 1 L.Ed.2d 639 (1957) (government must disclose the identity and whereabouts of a confidential informant if his identity or the content of his communication "is relevant and helpful to the defense of an accused"). Garcia's reliance on Ashley is misplaced. The Court in Ashley expressly withheld judgment on the question whether negligent concealment of a confidential informant violates a defendant's Sixth Amendment right to compulsory process of witnesses. 639 F.2d at 261. Even if it were the law that negligent concealment violates the Sixth Amendment, the government's conduct in this case was clearly not negligent. As soon as the court ordered the prosecution to reveal Mallos's whereabouts, the government began searching for him. Garcia's claim that the government should have begun its search after the district court denied the initial motion to disclose but before it reversed itself and ordered disclosure is meritless and rings hollow in light of the fact that Garcia waited until the first day of trial to present the motion even though he knew Mallos's identity and was aware of his presence at certain meetings between Garcia and Weed long before.[3]

3. Inconsistent Verdicts

24 Appellant Capote claims that he was first persuaded to join the conspiracy on September 17, 1979, when Barres introduced him and Felo Sanchez to Weed. Capote testified that at that time his daughter was suffering from birth defects that required her to be flown to France for treatment. He testified that when he told Weed of his situation, Weed replied that Capote's cut from the ANNA MARIE CLARK deal would be his chance to take his daughter to France. Capote claims that at that point he decided to join the conspiracy. Capote argued at trial that Weed's behavior amounted to entrapment, and the district court gave an entrapment instruction. The jury acquitted Capote of attempt but convicted him of conspiracy to import marijuana. Capote urges that the acquittal on the underlying attempt count must have been based on his entrapment defense, and that the two verdicts are therefore inconsistent and his conspiracy conviction should be reversed.

25 We begin with the proposition that inconsistency in a jury's verdict does not require reversal. United States v. Mulherin, 710 F.2d 731, 736 (11th Cir.1983), modified, No. 81-8025 (Nov. 21, 1983); United States v. Spradlen, 662 F.2d 724, 727 (11th Cir.1981); United States v. Varkonyi, 611 F.2d 84, 86 (5th Cir.), cert. denied, 446 U.S. 945, 100 S.Ct. 2173, 64 L.Ed.2d 801 (1980); United States v. Romeros, 600 F.2d 1104, 1105 (5th Cir.1979), cert. denied, 444 U.S. 1077, 100 S.Ct. 1025, 62 L.Ed.2d 759 (1980). This is true even where the jury convicts a defendant of conspiracy to commit an underlying substantive offense but finds the defendant not guilty of committing the underlying offense. We explained the proper analysis in such cases in United States v. Spradlen, supra, 662 F.2d at 727:

26 We begin by rejecting the appellants' contention that the conspiracy conviction cannot stand in view of the acquittal on the possession count. Inconsistency in the jury's verdict does not require reversal. "In a multi-count verdict, each count is considered separately, and a guilty verdict upon any count may stand, provided that it is supported by the evidence.... The disposition of the remaining counts is immaterial to the appellate inquiry." ... Thus, our only task here is to determine whether the evidence adduced at trial is sufficient to support the appellants' conspiracy convictions.

27 (citations omitted). Capote urges that we endorsed a broader standard of review in

United States v. Caro, 569 F.2d 411 (5th Cir.1978). He is incorrect. In Caro the Court stated that

28 [t]here is nothing necessarily inconsistent, in law or logic, with such a result and we do not hold that a conviction for conspiracy and acquittal of the substantive offense may never properly arise from the same facts and trial. We do suggest however, that such a result should engage our judicial skepticism. A critical analysis of the facts is required when such a contrariety of results does appear.

29 Id. at 418. These comments do not establish a standard of review. They merely point out that inconsistent verdicts in conspiracy cases can be analytically troubling, and that when such verdicts occur this Court should give particular attention to its review of the sufficiency of the evidence. As our later decision in Spradlen indicates, however, "our only task here is to determine whether the evidence adduced at trial is sufficient to support the appellants' conspiracy convictions." Spradlen, supra. Our review of the sufficiency of the evidence is limited to determining whether the evidence, viewed in the light most favorable to the government, permitted reasonable jurors to have found guilt beyond a reasonable doubt. United States v. Bell, supra.

30 We conclude, after reviewing the trial record, that the evidence amply supported Capote's conviction of conspiracy. The evidence of entrapment did not require the jury to acquit on that ground. "For entrapment to exist, the criminal design must originate with government officials, and it is they who must plant the criminal design in the mind of an innocent man." United States v. Lee, 694 F.2d 649, 653 (11th Cir.1983). The focus of an entrapment inquiry must be whether or not the defendant was predisposed to commit the crime. United States v. Bagnell, 679 F.2d 826, 834 (11th Cir.1982), cert. denied, --- U.S. ----, 103 S.Ct. 1449, 75 L.Ed.2d 803 (1983). A reasonable jury could clearly have found that the agents did not plant the criminal design in Capote's mind and that Capote was predisposed to join the conspiracy. Capote came to the agents with the criminal plan. Capote was associated with the conspirators before he ever met Weed. Far from being a wavering hanger-on, Capote took a substantial role from the start in negotiating the terms of the agreement with the agents. Capote's argument that his conviction is not supported by the evidence is meritless.

31 For the above reasons we AFFIRM the decision of the district court.

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* Honorable Virgil Pittman, U.S. District Judge for the Southern District of Alabama, sitting by designation

[1] None of the other indictees were tried with the appellants. Six pled guilty, two were unavailable for trial, and the government dismissed the indictment against the remaining defendant

[2] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), the Eleventh Circuit adopted as binding precedent the decisions of the Fifth Circuit rendered prior to October 1, 1981

[3] Garcia's failure to make this motion before trial is sufficient reason to deny his claim. United States v. Diaz, 655 F.2d 580, 586 (5th Cir. Unit B 1981), cert. denied, 455 U.S. 910, 102 S.Ct. 1257, 71 L.Ed.2d 448 (1982). In Diaz we also held that

where, as here, the informant was merely an "introducer" who then simply observed the negotiations between the undercover agents and the defendant, the informant's role in the illegal activity was insufficient to justify requiring the government to produce him. Id. at 588

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846 F.2d 1384

269 U.S.App.D.C. 398, 26 Fed. R. Evid. Serv. 164

UNITED STATES of America
v.
John C. TARANTINO, Appellant.
UNITED STATES of America
v.
Robert H. BURNS, Appellant.
UNITED STATES of America
v.
Fred B. BLACK, Jr., Appellant.
UNITED STATES of America
v.
Wilfred Samuel BELL, a/k/a Sam Bell, Appellant. (parties)

Nos. 85-5808 to 85-5810, 85-5846.

**United States Court of Appeals,
District of Columbia Circuit.**

Argued Oct. 19, 1987.
Decided April 12, 1988.
As Amended April 12, 1988.

Howard F. Cerny, New York City, for appellant Tarantino.

Robert H. Burns, pro se.

L. Barrett Boss (appointed by this court), with whom Henry W. Asbill, Washington, D.C., (also appointed by this court) was on brief, for appellant Bell.

Loren Kieve (appointed by this court), with whom Jo Anne Swindler, Washington, D.C., was on brief, for appellant Black. Thomas R. Dyson, Washington, D.C., also entered an appearance for appellant Black.

Charles E. Ambrose, Asst. U.S. Atty., with whom Joseph E. diGenova, U.S. Atty., Michael W. Farrell, Paul L. Knight and Roger M. Adelman, Asst. U.S. Attys., Washington, D.C., were on brief, for appellee.

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Before SILBERMAN, BUCKLEY and WILLIAMS, Circuit Judges.

Opinion PER CURIAM.

PER CURIAM:

1 This is an appeal from criminal convictions following a complex, two-month trial before U.S. District Judge Thomas F. Hogan.

2 All appellants were convicted on count one of the twenty-five count indictment: conspiracy to distribute and to possess with intent to distribute cocaine, in violation of 21 U.S.C. Secs. 841(a)(1) and 846 (1982). In addition, John C. Tarantino was convicted as a principal, 18 U.S.C. Sec. 2 (1982), of four counts of violations of the Travel Act, 18 U.S.C. Sec. 1952 (1982). Fred B. Black, Jr. was also convicted of violating the Travel Act, and Wilfred Samuel Bell of distribution of cocaine.

3 Viewing the evidence in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942), these appellants and others conspired to import, possess, and distribute large quantities of cocaine in various locales, and to launder the proceeds of this illegal activity. Lawrence ("Lonnie") Strickland, the main player in the conspiracy, testified for the government in exchange for a favorable recommendation to the sentencing judge who would consider Strickland's guilty plea. The government's evidence essentially established that (1) Black assisted Strickland in launching his drug operation and in laundering the resulting profits; (2) Robert H. Burns was instrumental in introducing Strickland to major drug importers (for which Burns received commissions) and laundering his illicit profits; (3) Tarantino participated heavily in distributing Strickland's cocaine and laundering his profits; and (4) Bell was Strickland's main distributor in the Washington, D.C. area.

4 Following guilty pleas by various defendants not now before us, a trial of the charges against Tarantino, Black, and Burns began on May 14, 1984. Judge Hogan declared a mistrial on June 13, 1984, and a new trial, in which Bell was joined, began on January 11, 1985. The jury returned the convictions on Mareh 8, 1985.

5 We commend Judge Hogan on his eonduct of this long and difficult trial. Apart from a few errors that we conclude did not deprive appellants of their right to a fair trial, Judge Hogan's management of the proceedings was admirable. We affirm in all respects, exeept that we remand Bell's sentence for eomplianee with Federal Rule of Criminal Proeedure 32(e)(3)(D).

6 I. VARIANCE: SINGLE VERSUS MULTIPLE CONSPIRACIES

7 Each appellant argues that the evidenee at trial varied impermissibly from the allegations of the indictment, and that the resultant prejudice deprived him of his right to a fair trial.

A. Permissible Variance

8 A variance between the allegations of the indictment and the proof at trial constitutes grounds for reversal only if the appellant proves (1) that the evidence at trial established facts materially variant from those alleged in the indictment, and (2) that the variance eaused substantial prejudice. See, e.g., United States v. Caporale, 806 F.2d 1487, 1499-1500 (11th Cir.1986), cert. denied, --- U.S. ----, 107 S.Ct. 3265, 97 L.Ed.2d 763 (1987). In a conspiracy prosecution, for example, the appellant may prove (1) that the evidence established the existence of multiple conspiracies, rather than the one eonspiracy alleged in the indietment, and (2) that because of the multiplicity of defendants and conspiracies, the jury was substantially likely to transfer evidenee from one eonspiraey to a defendant involved in another. Id.

9 The existence of a single eonspiraey or multiple conspiracies is primarily a question of fact for the jury. E.g., United States v. Erwin, 793 F.2d 656, 662 (5th Cir.), cert. denied, --- U.S. ---, 107 S.Ct. 589, 93 L.Ed.2d 590 (1986); United States v. Molt, 772 F.2d 366, 369 (7th Cir.1985), eert. denied, 475 U.S. 1081, 106 S.Ct. 1458, 89 L.Ed.2d 715 (1986); United States v. Potamitis, 739 F.2d 784, 787 (2d Cir.), eert. denied, 469 U.S. 934, 105 S.Ct. 332, 83 L.Ed.2d 269 (1984). The verdiet must be upheld if the evidence adequately supports a finding that a single conspiracy existed. Potamitis, 739 F.2d at 788; United States v. Arbelaez, 719 F.2d 1453, 1457-58 (9th Cir.1983),

cert. denied, 467 U.S. 1255, 104 S.Ct. 3543, 82 L.Ed.2d 847 (1984); cf. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) (verdict upheld if any rational trier of fact could have found elements of offense beyond reasonable doubt).

B. Establishing a Single Conspiracy

10 Appellants Bell and Burns urge us to follow the analysis of conspiracies used in Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). Kotteakos involved multiple conspiracies to defraud the Federal Housing Administration. The key figure, Brown, arranged with various defendants to submit false loan applications. None of the applicants had any conneetion with the others, although each had a relationship with Brown. Nevertheless, the government charged all the applicants with participation in a single conspiracy. On appeal, the government acknowledged that the proof established multiple conspiracies. Brown was the hub of a wheel, and the various applicants were the spokes. Without a rim to enclose the spokes, however, the evidence made out multiple conspiracies, not the single one alleged. 328 U.S. at 755, 66 S.Ct. at 1243. The government granted this much, but merely argued that the variance was harmless, a position that the Supreme Court rejected.

11 The wheel metaphor has not been strictly applied as the method of analysis for all conspiracies, and particularly not for drug conspiracies. Rather, courts have utilized a chain mctaphor.

12 An example is United States v. Gantt, 617 F.2d 831 (D.C.Cir.1980). The evidence established that the appellants had travelled from Washington, D.C. to Los Angeles to purchase narcotics. Other evidence established that the narcotics were later sold in D.C. The defendants claimed that these transactions were entirely distinct, establishing two conspiracies. The court disagreed. Certain defendants went to California to purchase narcotics, others prepared the drugs for sale in D.C., others distributed the drugs, and still others actually sold them. "The activities of each member and group in the organization meshed with those of the other members and groups. In short, the evidence disclosed a classic example of a narcotics sale and distribution conspiracy.... In those cases [relied on by appellants, e.g., Kotteakos], the evidence showed 'wheel-type' conspiracies, whereas the conspiracy here was the 'chain-type' conspiracy common in narcotics cases." 617 F.2d at 846 (citations omitted).

13 Under the chain analysis, the government need not prove a direct connection between all the conspirators. A single conspiracy may be established when each conspirator knows of the existence of the larger conspiracy and the necessity for other participants, even if he is ignorant of their precise identities. When the conspirators form a chain, each is likely to know that other conspirators are required. E.g., United States v. Andrus, 775 F.2d 825, 840-41 (7th Cir.1985); United States v. Inadi, 748 F.2d 812, 817 (3d Cir.1984) (citing W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 480-81 (1972)), rev'd on other grounds, 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986).

14 The chain metaphor, while helpful, does not end onr analysis. The existence of a chain is only an aid in answering the ultimate question: whether a single conspiracy was demonstrated. A single conspiracy is proven if the evidence establishes that each

conspirator had the specific intent to further the common unlawful objective. United States v. Ras, 713 F.2d 311, 314 (7th Cir.1983) (whether defendants "knowingly embraced a common criminal objective"); see also Andrus, 775 F.2d at 840 (applying Ras to chain conspiracy); cf. United States v. Haldeman, 559 F.2d 31, 112 (D.C.Cir.1976) (specific intent to further unlawful object of conspiracy must be sbown), cert. denicd, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977).

15 The existence of a chain helps us determine both the unlawful objective and the conspirators' intent. Unlike a wheel conspiracy, in which the interest of each spoke is unrelated to the interests of the other spokes, each link in the chain may rely upon the other links in furtherance of the common interest. The street dealer relies upon his supplier; the supplier relies upon his supplier; and so on. The existence of sueh a "vertically integrated, loose-knit combination," United States v. Bynum, 485 F.2d 490, 495-96 (2d Cir.1973), vacated & remanded on other grounds, 417 U.S. 903, 94 S.Ct. 2598, 41 L.Ed.2d 209 (1974), may raise the inference that each conspirator has agreed with the others (some whose specific identity may be unknown) to further a common unlawful objective, e.g., the distribution of narcotics.

16 Chain analysis must be used with care. Even in a vertically integrated combination, certain players may have performed activities wholly unrelated to the aims of the conspiracy. These unrelated activities may not be attributed to the co-conspirators, Pinkerton v. United States, 328 U.S. 640, 647-48, 66 S.Ct. 1180, 1184, 90 L.Ed. 1489 (1946), and those with whom the "freelancing" conspirator dealt do not necessarily become members of the main conspiracy. Thus, even if we determine that a chain conspiracy exists, we may still conclude that certain actions were outside the chain and formed a separate conspiracy.

17 In determining whether the conspiracy was single or multiple, and which acts were committed in furtherance of the common conspiracy, we are aided by those courts that have isolated a variety of factors. The most important of these is whether the conspirators share a common goal, such as the possession and distribution of narcotics for profit. Caporale, 806 F.2d at 1500; United States v. Dickey, 736 F.2d 571, 582 (10th Cir.1984), cert. denied, 469 U.S. 1188, 105 S.Ct. 957, 83 L.Ed.2d 964 (1985). Another is the degree of dependence inherent in the conspiracy. United States v. Cerro, 775 F.2d 908, 914 (7th Cir.1985); United States v. Adamo, 742 F.2d 927, 932-33 (6th Cir.1984), cert. denied, 469 U.S. 1193, 105 S.Ct. 971, 83 L.Ed.2d 975 (1985); Dickey, 736 F.2d at 582. Some courts have permitted the jury to infer the conspirators' knowledge of their link to other conspirators from the nature of a narcotics conspiracy. United States v. Behrens, 689 F.2d 154, 160 (10th Cir.), cert. denied, 459 U.S. 1088, 103 S.Ct. 573, 74 L.Ed.2d 934 (1982); United States v. Smith, 609 F.2d 1294, 1300 (9th Cir.1979); United States v. Burman, 584 F.2d 1354, 1356-57 (4th Cir.1978), cert. denied, 439 U.S. 1118, 99 S.Ct. 1026, 59 L.Ed.2d 77 (1979); United States v. Moten, 564 F.2d 620, 624-25 (2d Cir.), cert. denied, 434 U.S. 942, 98 S.Ct. 438, 54 L.Ed.2d 304 (1977); United States v. Taylor, 562 F.2d 1345, 1352 (2d Cir.), cert. denied, 432 U.S. 909, 97 S.Ct. 2958, 53 L.Ed.2d 1083 (1977). For this reason, cases relied upon by appellants dealing with non-narcotics conspiracies, e.g., United States v. Camiel, 689 F.2d 31 (3d Cir.1982); United States v. Butler, 494 F.2d 1246 (10th Cir.1974); United States v. Varelli, 407 F.2d 735 (7th Cir.1969), cert. denied, 405 U.S. 1040, 92 S.Ct. 1311, 31 L.Ed.2d 581 (1972), are of limited relevance. A final factor of lesser significance is the overlap of participants in the various operations claimed to comprise a single conspiracy. Caporale, 806 F.2d at 1500;

Erwin, 793 F.2d at 662-63. A single conspiracy conviction has been upheld, however, despite a "lack of significant overlap of some participants" when strong evidence established that a main player coordinated the narcotics importation and distribution enterprise. United States v. Champion, 813 F.2d 1154, 1166-67 (11th Cir.1987).

18 C. Sufficiency of the Evidence of a Single Conspiracy

19 In this case, the evidence presented to the jury was sufficient to establish the existence of a chain conspiracy whose aim was to accumulate wealth by distributing cocaine. The identity and relationship of the major players in the eonspiracy is summarized in the chart below. All appellants shared the conspiracy's objeets and knew of their dependence on other conspirators, even though they may not have known the precise identity of all the other conspirators. Each appellant played a vital role in the conspiracy's success. Burns facilitated purchase, Tarantino and Bell faeilitated distribution, and Black and Tarantino facilitated laundering of the profits into usable form. As will become apparent, however, each of the appellants also played other roles in the conspiracy, and all knew of the collaboration of others.

20 NOTE: OPINION CONTAINS TABLE OR OTHER DATA THAT IS NOT VIEWABLE

21 We hold that the evidence was sufficient for the jury to conclude that the appellants joined in a single conspiracy. The defendants' activities relating to the purchase, distribution, and laundering of funds did not constitute separate conspiracies, but were undertaken in furtherance of the overarching objectives of the single conspiracy. Accordingly, we find no basis for appellants' claim that they have been substantially prejudiced by a material variance between the evidence introduced at trial and the facts alleged in the indictment.

1. Burns

22 Strickland was introduced to Burns by Black, Tr. 123-29, with whom Burns had had numerous prior dealings. Tr. 5391-93. At their first meeting in Miami, Burns asked Strickland if he was in town to buy cocaine. An extensive discussion of the cocaine trade ensued. Burns stated that he had confidence in Strickland because of their mutual friendship with Black. Tr. 166-71. Strickland returned to Burns' apartment the next day, when Burns introduced him to two men, Gene Cello and an unidentified Colombian, who could supply cocaine. Burns offered to broker cocaine deals for Strickland for a commission of $2,000 per kilogram. Strickland then purchased a single kilo from Cello and the Colombian, which was transported to and distributed in Washington, D.C. Tr. 173-77.

23 After a subsequent purchase from Cello produced poor quality cocaine, Burns introduced Strickland to Armando Marulanda, a major Colombian importer. Marulanda offered to sell Strickland ten kilos of cocaine on credit, with a $2,000 per kilo commission to Burns. Marulanda's extension of credit to Strickland was a turning point in Strickland's cocaine trade. Never before had he been able to obtain such large quantities on consignment. Tr. 182-91. Burns thus was essential to the expansion and success of the conspiracy, and he benefitted directly by receiving commissions on each sale by Marulanda to Strickland.

24 Burns apprised Black of these transactions. Tr. 323-34. Strickland's purchases from Marulanda and Marcos Cadavid, an associate of Marulanda's, escalated over the

course of the next months, which increased Burns' commissions. Tr. 197-213.

25 Soon after the first transaction, Strickland introduced his partner and co-conspirator, Steve Kupits, to Burns. Strickland stated that he and Kupits were distributing the cocaine "in different parts of the country." Burns responded: "Fine, no problem." Tr. 195-96. Burns knew of and endorsed the nationwide scope of the conspiracy.

26 Burns also was directly involved with the other conspirators. When Ribera, one of Striekland's distributors, took over Strickland's customers in the D.C. area while Striekland took an extended "vacation," Burns dealt directly with Ribera. Under Strickland's prodding, Burns "fronted" cocaine to Ribera, i.e., gave him cocaine on consignment. Burns also supplied Ribera with a courier to transport cocaine to the conspiracy's distributors in California. Tr. 1769-72, 1791. Burns himself directly provided the California conspirators with three kilos of cocaine. Tr. 2223-25. Burns also dealt with the Texas conspirators working with Kupits. Tr. 272-75. There was even evidence linking Burns to Tarantino's plan to launder money by investing it in a Haitian casino, Tr. 472, and Black's plan to launder money through investments in a New Jersey casino (the "Gateway Project"). Tr. 353-55.

27 The evidence was sufficient for a jury to conclude that Burns was an essential link in the distribution chain. He shared the conspiracy's goals, and knew of the nature and scope of the enterprise.

28 Burns argues that the government's evidence was based entirely on perjured testimony, a claim which the jury was entitled to reject. Brief for Burns at 7-21. He also argues that every act of the conspirators was a separate conspiracy of which he was no part. Id. at 37. The evidence was sufficient, however, for the jury to conclude that Burns was an essential link in a single chain.

29 We have considered carefully Burns' claim that prosecutorial misconduct "permeated the entire proceedings." Id. at 21. To a large extent, Burns' claim reiterates his other assignments of error, e.g., use of perjured testimony, attempt to deprive Burns of his "pro se status," and suppression of evidence favorable to him and material to guilt or punishment under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). We discuss each of these arguments separately elsewhere in this opinion. We merely note here that we have found no obvious perjury on any material matter, much less knowing use of perjured testimony by the prosecutor. See Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935) (prosecutor's knowing use of material perjured testimony, along with deliberate suppression of impeachment evideuce, justifies collateral attack). The prosecutor was entitled to argue his interpretation of the evidence, and the jury was entitled to accept that interpretation.

2. Black

30 Strickland met Black after Black indirectly reeeived a $13,000 loan from Strickland. At their first meeting, Strickland informed Black that he was a marijuana dealer, upon which Black suggested that Strickland meet Burns (who later proved to be a major cocaine broker). Tr. 128. Black urged Strickland to transform the loan into an investment in Black's Gateway Projeet, and to increase the amount of the investment to $70,000. Black also stated he could help Strickland "clean up" his

money, that is to say, to disguise its illegal source. Tr. 129-30. Strickland soon invested a total of $140,000 in the Gateway Project, all of it in cash. Tr. 5025-26. Later, Black asked Strickland to "come out of retirement" to generate an additional $800,000, and a further cash payment by Strickland of $500,000 followed shortly. Tr. 362-69.

31 Black claims that he was unaware of the illicit source of Strickland's funds. Brief for Black at 24-28. The jury was entitled to infer, however, that Black was well aware that Strickland's investment represented his cocaine profits: according to Strickland's testimony, (1) Black knew from the first that Strickland was involved in the drug trade; (2) Black introduced Strickland to Burns, a major cocaine broker; (3) Black knew of the developing relationship between Strickland and Burns (Black told Strickland he had heard from Burns that "things are going well with you two" (Tr. 323-24)); (4) Black touted the Gateway Project as a good way for Strickland to "clean up" his money (Tr. 129-30); (5) Strickland provided huge sums of cash to Black (Tr. 362-69), a fact that should have at least aroused suspicion (cf. United States v. Nicholson, 677 F.2d 706, 709 (9th Cir.1982), holding that large cash transactions without documentation, combined with refusal to describe investment, established sufficient circumstantial evidence to infer conspiracy); and (6) Black twice arranged for attorneys to represent conspirators arrested on cocaine charges (Tr. 668-69, 672).

32 Black was also involved in a series of financial transactions that the jury was entitled to conclude were "washes." Black offered to issue a check for cash provided by Strickland in order to permit Strickland to show a legitimate source of income. Black twice issued a Dunbar Corporation check for $3,000 in exchange for $3,000 cash (proceeds of cocaine sales) provided by Strickland. Tr. 338-43. Black also washed $60,000 to permit the financing of a land development project of Strickland, Kupits, and Maddux. Tr. 343-48.

33 Two final pieces of evidence are decisive in establishing Black's involvement in the conspiracy, if credited by the jury. First, in 1980, Black asked Strickland if he was still dealing in drugs. Strickland said he was not, because of a capital shortage. Black offered to arrange the necessary financing. Tr. 426-28. Second, in 1981, Black asked Strickland whether the Texas federal grand jury's investigation centered on the land development plan only, or if it also concerned the drug network. Because of the two $60,000 washes he provided in connection with that project, he feared he might be indicted. Tr. 397-403.

34 We have little trouble concluding that the jury was entitled to find that Black knew of the nature and scope of the conspiracy, joined in its aims, and facilitated its success.

35 Black further claims that even if he knew of the conspiracy, he only dealt in an "article of free commerce, i.e., money." Brief for Black at 28. He argues that a "conspiracy conviction under 21 U.S.C. Secs. 841 and 846 requires more evidence of involvement in the conspiracy than mere handling of the proceeds of an illegal drug scheme." Brief for Black at 29. In a related argument, Black maintains that money laundering is not a proscribed offense under section 841; laundering is specifically criminalized by other statutes (e.g., 18 U.S.C. Secs. 1952(a) (1982), 1956(a)(1) (Supp. IV 1986), 1962(a) (1982), and 21 U.S.C. Sec. 854 (Supp. III 1985)), under which Black was not charged. Id. at 31-37.

36 This claim misconstrues the nature of the conspiracy as charged. The conspiratorial

agreement was proscribed by section 841 because one of its essential aims was the distribution of cocaine. The laundering of funds was a part of the plan to distribute cocaine; the conspirators, including Black, well knew that the cocaine money had to be "cleaned up" to be useful to them. Tr. 129-30. Black's aid in laundering the cocaine profits thus facilitated the attainment of the conspiracy's goals; money launderers play an essential part in a narcotics chain conspiracy. See, e.g., United States v. Dela Espriella, 781 F.2d 1432, 1436 (9th Cir.1986); United States v. Orozco-Prada, 732 F.2d 1076, 1080 (2d Cir.), cert. denied, 469 U.S. 845, 105 S.Ct. 154, 83 L.Ed.2d 92 (1984); United States v. Metz, 608 F.2d 147, 153 (5th Cir.1979), cert. denied, 449 U.S. 821, 101 S.Ct. 80, 66 L.Ed.2d 24 (1980). The government is not required to prove that every act taken in furtherance of the conspiracy is illegal, much less that it is specifieally proscribed by the conspiracy statute. See Braverman v. United States, 317 U.S. 49, 53, 63 S.Ct. 99, 101, 87 L.Ed. 23 (1942).

3. Tarantino

37 Tarantino participated in two aspects of the conspiracy: the distribution of cocaine and the laundering of proceeds.

38 Tarantino's involvement in the distribution of cocaine for Strickland began in the summer of 1980, when he introduced Strickland to Sonny Croughn, with the remark that Croughn could "sell a lot of coke." Tr. 438-40. Strickland agreed to provide eocaine to Croughn through Tarantino. Tr. 444-46, 458. Following a phone call from Tarantino, Strickland travelled from the District of Columbia to New Jersey to deliver cocaine to Croughn. Strickland "fronted" the coeaine to Croughn, who later paid Strickland through Tarantino. Tr. 457-61. Similar transactions followed. Tr. 462-66. In some of these, Strickland was accompanied by other members of the conspiracy, e.g., Baker (Tr. 2412-19) and Kohn (Tr. 477-78). In all of these instances, Tarantino was present at the delivery of the coeaine.

39 Tarantino also was aware of the national scope of the conspiracy. At the end of 1980, Strickland called Croughn from Houston and asked if Croughn could dispose of an excess kilo of cocaine. Tarantino immediately called back and arranged for a courier to pick up the cocaine. Striekland met the eourier, and Croughn and Tarantino confirmed the delivery. Tr. 479-83.

40 Tarantino's second level of involvement was his role in attempting to launder the proceeds of the conspiracy's cocaine sales. Strickland first met Tarantino in connection with Blaek's casino project (the Gateway Project; see supra at 1395). At first, Strickland concealed from Tarantino the source of the funds he was investing in the Gateway Project. But when Tarantino met Strickland in Las Vegas in 1980, he told Striekland he was aware that Strickland and Burns had been selling drugs. He thanked Strickland for his help in supporting the Gateway Project, and later advised him to make further investments in the casino. Tr. 437-38, 1208, 375-76. At a subsequent meeting in New Jersey concerning the Gateway Project, Tarantino introduced Strickland to Croughn as a man who could "sell a lot of coke." Tr. 438-40. Tarantino at least knew of, and arguably urged and facilitated Strickland's investment in the Gateway venture. Given Tarantino's knowledge of the nature of Strickland's business, he also would have known that Strickland's investments in Gateway were made to clean up his money. Tarantino knew of and condoned this aspect of the conspiracy's goals.

41 Tarantino managed a separate casino project in Haiti. He encouraged Strickland to invest in this project as well and credited the proceeds of Strickland's sales to Croughn to the Haitian project. Tr. 470, 475-77. Strickland invested $300,000 in the Haitian project, thinking it a good laundering device. Tr. 470-71.

42 Tarantino was familiar with other major players in the conspiracy. He knew Black through the Gateway Project. Tr. 434-36. He was acquainted with Bell, and was working with him on a separate investment project. Tr. 538-538A. Tarantino and Kohn, the conspiracy's bookkeeper, also had extensive discussions concerning the Haitian and other potential investment projects. Tr. 521, 3302-10.

43 Tarantino argues that, at most, the evidence established a conspiracy between Strickland, Croughn, and Tarantino to distribute cocaine, and an agreement by Strickland to invest $300,000 in the Haitian project. This conspiracy, says Tarantino, did not involve Black and Burns and was therefore totally separate from the conspiracy alleged in the indictment. Brief for Tarantino at 44. The jury concluded otherwise, however, and the evidence is sufficient to support its verdict. Tarantino was aware of Strickland's acquisition and distribution of cocaine; it is immaterial that he did not know the precise identities of all the other conspirators. As we discuss elsewhere in this opinion, Black and Burns were sufficiently aware of and entered into the goals of the conspiracy, even if they did not know the full extent of Strickland's dealings with Tarantino.

4. Bell

44 The evidence clearly established that Bell was the conspiracy's major distributor of cocaine in Washington, D.C. See, e.g., Tr. 98-118, 526-29. Bell does not seriously dispute this now, but claims he was unaware of other aspects of Strickland's operations, including the distribution of cocaine elsewhere in the nation and the laundering of the cocaine profits. Brief for Bell at 35-39.

45 The government was not obliged to prove that Bell knew every detail of the conspiracy. All that is required is that the evidence establish that he knew others were involved and that his own benefits depended upon the success of the entire venture. See United States v. Sisca, 503 F.2d 1337, 1345 (2d Cir.), cert. denied, 419 U.S. 1008, 95 S.Ct. 328, 42 L.Ed.2d 283 (1974) (cited in Brief for Bell at 35), and supra at 1392-93.

46 Bell had extensive dealings not only with Strickland, but also with other players in the conspiracy's distribution chain. He received cocaine deliveries from Ribera (Tr. 1726, 1740-43), acted as a money courier between Strickland and Kastrenakes (Tr. 532-33), and distributed cocaine supplied by Kastrenakes (Tr. 535-36). Bell was at least acquainted with Kupits and Kohn in Texas (Tr. 3269-70) and Tarantino in New Jersey (Tr. 538-538A). From this evidence, a jury could conclude that Bell was aware of the nationwide conspiracy and his dependence on its continued success. The existence of multiple distribution points does not, in itself, establish multiple conspiracies. See, e.g., United States v. Jenkins, 779 F.2d 606, 616-17 (11th Cir.1986); United States v. Bibbero, 749 F.2d 581, 587 (9th Cir.1984), cert. denied, 471 U.S. 1103, 105 S.Ct. 2330, 85 L.Ed.2d 847 (1985); United States v. Vila, 599 F.2d 21, 24 (2d Cir.), cert. denied, 444 U.S. 837, 100 S.Ct. 73, 62 L.Ed.2d 48 (1979).

47 Finally, although the evidence did not establish that Bell directly participated in the

laundering phase of the conspiracy, he was aware that the continued success of the conspiracy depended upon effective means of "cleaning up" its funds. The laundering of funds was a further link in the chain of which Bell was a part, and the conspirators' acts in laundering the funds were thus attributable to Bell. Pinkerton, 328 U.S. at 646-47, 66 S.Ct. at 1183-84.

II. SEVERANCE

48 Each appellant argues that the trial court should have granted his motion for severance. We review the denial of a motion to sever under an abuse of discretion standard. United States v. Butler, 822 F.2d 1191, 1194 (D.C.Cir.1987).

A. Disparity in Evidence

49 Severance is required in two situations. First, when the evidence against the other defendants was "far more damaging," the prejudicial spillover may have deprived a defendant of a fair trial. Id. (quoting United States v. Sampol, 636 F.2d 621, 645 (D.C.Cir.1980)). The trial judge is usually in the best position to evaluate the resulting degree of prejudice, and jury instructions generally are sufficient to minimize any disparities in evidence. Butler, 822 F.2d at 1194; United States v. Wright, 783 F.2d 1091, 1096 (D.C.Cir.1986).

50 Although each appellant claims the government's case against him was far weaker than that against the other appellants, the evidence was not so dramatically disparate that the judge abused his discretion in denying the motions to sever. We have rarely held that a district court improperly denied a motion to sever. In United States v. Mardian, 546 F.2d 973 (D.C.Cir.1976) (en banc), Robert Mardian was tried along with the other Watergate conspirators. Mardian's participation in the conspiracy was brief, and the evidence against him was slight. Nevertheless, we held that severance was not required until Mardian's lawyer became ill during the trial. 546 F.2d at 979-80.

51 In Sampol, 636 F.2d 621, Ignacio Sampol was tried only for misprision of a felony and making false statements, whereas his co-defendants were tried for conspiracy and murder. Because of the quantity and inflammatory nature of the testimony against the co-defendants, the risk of a transference of their guilt was significant. Moreover, the testimony created a false impression that Sampol was involved in the conspiracy. 636 F.2d at 644-48.

52 In United States v. Bruner, 657 F.2d 1278 (D.C.Cir.1981), however, the kingpin of the conspiracy was tried along with his confederates. Lynch directed the operation, in which groups of overweight women were sent to doctors in various cities to obtain prescriptions for Dilaudid and Preludin. These drugs were later illegally resold. Although the evidence against Lynch was "substantial," there was also "independent and substantial evidence" that the co-defendants participated in the conspiracy. The disparity in the weight of the evidence was not so dramatic as to require a severance. 657 F.2d at 1290-91.

53 We also distinguished Mardian and Sampol in United States v. Sutton, 801 F.2d 1346 (D.C.Cir.1986). There, we held the trial judge did not abuse his discretion in denying a motion for severance when the charges required the "presentation of much of the same evidence, testimony of the same witnesses, and involve[d] two defendants who [were] charged, inter alia, with participating in the same illegal acts." 801 F.2d at 1365.

54 Here, too, there was substantial and independent evidence of each appellant's significant involvement in the conspiracy. Once each appellant was tied to the conspiracy, the acts of each conspirator in furtherance of the conspiracy's aims were attributable to all. The evidence and the charges were substantially overlapping, but the overlap was caused by the involvement of each appellant in a single scheme. In these circumstances, severance was not required.

B. Conflicting Defense Theories

55 Severance may also be required in cases in which co-defendants rely on defenses that are mutually contradictory. "[T]he denial of a severance motion generally constitutes an abuse of discretion when 'the defendants present conflicting and irreconcilable defenses and there is a danger that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.' " Wright, 783 F.2d at 1094 (quoting Rhone v. United States, 365 F.2d 980, 981 (D.C.Cir.1966)). In Wright, two men were charged with kidnapping. Wright intended to claim insanity, and Moss duress, but this in itself did not establish the requisite conflict requiring severance. Wright further claimed that a substantial factor contributing to his mental illness was the murder of his lover. But Moss claimed that Wright had said that he himself had killed his lover. According to Moss, Wright's statement lent plausibility to his alleged threats, which forced Moss to join in the kidnapping plan. Although we recognized the conflict to be "a real one," the defenses were not "so contradictory as to raise an appreciable danger that the jury would convict because of the inconsistency." The inconsistency "would not logically require a jury to find Wright guilty if it acquitted Moss." 783 F.2d at 1095.

56 The conflicts between appellants in the instant case are far less severe, and not such as to require severance. For example, Black claims that restrictions placed on impeachment of Strickland resulted from conflicts with co-defendants. Black's counsel was not permitted to inquire about Strickland's knowledge of the murder of a Colombian drug source. But this restriction was imposed by the district court not because of the tendency to implicate Burns (as Black claims), but because it was "not probative of anything." Tr. 713. Similarly, the court restricted inquiry on cross-examination as to witnesses' fears of other defendants. See, e.g., Tr. 3574-77. The court imposed these restrictions partly to avoid unfair prejudice to the co-defendants, but mainly because the probative value of the evidence was slight. Finally, although the trial court refused to allow Bell's counsel to cross-examine Strickland regarding an alleged plot to kill Kupits because the probative value was outweighed by the danger of prejudice to Black, see infra at 1405-07, we cannot say that the decision not to sever Bell (or Black) from the other defendants based on this prejudice was an abuse of discretion. The conflicts between the defendants in this respect were not so severe as to require severance.

III. JURY INSTRUCTIONS

A. Single Versus Multiple Conspiracies

57 After a thorough instruction on the elements of conspiracy, the trial judge told the jury:

58 [I]n the context of that instruction as to the elements of a conspiracy, you're further instructed with regards [sic] to this alleged conspiracy offense, that proof of several

separate conspiracies is not proof of the single, overall conspiracy charged in the indictment unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges. What you must do is determine whether the single conspiracy charged in the indictment existed between two or more conspirators. If you find that no such conspiracy existed, then you must acquit the defendants as to that charge. However, if you are satisfied that such a conspiracy existed, you must determine who were the members of that conspiracy.

59 If you find that a particular defendant is a member of another conspiracy, not the one charged in the indictment, then you must acquit the defendant. In other words, to find a defendant guilty you must find that he was a member of the conspiracy charged in the indictment and not some other, separate conspiracy.

60 Tr. 6444-45. Taking the instructions as a whole, this charge was proper. E.g., United States v. Darby, 744 F.2d 1508, 1542 (11th Cir.1984) (approving identical instruction), cert. denied, 471 U.S. 1100, 105 S.Ct. 2322, 85 L.Ed.2d 841 (1985); cf. United States v. Gantt, 617 F.2d 831, 846 (D.C.Cir.1980) (approving substantially similar instruction).

61 Appellant Bell nevertheless complains that Judge Hogan did not adopt the precise language of his proposed instruction, especially the following:

62 A conspiracy may ... include two or more separate agreements ... providing the participants in the separate agreements are joined together by their knowledge of the essential features and scope of the overall conspiracy and by the common goal. Where the participants in separate agreements are not so joined, they are not members of a single, overall conspiracy....

63 See United States v. Bailey, 607 F.2d 237, 243 n. 14 (9th Cir.1979) (the source of the instruction), cert. denied, 445 U.S. 934, 100 S.Ct. 1327, 63 L.Ed.2d 769 (1980). Bell argues that the instruction given "provided no guidance to the jury as to how to determine whether, in fact, there was more than one conspiracy." Brief for Bell at 42.

64 We do not decide the correctness of the Bailey instruction, as the instruction given here was adequate. The trial court is required to give a proper instruction, and to instruct on the defendant's theory of the case if supported by the evidence. United States v. Payne, 805 F.2d 1062, 1067 (D.C.Cir.1986). The court is not required to give the instruction in the specific language requested by the defendant. Id. Judge Hogan did instruct the jury on the elements of conspiracy, Tr. 6432-35, so that the jury had a proper basis for determining whether the agreements between the various conspirators comprised one or several conspiracies. The adequacy of the instructions must be determined by looking at the charge as a whole. E.g., United States v. Douglas, 818 F.2d 1317, 1321-22 (7th Cir.1987). The slight variation from the proposed instructions did not substantially prejudice the appellants, particularly in view of the strength of the evidence of a single conspiracy. Cf. United States v. Davenport, 808 F.2d 1212, 1217-18 (6th Cir.1987) (because of strength of evidence and adequacy of instruction on elements of conspiracy, failure to give specific instruction on multiple conspiracies was harmless error).

65 Finally, Bell's claim that the court "fail[ed] to charge the jury that if it found that multiple conspiracies existed, it should disregard all evidence introduced by the government relating to conspiracies other than the one in which the defendant was

involved," Brief for Bell at 42, is inaccurate. Judge Hogan instructed the jury as follows:

66 [I]n determining whether a particular defendant was a member of the conspiracy, if any existed, you may consider only his own acts and statements. A defendant cannot be bound by the acts or declarations of the other participants unless and until it is established that a conspiracy existed and the defendant was one of its members.

67 Tr. 6434. This instruction adequately conveyed the importance of segregating evidence between defendants. Although the jury was not instructed in the precise terms Bell desires, it was told that the defendants were bound by co-defendants' acts only if they were found to be members of the same conspiracy.

B. The Travel Act

68 The Travel Act, 18 U.S.C. Sec. 1952 (1982),[1] broadly forbids travel in interstate commerce or the use of facilities of interstate commerce for the purposes of furthering "any unlawful activity." 18 U.S.C. Sec. 1952(a). The statute defines "unlawful activity" as "any business enterprise" involving narcotics or controlled substances, 18 U.S.C. Sec. 1952(b)(1), and the courts have construed "business enterprise" to require "a continuing course of conduct rather than sporadic casual involvement in a proscribed activity." United States v. Kendall, 766 F.2d 1426, 1434 (10th Cir.1985), cert. denied, 474 U.S. 1081, 106 S.Ct. 848, 88 L.Ed.2d 889 (1986); United States v. Corbin, 662 F.2d 1066, 1072 (4th Cir.1981). See also H.R.Rep. No. 966, 87th Cong., 1st Sess. 3 (1961) ("[I]ndividual or isolated violations would not come within the scope of this bill since they do not constitute a continuous course of conduct so as to be a business enterprise.") Black attacks his conviction under the Travel Act on the ground that the trial judge's charge failed to tell the jury of the need to find a continuous course of conduct. Because Black failed to object at trial we could reverse only if we found "plain error," which we do not.[2]

69 The trial court's instructions to the jury on the "unlawful activity" element of the Travel Act did not specifically mention the "business enterprise" aspect of the offense:

70 In this case, the unlawful activity is alleged to be the distribution of cocaine and other controlled substances and the conspiracy to distribute cocaine and other controlled substances.... You are instructed as a matter of law that the distribution of cocaine and other controlled substances are violations of the laws of the United States.

71 Tr. 6462-63. Because this instruction did not mention the "business enterprise" requirement or make clear that the jury had to find a continuous course of criminal conduct, it was an incomplete discussion of the "unlawful activity" element of the Travel Act. United States v. Rinke, 778 F.2d 581, 586 (10th Cir.1985) (specific findings as to the existence of a "business enterprise" essential to conviction at bench trial); United States v. Kaiser, 660 F.2d 724, 731 (9th Cir.1981) (error to refuse to instruct the jury that it must find a continuous course of criminal conduct to convict on Travel Act counts), cert. denied, 455 U.S. 956, 102 S.Ct. 1467, 71 L.Ed.2d 674 (1982); cf. United States v. Gallo, 782 F.2d 1191, 1195 (4th Cir.1986) (error to fail to give any definition of "unlawful activity").

72 The defendant did not, however, object at trial to this definition of "unlawful activity."[3] Consequently, reversal of the trial court would require a finding of plain

error. United States v. DeBango, 780 F.2d 81, 84 (D.C.Cir.1986). See also FED.R.CRIM.P. 30 ("No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."); FED.R.CRIM.P. 52(b) ("Plain errors or defects affeeting substantial rights may be noticed although they were not brought to the attention of the court.") The Supreme Court has recently admonished that the plain error exception is an exceedingly narrow one, to be used only " 'to correct particularly egregious errors,' United States v. Frady, 456 U.S. 152, 163, 102 S.Ct. 1584, 1592, 71 L.Ed.2d 816 (1982), those errors that 'seriously affect the fairness, integrity or public reputation of judicial proceedings,' United States v. Atkinson, 297 U.S. [157,] 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 [(1936)]." United States v. Young, 470 U.S. 1, 15, 105 S.Ct. 1038, 1046, 84 L.Ed.2d 1 (1985).

73 The inadequacy of the court's charge on the "unlawful activity" aspect of the Travel Act does not rise to the level of plain error. First, although the instruction did not contain the specific words "business enterprise" or "continuous course of conduct," the references to "distribution of cocaine" and the "conspiracy to distribute cocaine" indirectly expressed those concepts. Although both distribution and conspiracy may, of course, consist of sporadic activities, we think that in the context of this case the jury could only understand the instructions to refer to the massive ongoing conspiracy alleged in the indictment. Second, and more fundamentally, the jury convicted all of the defendants--including Black and Tarantino--on Count One of the indictment, which alleged a continuous, vertically integrated, geographically widespread operation to acquire, distribute and sell cocaine, and to launder the proceeds. The conspiracy spanned several years, and the jury heard evidence showing that Black and Tarantino were each involved in more than a few sporadic trausactions during this period. The convictions for this wide-ranging conspiracy render it essentially inconceivable that Black or Tarantino was harmed by the court's failure to more clearly emphasize the "continuous course of conduct" aspect of "unlawful activity." Finally, in evalnating whether the instructions constituted plain error, we may ourselves evaluate the strength or weakness of the evidence against the defendants on the Travel Act. Young, 470 U.S. at 19-20, 105 S.Ct. at 1048 (plain error reversal unwarranted because overwhelming evidence of defendant's fraud showed that prosecutor's improper remarks did not undermine the fairness of the trial). In this case the evidence showed beyond any reasonable doubt that Tarantino and Black were each a vital actor in an ongoing criminal business enterprise to acquire, distribute, sell, and profit from illicit drugs. See supra at 1395-98.

74 That the error involved an omission of essential ingredients of the crimes makes no difference in this analysis. In the related area of "harmless error" analysis, applicable where proper objection has been made and where accordingly the standards must be more stringent, the Supreme Court has made clear a conviction may be sustained even when the trial court's instructions allow the jury to convict without finding "each element of the crime under the proper standard of proof." Pope v. Illinois, --- U.S. ---, 107 S.Ct. 1918, 1922 n. 7, 95 L.Ed.2d 439 (1987), citing Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986). As the facts that the jury necessarily found established guilt beyond a reasonable doubt, cf. Pope, 107 S.Ct. at 1922, the convictions on the Travel Act counts must stand.

C. The Cash Transaction Reports Instruction

75 Defendant Black also objects to the trial court's instructions regarding the filing of cash transactions reports ("CTR"s) under the Currency Transaction Reporting Act ("CTRA"), 31 U.S.C. Sec. 5313(a) (1982). This requires banks to report certain transactions as specified by the Treasury Department, which has set a threshold of $10,000. See 31 C.F.R. Sec. 103.22 (1987). Black's objections are that the court did not make it sufficiently clear, first, that only the financial institution has a duty to file CTRs, and second, that the depositors are completely free to structure their transactions so as to keep under the threshold. We find no error.

The court instructed the jury as follows:

76 The law provides that a financial institution shall file a report of each transaction in currency of more than $10,000. The duty and the responsibility to obtain the required information, fill out and file the required currency transaction report is on the banking institution in the case of bank deposits exceeding $10,000. The depositor, that is the person making the deposit, does not file the report.

77 Tr. 6421. These instructions obviously make it clear that depositors do not have a duty to file CTRs, so we turn to the second objection.

78 Here Black specifically objects to the trial court's refusal to give his Requested Instruction No. 8, to the effect that the law does not prohibit a person from structuring his transactions in such a way as to avoid the filing of CTRs. We note at the outset that Black's view of the law is hotly disputed in the courts of appeal. Compare United States v. Nersesian, 824 F.2d 1294, 1311 (2d Cir.1987); United States v. Puerto, 730 F.2d 627, 631 (11th Cir.), cert. denied, 469 U.S. 847, 105 S.Ct. 162, 83 L.Ed.2d 98 (1984); United States v. Tobon-Builes, 706 F.2d 1092, 1098 (11th Cir.1983) with United States v. Larson, 796 F.2d 244, 246 (8th Cir.1986); United States v. Reinis, 794 F.2d 506, 508 (9th Cir.1986); United States v. Varbel, 780 F.2d 758, 762 (9th Cir.1986); United States v. Anzalone, 766 F.2d 676, 681 (1st Cir.1985). Even if we assume that the depositor has no legal duty not to structure his transactions so as to avoid the filing of CTRs, however, we still conclude that omission of the requested instructions was not error. The prosecution did not charge Black with substantive violations of the CTRA.[4] Though the prosecutor made references to Black's evident efforts to keep below the trigger amount, he did so exclusively to support the inference that Black wished to avoid the governmental scrutiny that would follow if the bank filed a CTR with the federal government each time he deposited proceeds of drug sales. Tr. 6082-83, 6085-90, 6354-55. Thus the government claim was that these otherwise apparently lawful acts were unlawful only because they were carried out in furtherance of a conspiracy.[5]

79 Clearly many acts that are by themselves perfectly legal may constitute overt acts manifesting participation in an illegal conspiracy, C. TORCIA, 4 WHARTON'S CRIMINAL LAW Sec. 728 at 538 (1981). The jury need not be informed that all such acts are in the normal course of things perfectly legal. For instance, where conspiracy to rob a bank is charged and one member is assigned to "case the joint" by driving around the bank, it would be absurd to argue that the trial court must explain that driving a car near a bank is legal. In the absence of either a charge against Black under the CTRA itself or insinuations by the prosecutors or the court that Black's actions were illegal apart from their connection to the conspiracy, we find no error in denial of the proposed instructions.

D. The Missing Witness Instruction

80 Burns argues that the trial court should have given a "missing witness" instruction (suggesting an inference adverse to the government), or allowed Burns' counsel to note for the jury the absence of Steve Kupits, Nancy Strickland and many other witnesses that counsel at trial vaguely characterized as having a special "relationship" with the government. See, e.g., Tr. 5985. The decision to refuse a missing witness instruction rests within the discretion of the trial court. United States v. Montoya, 676 F.2d 428, 431 (10th Cir.), cert. denied, 459 U.S. 856, 103 S.Ct. 124, 74 L.Ed.2d 108 (1982), and nothing in this case suggests any abuse of that discretion.

81 First, an instruction or inference that the missing witness' testimony would be unfavorable to the government is generally permissible only when it is within the government's exclusive power to call the witness to testify. Id. In the instant case, Burns had every opportunity to call these witnesses; indeed, the trial court at one point specifically questioned Burns as to why he could not call them. Tr. 5859. Burns has made no specific allegation that any of these potential witnesses were in fact unavailable to the defense, and, contrary to Burns' assertion, no automatic inference of exclusive government control arises from the fact that witnesses are acting as government informants, DeBango, 780 F.2d at 84 (informant equally available to prosecution and defense); Montoya, 676 F.2d at 431 (same), or from a grant of immunity from prosecution, United States v. Keplinger, 776 F.2d 678, 702 (7th Cir.1985), cert. denied, 476 U.S. 1183, 106 S.Ct. 2919, 91 L.Ed.2d 548 (1986).

82 Second, the trial court itself was responsible for the non-appearance of at least some of these possible witnesses; it restricted the government's intended presentation in the interest of avoiding cumulative evidence. Tr. 5864, 5990-91. Cf. United States v. Jennings, 724 F.2d 436, 446 (5th Cir.) (missing witness instruction not justified if testimony of witness not called is likely to have been cumulative or corroborative), cert. denied, 467 U.S. 1227, 104 S.Ct. 2682, 81 L.Ed.2d 877 (1984).

83 On these facts the trial court plainly did not abuse its discretion in declining to invite, or to allow defendants to invite, an inference against the government.

E. Strickland's Guilty Plea

84 Strickland testified at trial that he had pleaded guilty to the same conspiracy counts for which the defendants were being tried. Tarantino contends that the trial court should have informed the jury that they should not consider Strickland's guilty plea in assessing the defendants' guilt or innocence.

85 A government witness' guilty plea obviously may not be used as substantive evidence of the guilt of defendants, but the plea is equally obviously admissible to show the witness' acknowledgement of his role in the offense and to reflect on his credibility. United States v. Roth, 736 F.2d 1222, 1226 (8th Cir.), cert. denied, 469 U.S. 1058, 105 S.Ct. 541, 83 L.Ed.2d 429, 433 (1984). In some instances—most obviously where there is a serious risk that the plea itself may be taken by the jury to support the defendants' guilt—a limiting instruction may be necessary to avoid prejudice. Wallace v. Lockhart, 701 F.2d 719, 725-26 (8th Cir.), cert. denied, 464 U.S. 934, 104 S.Ct. 340, 78 L.Ed.2d 308 (1983). At trial, however, Tarantino's counsel neither requested limiting instructions nor objected to the court's failure to give such instructions. Therefore, we could reverse only if the omission were plain error.

DeBango, 780 F.2d at 84; FED.R.CRIM.P. 30; FED.R.CRIM.P. 52. See also supra at 1402.

86 Here the defendants were not disadvantaged in any significant way by the omission of the instructions. The government never attempted to argue or even hint that Strickland's guilty plea had any bearing on the defendants' guilt or innocence. Wallace v. Lockhart, 701 F.2d at 726; cf. United States v. Fleetwood, 528 F.2d 528, 532-33 (5th Cir.1976) (government's emphasis on witness' guilty plea was prejudicial). Moreover, the overwhelming evidence of Tarantino's involvement in the conspiracy negates any possible harm from Strickland's statement. Failure to instruct on the issue was not plain error. United States v. Martin, 790 F.2d 1215, 1219 (5th Cir.), cert. denied, --- U.S. ----, 107 S.Ct. 231, 93 L.Ed.2d 157 (1986); United States v. Smith, 790 F.2d 789, 793-94 (9th Cir.1986); Roth, 736 F.2d at 1226-27.

IV. RESTRICTIONS ON CROSS-EXAMINATION

87 The defendants have challenged several rulings of the trial court restricting the scope of cross-examination of government witnesses. We address the various arguments separately below. We note at the outset, however, that "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on ... cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety or interrogation that is repetitive or only marginally relevant." Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986). See Fed.R.Evid. 611. Appellate review under the harmless error doctrine is to "focus[ ] on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." Van Arsdall, 106 S.Ct. at 1436-37.

88 In Van Arsdall the Supreme Court found a breach of the Confrontation Clause when the trial court "prohibited all inquiry into the possibility that [a key prosecution witness] would be biased as a result of the State's dismissal of his pending public drunkenness charge." 106 S.Ct. at 1435 (emphasis in original). But it also made clear that "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Id. at 1435 (quoting Delaware v. Fensterer, 474 U.S. 15, 106 S.Ct. 292, 295, 88 L.Ed.2d 15 (1985) (emphasis in original)). Of course one might find a prohibition of "all inquiry" into almost any specific subject simply by defining the subject narrowly, but such a reading would plainly conflict with the Court's observations on the trial court's right to impose reasonable limits. Limits imposed in the interest of avoiding prejudice to a defendant (as in one instance here) are especially likely to cut off what might be loosely called a "subject," since such limits will typically foreclose reference to some discrete event that carries a risk of prejudice. Accordingly, we believe that we must conduct our Confrontation Clause inquiry with some consideration of the countervailing values.

A. Strickland's Plan to Murder Kupits

89 The trial court refused to allow Bell's counsel to cross-examine Strickland about an alleged plot, involving Strickland, Blaek, Kohn, Ribera and Kastranakes, to hire a hit man to murder Kupits in Texas. The supposed rationale for the plan was to prevent Kupits from testifying as a government witness. Tr. 1256-72. Bell asserts that this ruling was an abuse of the trial court's discretion.

90 Under FED.R.EVID. 608(b), specific instances of conduct may, in the discretion of the trial court, be inquired into on cross-examination "if probative of truthfulness or untruthfulness." Although the government argues that the plan to kill Kupits is not probative at all of Strickland's credibility, we cannot agree. To be sure, the planning or commission of a crime of violence without more is not usually thought to bear on a witness' veracity. See J. WEINSTEIN & M. BERGER, 3 WEINSTEIN'S EVIDENCE Sec. 608(05) at 608-45 to 608-46 (1987). For instance, in United States v. Young, 567 F.2d 799 (8th Cir.1977), a case heavily relied upon by the government, the Eighth Circuit held that it was not an abuse of discretion to refuse to allow cross-examination of a witness regarding her attempt to have her ex-husband killed. There the court held that the attempted murder was "not relevant to veracity and honesty." Id. at 803. The viewpoint suggests a strong judicial concern over the drawbacks of allowing such inquiries; surely readiness to kill others for one's personal advantage, of any kind, signifies an egotism that in turn signifies a readiness to blur the truth when it is personally advantageous to do so. Judicial exclusion of such material is not sufficiently explained by any lack of logical connection to credibility.

91 Nonetheless, we think that a murder plan aimed at stamping out evidence impugns a witness' credibility more directly than murder plans generally. Young is therefore not controlling; nowhere in that case was there any suggestion that the witness had wanted her former spouse killed to prevent him from testifying, or in any way to obstruct justice. We think the excluded evidence bears sufficiently on credibility that if the only drawback to admission were the universally applicable ones—diversion of attention, confusion, consumption of time--exclusion would likely be an abuse of discretion. See Fed.R.Evid. 403 (proper to exclude relevant evidence where probative value outweighed by various negative features); United States v. Lavelle, 751 F.2d 1266, 1277 (D.C.Cir.1985) (trial court's balance reversible only for abuse of discretion), cert. denied, 474 U.S. 817, 106 S.Ct. 62, 88 L.Ed.2d 51 (1986).

92 Here, however, a substantial additional factor tilted the balance against inclusion. Strickland's testimony could have been highly prejudicial to Black, who was implicated in the plot to kill Kupits. Indeed, evidence of a conspiracy to kill a co-conspirator could have prejudiced even the defendants not implicated in the plot. Given that the defendants took advantage of numerous opportunities to impeach Strickland in other ways[6] —the defendants' cross-examination of Strickland took five days and covered nearly 1,000 pages of transcript, Tr. 563-1550--and bearing in mind the demands of the Confrontation Clause, we think Judge Hogan's balance entirely suitable.

93 B. Strickland's Benefits from the Witness Protection Program

94 Bell contends that restrictions imposed by the trial court "effectively prevented" his counsel from cross-examining Strickland about the benefits Strickland received in the Witness Protection Program. Bell is right, of course, to point out that a defendant must be given a reasonable opportunity to cross-examine a government witness as to any agreement with the prosecution. United States v. Greenwood, 796 F.2d 49, 54 (4th Cir.1986); United States v. Sampol, 636 F.2d 621, 660 (D.C.Cir.1980). The right to confront prosecution witnesses is not, however, absolute. Reasonable restrictions may be imposed, see Van Arsdall, 106 S.Ct. at 1435, and here we find those of the trial court eminently reasonable.

95 Contrary to Bell's contention, the trial court did not totally preclude Bell from

questioniug Strickland about the program. It ruled that Bell could eross-examine as to paymeuts and othcr support provided by the government, Tr. 1340, imposing one restriction and one condition. The restriction was to prohibit questions about the protection aspect of the program and Strickland's "generalized fear of the othcr defendants, as they contrast to Bell." Id. This limit, based on the vcry real danger of prejudice to the other defendants, was well within the court's discretion.

96 The court's condition was that if the subject were opened, either thc govcrnmcnt or othcr defendants could elicit from Strickland the name of the program--including the word "protection." The court explained that completely unexplained admissions by Strickland that he was receiving money and othcr support from the government would create the damaging inference that the prosecution was paying Strickland to testify. Tr. 1344-46. Bell admits in his brief that his counsel made thc tactical decision to forego all cross-examination on the Witness Protection Program in order to avoid opening the door for the government to bring out the name of the program on re-direct examination, with its connotation that Strickland fcared violcnt retribution from all the defendants, including Bell. Brief for Bell at 31-32. Forcing the defendant to this kind of tactical decision hardly amounts to a total prohibition of inquiry into Strickland's bias. Moreover, Bell's counsel was given the opportunity to--and did--question Strickland at great length as to several other important aspects of the plea bargain with the government. Tr. 1434-69. In sum, the trial court's restrictions on Bell's cross-examination of Strickland regarding the Witness Protection Program constitute neither a violation of the Confrontation Clause nor an abuse of discretion.

97 C. Strickland's Payment of Attorneys' Fees for Nicholls

98 Black, joined by Burns, claims that the trial court erred by refusing to allow re-cross examination of Strickland concerning Black's payment of attorneys' fees to defend one Richard Nicholls, the brother of a co-conspirator, against drug charges. During cross-examination of Strickland by Burns' counsel, Strickland revealed that Black paid a law firm $3800 to represent Nicholls in a pending criminal case. Tr. 672-73. Following re-direct examination of Strickland by the government, the trial court refused to allow Black's trial counsel to question him regarding the payment, stating that the matter could have been brought out by defendants' counsel on cross-examination. Tr. 1663-65.

99 The trial court's explanation for the limit is plainly correct. It was during cross hy Strickland's first cross-examiner (Burns' lawyer) that Strickland made the statement now claimed to be so important. But neither Burns' nor Black's lawyer sought to dig deeper into the area. In neither case was there any intimation from the court that the subject was off limits. As defendants' counsel had ample opportunity to delve into the payment on cross-examination, the trial court was entirely within its discretion in refusing to allow re-cross on the subject.[7] See FED.R.EVID. 611.

100 D. Miscellaneous Restrictions on Cross-Examination

101 Black raises two other issues regarding the court's restrictions on cross-examination that do not merit extended discussion. First, Black claims that the defense was precluded from examining Strickland regarding an alleged agreement with some co-conspirators to "frame" the defendants. Contrary to Black's claim, however, the court never made such a ruling. Rather, the court prohibited defense counsel from questioning Strickland as to why certain alleged co-conspirators, including Sonny

Croughn, had not been indicted. Tr. 1300, 1306, 1309, 1311, 1312, 1317-19. The limit was natural enough, given that Strickland had neither authority to ask the grand jury to indict co-conspirators nor personal knowledge of the reasons for the prosecutor's actions. This was not, therefore, an abuse of discretion.

102 Second, Black contends that the trial court forbade cross-examination of Kohn as to whether Strickland had counseled him to lie about the conspiracy. Again, Black mischaracterizes the court's ruling. The government conceded to the trial court that the defense is "entitled to show that Mr. Strickland tried to interfere with the grand jury process by counseling Mr. Kohn." Tr. 3337. See also Tr. 3338 (government has "no objection to [the defense] asking Mr. Kohn about the counseling he received from Mr. Strickland"). The court thus did not restrict the defense from inquiring into an alleged plan between Kohn and Strickland to lie to the grand jury. Tr. 3340. The court merely ruled that the defense could not examine Kohn regarding Strickland's invocation of the Fifth Amendment before a grand jury. Tr. 3339-41. This was entirely proper.

V. EVIDENTIARY RULINGS

A. Admission of Cocaine

103 Defendants Black and Burns assert that under United States v. Palumbo, 639 F.2d 123 (3d Cir.), cert. denied, 454 U.S. 819, 102 S.Ct. 100, 70 L.Ed.2d 90 (1981), and United States v. Falley, 489 F.2d 33 (2d Cir.1973), the admission into evidence of one gram of cocaine was error because the relevance of the cocaine was outweighed by its prejudicial impact upon the jury. In Falley, the trial judge allowed the government to introduce a suitcase containing a dramatic quantity of hashish a witness had attempted to smuggle into the country, even though the hashish had nothing to do with the smuggling conspiracy charged in the indictment--the hashish was put in solely to prove the witness was a bona fide smuggler. On such facts, the Second Circuit held the admission of the evidence impermissibly prejudicial. Similarly, in Palumbo, there was "no evidentiary connection made between the drug possessed by the co-conspirator and the defendant in the conspiracy in issue." 639 F.2d at 127. In this case, however, the cocaine, although it traveled a somewhat picaresque route before coming into the government's possession, was adequately linked to the conspiracy charged in the indictment.

104 Strickland testified he had ordered a quantity of cocaine from Burns, who sent it to the Washington area via a courier. After receiving the cocaine, Strickland and Baker distributed some of the drug to Williams, a local dealer. Shortly thereafter, Williams was arrested, searched pursuant to the arrest, and relieved of the cocaine. It was this cocaine that was introduced at trial. The drug was plainly relevant to demonstrating the conspiracy's purpose, and it was not an abuse of discretion to admit it.B. Limitations on Collateral Impeachment

105 During the trial, the testimony of two prospective witnesses for Burns and a tape recording allegedly of a statement by Barbara Jo Rubin were excluded. Barbara Jo Rubin, a government witness who was also Burns' second cousin and former girlfriend, testified that Burns had purchased a house in Miami, paying cash for it, that Burns told her the house would be deeded to her as partial payment for her role in drug transactions, and that at the settlement for the house she saw a deed putting the property in her name. Rubin also testified that Burns, together with three of his

friends who were police officers, evicted her from the house in the midst of a nighttime altercation. Burns wished to eall one of the three police officers, Sergeant Matthews, who it is asserted would have testified that the details of the altercation were not as Rubin had claimed, and moreover, that while being evicted Rubin said she did not own the house. The second witness, Burns' former wife, would have authenticated a tape recording Burns sought to have admitted into evidence. The proffered testimony of the former Mrs. Burns was that a woman, whose voice she recognized as Rubin's, left a message on her answering machine one afternoon while she was not at home, admitting the house belonged to Burns. The trial judge refused to allow either witness to testify, largely on the grounds that their testimony concerned only collateral issues. Burns contends this ruling was erroneous.

106 The source of the trial court's power to exclude such evidence is not entirely clear—the government in its brief relies on FED.R.EVID. 608(b), which states that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility ... may not be proved by extrinsic evidence." But by its terms this rule does not apply here, because Matthews would not necessarily have testified about Rubin's conduct, but rather about the details of Rubin's eviction. For example, Rubin said cocaine was in plain view during the eviction, while Matthews would presumably have contradicted her on this point, thereby drawing Rubin's credibility into question, but without referring to ber conduct. So although Burns sought Matthews' testimony in order to impeach Rubin's credibility, the proposed impeachment would not consist of showing specific instances of Rubin's conduct (i.e., fraudnlent or dishonest behavior) indicative of untruthfulness. We think it only this latter type of evidence that Rule 608(b) addresses. See United States v. Opager, 589 F.2d 799 (5th Cir.1979) (Rule 608(b) applies solely to evidence showing a witness' general character for truthfulness).

107 The exclusion of Sergeant Matthews' testimony is an application not of Rule 608(b), but of what is referred to as the "specific contradiction" rule, which states that "a witness may not be impeached by extrinsic evidence (contradiction by another witness or evidence) on a collateral issue." United States v. Pugh, 436 F.2d 222, 225 (D.C.Cir.1970). This rule serves "to avoid confusion of the issues and undue extension of the trial. This is essentially a matter of administrative policy and concentration of attention." Ewing v. United States, 135 F.2d 633, 643 (D.C.Cir.1942).[8] In an old English case the rule is justified as a consequence of our not having a thousand year life span. See 3A WIGMORE, EVIDENCE SEC. 1002 (Chadbourn rev. 1970) (citing Attorney-General v. Hitchcock, 1 Exch. 91, 104 (1847)). The "specific contradiction" rule then is a particular instance of the trial court's general power under Fed.R.Evid. 403 to exclude evidence "if its probative value is substantially outweighed ... by considerations of undue delay, [or] waste of time." See 3 WEINSTEIN, EVIDENCE p 607 at 83.

108 It was undoubtedly within the trial judge's discretion to exclude that part of Matthews' testimony which simply contradicted details of Rubin's eviction, since the eviction was purely collateral to the case and Burns' sole reason for presenting evidence concerning it was to impeach Rubin's credibility.

109 The exclusion of Sergeant Matthews' testimony regarding Rubin's statement that she did not own the house is somewhat more troubling. The government invokes the specific contradiction rule, arguing that because Rubin denied on cross-examination making the statement, the exclusion was proper, for Matthews' testimony was an

impermissible attempt to use extrinsic evidence to impeach a witness on a collateral matter. The difficult issue is whether Rubin's denial can properly be characterized as collateral. A commonly used test of collaterality asks: "Could the fact, as to which error is predicated, have been shown in evidence for any purpose independently of the contradiction?" 3A WIGMORE, EVIDENCE SEC. 1003 (CHADBOURN REV.1970); see Tinker, 417 F.2d at 545 n. 16. The government suggests that under this test the ownership of the house is collateral. This depends, however, despite the seeming definiteness of the test, upon what stage of the trial one takes as his vantage point. Certainly, had the government not introduced any evidence regarding the ownership of the house, Burns could not then himself have introduced evidence on this question, as it bears no relevance to any elements of the crimes charged or to any affirmative defenses to those crimes. To that extent, Burns had no reason "independent[ ] of the contradiction" to offer the evidence.

110 Nevertheless, once Rubin testified she had participated in drug dealing with Burns and had been paid for her services with the house, the question of ownership assumed a relevance independent of Rubin's credibility—the house was now evidence of Burns' participation in a drug conspiracy, for the government claimed it was a form of payment used by Burns to buy services needed to further the aims of the conspiracy. If Burns could show the house had never been transferred to Rubin as a form of payment, he would have negated a part of the government's case against him. We do not believe, therefore, that the issue of who owned the house can properly be called collateral. See United States v. Dimatteo, 716 F.2d 1361, 1366-67 (11th Cir.1983) (evidence may be admitted to prove or disprove material facts in a case, even though a previous witness has testified to the contrary), cert. denied, 474 U.S. 860, 106 S.Ct. 172, 88 L.Ed.2d 143 (1985); Opager, 589 F.2d at 803 (same).

111 The trial judge, however, did not rely on the erroneous proposition that whether Rubin had been paid with a house was collateral. He said "[t]he issue ... as to the purposes for which the house was bought ... is not collateral." Tr. 4277. Instead, Sergeant Matthews' testimony was excluded because it was not sufficiently relevant to the question of ownership--it mainly concerned a dispute on a collateral detail. All the testimony, including the proffer of Sergeant Matthews' testimony, indicated that the night Rubin left Burns' home was very chaotic. Rubin denied having said, while being forcibly evicted, that the house belonged to Burns. Sergeant Matthews would have testified to the contrary. This dispute--whether Rubin made the statement--is certainly collateral to the case, and, furthermore, is not highly probative, given the riotous circumstances in which it was made, of the underlying factual issue of who owned the house.[9] Therefore, keeping in mind the broad discretion entrusted to the trial judge by FED.R.EVID. 403 to exclude relevant evidence on the grounds of confusion, considerations of undue delay or waste of time, we cannot say the exclusion of Sergeant Matthews' testimony was an abuse of discretion. See United States v. DeLoach, 654 F.2d 763, 770 (D.C.Cir.1980), cert. denied, 450 U.S. 1004, 101 S.Ct. 1717, 68 L.Ed.2d 209 (1981).

112 It was also within the trial judge's discretion to refuse to admit the tape recording of the message allegedly left by Rubin on the answering machine of Burns' former wife. The original tape had been erased, and Mrs. Burns had made a copy of it prior to erasing the original, although at trial she admitted to not understanding very much about tape recording. Nor did Mrs. Burns play the tape for anyone, including her lawyer, for over five years, even though the message indicated Burns was the real

owner of the house, and so directly conflicted with Burns' sworn testimony in a divorce proceeding that he did not own the house--a divorce proceeding in which Mrs. Burns had an obvious interest. Furthermore, the tape had not been in Mrs. Burns' continuous custody for the five years; she testified she had recently given it to a lawyer who was representing her in a civil forfeiture proceeding concerning the house. Under United States v. Sandoval, 709 F.2d 1553, 1554 (D.C.Cir.1983), "[t]he admission of tape recordings into evidence is committed to the sonnd discretion of the district court." The trial judge did not abuse his discretion by refusing to admit this evidence on grounds he was not confident of its reliability.

C. Prior Consistent Statements

113 Appellant Burns contends that a prior consistent statement made by Strickland was improperly admitted for the purpose of rebutting a charge of "recent fabrication" implicitly raised against him in cross-examination. See FED.R.EVID. 801(d)(1)(B). At the time this evidence was admitted, no objection was made, so we may consider Burns' contention only if admission was a "plain error[ ] affecting snbstantial rights." FED.R.EVID. 103(d); FED.R.CRIM.P. 52(b).

114 Strickland testified that, during the course of the conspiracy, he had transferred $250,000 to Black. On direct examination, Strickland characterized this transfer as a payment for Black's introducing him to Burns. On cross-examination, Burns' lawyer read Strickland testimony Strickland had given in another proceeding, in which Strickland characterized the payment as an investment in the Dunbar Corporation and its holdings in Atlantic City. Tr. 1026-29. On redirect examination, the prosecutor read additional testimony given hy Strickland at the same previous trial, in which Strickland was asked whether he got anything besides stock in Dunbar Corporation, and Strickland answered "Well, I got the introduction to Robert Burns." Tr. 1625.

115 Under FED.R.EVID. 801(d)(1)(B), a prior consistent statement is admissible if the declarant testifies at trial, is subject to cross-examination concerning the statement, and the statement is "consistent with declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication." United States v. Sampol, 636 F.2d 621, 671 (D.C.Cir.1980); see also United States v. Coleman, 631 F.2d 908, 913-14 (D.C.Cir.1980). Strickland's prior consistent statements satisfy these requirements. Furthermore, on redirect Strickland was merely asked to confirm the remainder of the prior statements already introduced on cross-examination, in order to place those statements in context. The opposing party may not pick and choose among prior statements to create an appearance of conflict and then object when this appearance is rebutted by means of a fuller version of the same prior statements. See United States v. Andrade, 788 F.2d 521, 532-33 (8th Cir.), cert. denied, --- U.S. ---, 107 S.Ct. 462, 93 L.Ed.2d 408 (1986). It was not error, much less plain error, for the trial judge to admit these statements.

D. Co-conspirators' Statements

116 Under FED.R.EVID. 801(d)(2)(E), "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy" is not hearsay. Appellants Black and Burns assert the admission of several hearsay statements was error, because the statements were not made "during the course and in furtherance of the conspiracy." The "in furtherance of" requirement is a limitation on what statements by co-conspirators may be admitted; mere narratives of past successes and failures,

for example, are not admissible. United States v. Haldeman, 559 F.2d 31, 110 (D.C.Cir.1976) (en banc), cert. denied, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977). Nor are a "conspirator's casual comments to people outside or inside the conspiracy" admissible under this rule. United States v. Snider, 720 F.2d 985, 992 (8th Cir.1983), cert. denied, 465 U.S. 1107, 104 S.Ct. 1613, 80 L.Ed.2d 142 (1984). If the statement, however, can reasonably be interpreted as encouraging a co-conspirator or other person to advance the conspiracy, or as enhancing a co-conspirator or other person's usefulness to the conspiracy, then the statement is in furtherance of the conspiracy and may be admitted. See id.; United States v. Patton, 594 F.2d 444, 447 (5th Cir.1979).

117 Ribera testified he had discussions with Strickland during which Strickland said that investing in the casino Black was building in Atlantic City "would be a good way for us to invest our money, and even to wash or clean up our money, which was this illegal drug money." Tr. 1825. Black's objection to this testimony is twofold. First, Black argues that since Ribera states he did not invest in Black's casino venture, Strickland's remark was merely a part of a casual conversation and not in furtherance of the conspiracy. But the statement is essentially an invitation to participate in a further stage of the conspiracy--that the invitation was declined is irrelevant to whether it was intended to further the conspiracy. Secondly, Black argues that laundering drug proceeds is unrelated to the conspiracy to distribute cocaine, and thus the statements were not in furtherance of the conspiracy charged in the indictment. However, as was shown supra at 1396-97, this argument ignores the nature of the conspiracy charged, which included the laundering of funds. In any event, there is no requirement that the actions invited by the hearsay statements be charged in the indictment or be illegal--any act which furthers the conspiracy (certainly easy transfer of the large sums of money generated by the sale of cocaine would further a conspiracy to distribute cocaine) may be admitted under this rule.

118 Rubin testified that while she was living with Burns, he would act as a middleman for numerous cocaine sales, operating out of his home. Rubin was often home while these deals took place, but in another room. Her testimony concerning many of the details of these transactions would therefore be hearsay but for 801(d)(2)(E)--after the deal was done and the participants had left, Burns would tell her what happened, including details about his profits. Appellants characterize these conversations as mere narrations of past events--not necessary to or in furtherance of the ongoing conspiracy. Appellants' argument would be stronger if Burns had recapitulated the details of these transactions months or years after they had occurred, for then it would be more difficult to see what purpose such narration could have. But where the recounting took place soon after the events at issue, and where Rubin was a participant in the overall conspiracy, acting as a courier and helping to count the money generated by the deals, Burns' reports helped to keep Rubin current on the status of the business. In particular, it is quite plausible that the statements regarding profits could have served as motivation for her continued participation.[10]

119 Later on in the trial, Kohn, who acted as bookkeeper for the land project in Texas, testified about statements by Strickland and Maddux concerning the fictitious nature of two $60,000 loans Black had made to the Texas land development corporation. Evidence showed these loans had been "washes": Black made out two $60,000 checks only after receiving two payments of $60,000 in cash, thus providing a seemingly legitimate source for the funds used by the land development corporation. It was

some time after these phony loans were made that Kohn was informed about them, and for this reason appellant Black objects to the admission of Strickland's statements to Kohn, contending they were mere narratives of past events. As bookkeeper for the organization, however, Kohn needed to understand the nature of the debts nominally listed on the books of the Texas land corporation. This became particularly important when Black began to demand some form of repayment, so as to convince the IRS that the loans were legitimate. Thus, although Strickland's statements to Kohn about the loans did not "set in motion transactions that were an integral part of the ... scheme," United States v. Eubanks, 591 F.2d 513, 520 (9th Cir.1979), they did provide important background information to a key player, thereby helping him to carry out his duties. The statements were therefore properly admitted. See Snider, 720 F.2d at 993 (statements were in furtheranee of a conspiraey when they aided a co-conspirator's "informed participation"); Haldeman, 559 F.2d at 110-11 (statements necessary to facilitate coordination among co-conspirators in covering up conspiracy are in furtherance of conspiracy).

120 VI. THE REFERENCE TO BLACK'S BEING NAMED IN ANOTHER INDICTMENT

121 In Bell's counsel's cross-examination of Strickland as to his plea bargain with the government, he showed Strickland a copy of the indictment in another case, and Strickland inadvertently referred to Black's inclusion among the named defendants:

122 Q. And [the government is] also going to drop count 25, another travel act count; is that correct?

123 A. Count 25?

124 Q. Right.

125 A. Count 25 is Mr. Black.

126 Q. You are not in that count?

127 A. I am sorry. I don't see it here, no. It is just Mr. Black.

128 * * *

129 * * *

130 Q. How about 28?

131 A. Mr. Black and myself.

132 Tr. 1444-45. Black's counsel immediately moved for a mistrial. The trial court denied the motion, but offered to instruct the jury to disregard the testimony. Black's trial counsel declined the offer. Tr. 1454-57.

133 The trial court did not err by denying Black's motion for a mistrial. The decision whether to grant a mistrial generally rests within the sound discretion of the trial court, and the single most important factor in making that determination is the extent to which the defendant has been prejudiced. See United States v. Bailey, 675 F.2d 1292, 1297 (D.C.Cir.), cert. denied, 459 U.S. 853, 103 S.Ct. 119, 74 L.Ed.2d 104 (1982). Here the risk of prejudice seems slight. Contrary to Black's characterization of the testimony as "repeated references to Mr. Black's involvement in a concurrent criminal case," Brief for Black at 52, Strickland's mention of Black's indictments was

inadvertent and brief, and took place on a single occasion five weeks before the start of the jury's deliberations. The government never mentioned the reference in later questions or argument. Thus we cannot say that the reference had such a prejudicial effect on the jury's decision that it was an abuse of discretion to deny the motion.

134 In two past decisions we have upheld denials of a mistrial after far more hazardous blurtings. In Hardy v. United States, 343 F.2d 233, 234 (D.C.Cir.1964), cert. denied, 380 U.S. 984, 85 S.Ct. 1353, 14 L.Ed.2d 276 (1965), a witness was asked if he had ever previously seen the defendant, and replied in the affirmative, explaining that "we had did [sic] time in the penitentiary togetber." Similarly, in McIntosh v. United States, 309 F.2d 222 (D.C.Cir.1962), cert. denied, 373 U.S. 944, 83 S.Ct. 1557, 10 L.Ed.2d 700 (1963), a government witness referred to a person as the defendant's "parole officer." We held that the "vague and indirect suggestion of some previous conviction" did not compel a mistrial. Id. In both cases the jury was--in effect--informed of a defendant's past conviction, whereas Striekland mentioned only an indictment.

135 There are, to be sure, cases from other eircuits finding undue prejudiee in references to convietions in particular circumstances. See United States v. Ailstoek, 546 F.2d 1285, 1291 (6th Cir.1976) (reference to defendant's two prior terms in the penitentiary constituted prejudicial error); United States v. Poston, 430 F.2d 706, 709 (6th Cir.1970) (reference to defendant being on probation was prejudicial); Tallo v. United States, 344 F.2d 467, 468 (1st Cir.1965) (reference to defendant's past jail term "could only be prejudicial"). Even if these cases meant that reference to conviction automatically required a mistrial, they would be inconsistent with Hardy and McIntosh, which control in this eireuit. And the same indictment/conviction factor, by which the correctness of the trial judge's ruling follows a fortiori from Hardy and McIntosh, readily distinguishes them. The court properly denied the motion.

VII. DISCLOSURE OFWITNESS STATEMENTS

A. Jencks Act

136 Appellants Burns and Tarantino allege that notes and other material regarding the testimony of several government witnesses were improperly withheld from the defense. Tarantino was especially concerned with statements by government witnesses (so-called Jencks Act material) relating to conversations these witnesses had with Strickland or relating to details of the particular drug transactions about which Strickland testified. Tarantino argues that the government should have been required to turn these statemeuts over to the defense prior to Strickland's cross-examination because access to these statements would have enhanced defense counsels' ability to cross-examine Strickland--the key government witness.

137 Federal Rule of Criminal Procedure 16(a)(2) prohibits discovery of statements by government witnesses or prospective government witnesses except as provided in the Jencks Act, 18 U.S.C. Sec. 3500 (1982). The Jencks Act directs that in a criminal prosecution, statements made by government witnesses or prospective government witnesses are not open to discovery or inspection by the defense until said witnesses have testified on direct examination in the trial of the case. See United States v. Campagnuolo, 592 F.2d 852, 858 (5th Cir.1979); Haldeman, 559 F.2d at 77 n. 111. In balancing a criminal defendant's need for such statements against legitimate state interests, Congress provided for discovery of statements only after the witness has

testified, out of concern for witness intimidation, subornation of perjury, and other threats to the integrity of the trial process. United States v. Roberts, 811 F.2d 257 (4th Cir.1987) (en banc); United States v. Mills, 641 F.2d 785, 790 (9th Cir.), cert. denied, 454 U.S. 902, 102 S.Ct. 409, 70 L.Ed.2d 221 (1981); United States v. Murphy, 569 F.2d 771, 773 (3d Cir.), cert. denied, 435 U.S. 955, 98 S.Ct. 1588, 55 L.Ed.2d 807 (1978); United States v. Percevault, 490 F.2d 126, 131 (2d Cir.1974). This congressional determination is not to be disregarded by the courts. "The Act supplies the only avenue to the materials it encompasses, and 'statements of a government witness made to an agent of the Government which cannot be produced under the terms of 18 U.S.C. Sec. 3500 ... cannot be produced at all.' " Haldeman, 559 F.2d at 77 n. 111 (quoting Palermo v. United States, 360 U.S. 343, 351, 79 S.Ct. 1217, 1224, 3 L.Ed.2d 1287 (1959)). So, under the Jencks Act, defendants had no right to the statements given by other witnesses prior to Strickland's eross-examination.[11] Only after those witnesses themselves testified does the Jencks Act give the defendants aceess to their statements.[12]

B. Sixth Amendment

138 In addition to his arguments based on the Jencks Act, appellant Tarantino contends that the failure of the government to turn over eertain material constituted an improper denial of cross-examination, thus violating the Confrontation Clause of the Sixth Amendment. Tarantino argues, in particular, that notes made by government agents while interviewing Kohn, whieh were later used to refresh Kohn's recollection during his grand jury testimony and which the trial court therefore found had been adopted by Kohn for purposes of the Jencks Act, should have been turned over to the defense prior to Strickland's cross-examination. Tarantino asserts these notes would have aided the cross-examination of Strickland, because Kohn described some of the same transactions described by Strickland, but Kohn's versions were different in various details.[13]

139 Appellant's attempt to use the Sixth Amendment as a constitutional rule of discovery, over and above the discovery provided by the Federal Rules of Criminal Procedure and the Jencks Act, is barred by the plurality opinion in Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). In Ritchie, the defendant, who was charged with sexual offenses against his minor daughter, argued that his right to cross-examine the witness against him (his daughter) was impaired when a state protective service agency responsible for investigating cases of child abuse refused to turn over its records to him. Unlike this case, the records sought in Ritchie were alleged to contain statements made by the witness herself to agency counselors. Nevertheless, the plurality refused to hold the failure to produce these records violated defendant's right to cross-examine. The Court said that

140 the right of confrontation is a trial right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination.... The ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony. Normally the right to confront one's accusers is satisfied if defense counsel reccives wide latitude at trial to question witnesses.

141 Ritchie, 107 S.Ct. at 999 (citations and footnote omitted). Similarly, in this case, the government's refusal to produee statements made by other potential witnesses prior to Strickland's cross-examination did not breach appellant's right to cross-examine

Strickland--the refusal to turn over potentially useful or even exculpatory material is not equivalent to a restriction on cross-examination under Ritchie. See also United States v. Balistrieri, 779 F.2d 1191, 1221 (7th Cir.1985), cert. denied, 475 U.S. 1094, 106 S.Ct. 1490, 89 L.Ed.2d 892 (1986).

C. Brady

142 Tarantino also argues that the failure to disclose the statements by witnesses that contradicted Strickland's version of events violated the due process clause of the Fifth Amendment as interpreted in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).[14] Under Brady the government may not suppress evidence favorable to the accused when it is material to either guilt or punishment, and under Giglio and Bagley such evidence includes impeachment material. One element of a successful Brady claim is that the government did, in fact, suppress the evidence. United States v. Driver, 798 F.2d 248, 250 (7th Cir.1986); United States v. Preston, 608 F.2d 626, 637 (5th Cir.1979), cert. denied, 446 U.S. 940, 100 S.Ct. 2162, 64 L.Ed.2d 794 (1980); United States v. Bernard, 607 F.2d 1257, 1263 (9th Cir.1979). No suppression occurred here--Kohn's statements to the government agent were undisputedly delivered to the defense in accordance with the requirements of the Jencks Act. Tarantino, however, claims the production was too late to be useful in Strickland's cross-examination. This argument strikes us as an attempt to convert Brady into a broad rule of discovery in criminal cases. Appellants' argument necessarily suggests that all relevant material held by the government must be produced prior to trial, for relevant material will always be at least marginally useful at every stage of the trial. As a matter of policy such broad discovery might or might not be wise, but certainly it is not required by present law. See United States v. Agurs, 427 U.S. 97, 108-09, 96 S.Ct. 2392, 2398-2400, 49 L.Ed.2d 342 (1976). The Supreme Court has stated that "[t]here is no general constitutional right to discovery in a criminal case, and Brady did not create one; ... 'the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded.' " Weatherford v. Bursey, 429 U.S. 545, 559, 97 S.Ct. 837, 846, 51 L.Ed.2d 30 (1977) (quoting Wardius v. Oregon, 412 U.S. 470, 474, 93 S.Ct. 2208, 2212, 37 L.Ed.2d 82 (1973)); see United States v. Kendall, 766 F.2d 1426, 1440-41 (10th Cir.1985), cert. denied, 474 U.S. 1081, 106 S.Ct. 848, 88 L.Ed.2d 889 (1986); United States v. Pollack, 534 F.2d 964, 975 (D.C.Cir.), cert. denied, 429 U.S. 924, 97 S.Ct. 324, 50 L.Ed.2d 292 (1976).

143 Once defendants obtained Kohn's statements, they were perfectly able to impeach his trial testimony if inconsistent. And during Kohn's cross-examination or during final argument, defendant's counsel could call the jury's attention to any inconsistencies between Kohn's version of the events (whether the account presented at trial or the one given to the government agents, if the two were at odds) and Strickland's rendition. Tarantino argues, nevertheless, that because the material was unavailable for Strickland's cross-examination, the force of the discrepancies was likely to have been lost on the jury. This argument is unavailing for two reasons. First, witnesses are not impeached by prior inconsistent statements of other witnesses, but by their own prior inconsistent statements. See FED.R.EVID. 613, 801. And even if it had been permissible to confront Strickland with a statement by Kohn that the details of a particular transaction were not as Strickland had said, the effectiveness of this is not self-evident, as Strickland could not confirm or deny that Kohn had made the

statement or explain Kohn's statement.

144 Second, Brady provides the sole theory on which Kohn's statements were discoverable prior to Kohn's direct examination. But under Brady, "the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." Bagley, 473 U.S. at 675, 105 S.Ct. at 3380 (footnotes omitted); see Pollack, 534 F.2d at 975. Thus, Brady directs only that "material" information be disclosed, and in Bagley the Supreme Court held information is material only if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." 473 U.S. at 682, 105 S.Ct. at 3383; see United States v. Kelly, 790 F.2d 130, 135-36 and n. 3 (D.C.Cir.1986).

145 Since the evidenee at issue here was disclosed, Tarantino must establish that had the statements been disclosed earlier, there is a probability sufficient to undermine our confidence in the actual outcome that the jury would have acquitted. Because we doubt whether earlier discovery of the statements would have appreciably increased the effectiveness of Strickland's cross-examination, and beeause the defense was not foreclosed from arguing any inconsistencies to the jury at a later point in the trial, we think that nothing approaching a Brady violation occurred here. See United States v. Browne, 829 F.2d 760, 765-66 (9th Cir.1987) (Brady not violated where impeachment material was disclosed after several witnesses had testified, but in time to be used to impeach key witnesses); United States v. Twomey, 806 F.2d 1136, 1141 (1st Cir.1986); United States v. Brimberry, 803 F.2d 908, 911-915 (7th Cir.1986), cert. denied, --- U.S. ---, 107 S.Ct. 1977, 95 L.Ed.2d 817 (1987); United States v. Peters, 732 F.2d 1004, 1008-10 (1st Cir.1984); United States v. Kaplan, 554 F.2d 577, 580 (3d Cir.1977); United States v. Harris, 458 F.2d 670, 675-77 (5th Cir.), cert. denied, 409 U.S. 888, 93 S.Ct. 195, 34 L.Ed.2d 145 (1972) (Brady does not override Jencks Act where one witness' statement is inconsistent with another's and where defense could bring out discrepancy at trial).

D. Statements by Co-conspirators

146 Finally, appellant Tarantino argues that the trial court erred in not ordering the government to turn over any Jencks material relating to Nancy Strickland. During the trial, Tarantino's counsel requested discovery of Nancy Strickland's Jencks material so he could use it to aid his decision whether to ask for Lonnie Strickland's recall for re-cross examination or to call Nancy Strickland as a witness for the defense. Tr. 4119. This motion was made after it became apparent that the government was not going to call Nancy Strickland as a government witness. However, just as the Jencks Act does not provide for the discovery of statements by government witnesses prior to their actual testimony, it also does not require production of statements by potential witnesses who in fact do not ultimately testify. United States v. Mills, 810 F.2d 907, 910 (9th Cir.) (Judge, now Justice, Kennedy), eert. denied, --- U.S. ----, 108 S.Ct. 107, 98 L.Ed.2d 67 (1987); United States v. Cadet, 727 F.2d 1453, 1469 (9th Cir.1984) (abuse of discretion to order production of statements of witnesses the government did not intend to call); United States v. Disston, 612 F.2d 1035, 1038 (7th Cir.1980).

147 Tarantino asserts, nevertheless, that he was entitled to discovery of Nancy Strickland's statements because she was a co-conspirator. Nancy Strickland, an

unindicted co-conspirator, was listed as a prospective witness and before trial had made statements to government agents regarding the conspiracy. She was not called by the government to testify, and while it is true that the government did not hinder the defense from interviewing her, the defendants felt, perhaps reasonably, that any attempt to do so would have proved futile. Moreover, although Nancy Strickland was available as a witness for the defense, the defense was understandably reluctant to call her without either a prior interview or knowledge of statements she may have made to the government. Nancy's statements were presented to the district court for review in camera; the court concluded the statements did not contain Brady material and refused to order disclosure.

148 Tarantino's argument in favor of discovery requires a close reading of FED.R.EVID. 801(d)(2)(E) in conjunction with FED.R.CRIM.P. 16(a)(1)(A). Under 801(d)(2)(E), a co-conspirator's statement is attributed on an agency rationale to each of the co-conspirators, and so it is classified as non-hearsay and may be admitted against each co-conspirator as if it were his own statement. And under 16(a)(1)(A), a defendant is entitled to pre-trial discovery of any of his own statements in the government's possession. Thus, because the co-conspirator's statements may be treated as the defendant's own for purposes of hearsay analysis, Tarantino argues they should be discoverable in the same manner as the defendant's own statements. Once it was apparent that Nancy Strickland would not testify for the government and consequently her statements would not be discoverable in accordance with the Jencks Act, Tarantino contends the trial court should have ordered disclosure.

149 Even though the Jencks Act explicitly provides that statements of witnesses or prospective witnesses, including co-conspirators, are not discoverable until after the witness testifies, some courts have ordered diselosure of co-conspirator statements where the prosecution does not propose to put the co-conspirator on the stand. See United States v. Konefal, 566 F.Supp. 698, 705-07 (N.D.N.Y.1983) (citing cases in aecord); 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE Sec. 253 at 50 (2d ed. 1982) (citing cases).

150 We believe, however, that we are without authority to order such discovery. Nothing in the Federal Rules of Evidence or in the Jencks Act requires such disclosure—we think it clear that as used in Fed.R.Crim.P. 16(a)(1)(A) the phrase "statements made by the defendant" does not include statements made by co-eonspirators of the defendant, even if those statements can be attributed to the defendant for purposes of the rule against hearsay. Once appellant's imaginative reading of 16(a)(1)(A) is rejected, no other authority is suggested for this type of discovery order. Under our law, the adversary system is "the primary means by which truth is uncovered." Bagley, 473 U.S. at 675, 105 S.Ct. at 3380. We decline to extend the defendant's right to discovery beyond that required by statute or the Constitution. We note this result is in agreement with every other circuit that has examined the question. See United States v. Orr, 825 F.2d 1537 (11th Cir.1987); United States v. Roberts, 811 F.2d 257 (4th Cir.1987) (en banc); United States v. Percevault, 490 F.2d 126 (2d Cir.1974); see also 8J. MOORE, MOORE'S FEDERAL PRACTICE p 16.04 at 16-54, 55 (2d ed. Nov. 1986 Rev.).

VIII. CONTINGENT PLEA ARRANGEMENTS

151 Strickland agreed to testify in exchange for a promise that the government would advise the sentencing judge of "the full nature, extent, and value of the cooperation

provided." Tr. 79 (emphasis added). The plea agreement further provided that if Strickland made "any false statements or commit[ted] any perjury ... the United States will have the right to terminate this agreement and prosecute him for any and all offenses that can be brought." Tr. 81.

152 Bell argues that Strickland's testimony should have been stricken because it represented the fruits of a prohibited contingent plea arrangement. Strickland's incentive to lie was overwhelming, says Bell, because the government's sentence recommendation would be inversely related to the "value" of his testimony, i.e., how many people he was instrumental in convicting. Bell points to Strickland's cross-examination as demonstrating that Strickland understood the condition as a contingent plea arrangement, but Strickland testified that he understood "value" to mean "about what crimes that have been committed, and may be committed, am I giving information." Tr. 1464-65. Bell argues Strickland's testimony is inherently untrustworthy and must be stricken under the Fifth and Sixth Amendments. Brief for Bell at 46-50.

153 In United States v. Waterman, 732 F.2d 1527 (8th Cir.1984), on which Bell largely relies, the government promised its main witness that it would recommend a reduction in his sentence if and only if his testimony led to further indictments. The court reversed the conviction, holding that the agreement between the government and the witness was "nothing more than an invitation to perjury having no place in our constitutional system." 732 F.2d at 1531. The panel's opinion in Waterman was subsequently vacated following an en banc vote that produced an equally divided court. Id. at 1533, cert. denied, 471 U.S. 1065, 105 S.Ct. 2138, 85 L.Ed.2d 496 (1985). It has no precedential value, even within the Eighth Circuit. E.g., United States v. Spector, 793 F.2d 932, 936 (8th Cir.1986), cert. denied, --- U.S. ---, 107 S.Ct. 876, 93 L.Ed.2d 830 (1987).

154 In another case cited by Bell, United States v. Cervantes-Pacheco, 800 F.2d 452 (5th Cir.1986), a government informer was hired to gather information on a particular individual. The informer's pay was dependent on his effectiveness in gathering information and testifying against the targeted individual. The court held that use of the informer's testimony violated due process. The Fifth Circuit, sitting en banc, reversed the Cervantes-Pacheco panel opinion, and held instead that "an informant who is promised a contingent fee by the government is not disqualified from testifying.... [I]t is up to the jury to evaluate the credibility of the compensated witness." 826 F.2d 310, 315 (5th Cir.1987) (en banc), cert. denied, --- U.S. ---, 108 S.Ct. 749, 98 L.Ed.2d 762 (1988).

155 The agreement between the government and Strickland was less akin to these contingent arrangements than to a typical plea bargain under which an accomplice agrees to testify in exchange for a promise of a reduced sentence. Courts "uniformly hold that such a witness may testify so long as the government's bargain with him is fully ventilated so that the jury can evaluate his credibility." Cervantes-Pacheco, 826 F.2d at 315 (citing United States v. Dailey, 759 F.2d 192, 198-200 (1st Cir.1985)); see also Spector, 793 F.2d at 937 & n. 3, and cases cited; United States v. Rosenthal, 793 F.2d 1214, 1240-41 (11th Cir.) (testimony permitted despite agreement in which government would inform sentencing judge of "value to the Government" of defendant's testimony and make a recommendation based upon a "subjective evaluation by the Government of the nature and scope" of cooperation), modified in different part, 801 F.2d 378 (11th Cir.1986), cert. denied, --- U.S. ----, 107 S.Ct. 1377,

94 L.Ed.2d 692 (1987).

156 Although conditioning the sentencing recommendation on the "value" of the witness' testimony may in some cases create a greater incentive to lie, the likelihood of perjury is clearly not enough as to require a per se rule excluding such testimony. The "value" of Strickland's testimony was not necessarily tied to the success of the prosecutions, and Strickland did not so testify. Tr. 1464-65. See Dailey, 759 F.2d at 197 (upholding "value" agreement). Moreover, the sentencing recommendation was conditioned on truthful testimony, which surely must encourage veracity. E.g., United States v. Moody, 778 F.2d 1380, 1385 (9th Cir.1985) (requirement of truthful testimony "negates inference of inducement to testify falsely" (citing Dailey, 759 F.2d at 197)), amended on other grounds, 791 F.2d 707 (9th Cir.1986). Finally, the agreement itself was the subject of extensive cross-examination. "The established safeguards of the Anglo-American legal system leave the veracity of the witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury." Hoffa v. United States, 385 U.S. 293, 311, 87 S.Ct. 408, 418, 17 L.Ed.2d 374 (1966). Under the circumstances of this case, admission of Strickland's testimony was permissible.

IX. BURNS' DESIRE TO REPRESENT HIMSELF

157 Citing the Supreme Court's decision in Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), Burns contends that the trial court violated his rights under the Sixth Amendment by "thrust[ing] counsel" upon him and refusing to allow him to represent himself at trial. In Faretta, the Supreme Court held that the Sixth Amendment right to the assistance of counsel includes the right to "proceed without counsel when [the defendant] voluntarily and intelligently elects to do so." Id. at 807. Beeause the exercise of the right of self-representation involves a waiver of the right to assistance of counsel, United States v. Weisz, 718 F.2d 413, 425 (D.C.Cir.1983), cert. denied, 465 U.S. 1034, 104 S.Ct. 1305, 79 L.Ed.2d 704 (1984), we have recently emphasized that "the right of self-representation is waived unless defendants articulately and unmistakably demand to proceed pro se," id. at 426.

158 Our reading of the trial transcript demonstrates to us that Burns never made an unambiguous waiver of his right to assistance of counsel or, therefore, an unambiguous claim to represent himself. It is true that from time to time, in the first trial (which later ended in a mistrial due to Black's illness) and the second, and in status hearings, he expressed his desire to proceed pro se. However, although the court carefully and repeatedly explained to Burns that he had to choose between representing himself and being represented by appointed counsel, and gave Burns numerous opportunities to uuequivocally assert his iutention to proceed pro se, Burns never made such an assertion. Instead, he seemed to desire some sort of hybrid form of representation, whereby both he and his appointed counsel would be permitted to examine witnesses, make objections, and argue motions. While the district court would have been within its discretion in permittiug this practice, Burns did not have a constitutional right under the Sixth Amendment to combine self-representation with representation by counsel. United States v. Mosely, 810 F.2d 93, 97 (6th Cir.), cert. denied, --- U.S. ----, 108 S.Ct. 129, 98 L.Ed.2d 87 (1987); United States v. Weisz, 718 F.2d at 425. It would not be terribly cynical to suppose that Burns' equivocal requests were made more with an eye to creating an issue on appeal than for any other purpose.

159 Because Burns has gone to great lengths in his brief and at oral argument to

demonstrate that he did unambiguously assert his right to represent himself, we recount the saga in some detail. At a hearing before a magistrate on December 22, 1983, Burns stated that he "would like to try to represent [him]self, if at all possible." Tr. 12/22/83 at 3. The magistrate, however, after questioning Burns about his financial capacity to hire an attorney, appointed a Mr. Garber in "an advisory capacity." Id. The court then left it up to Burns, Garber, and Judge Hogan "to work out the precise parameters of that representation." Id. at 11. A docket entry filed January 10, 1984 reflects the appointment. Record ("R.") 21.

160 Mr. Garber appeared on behalf of Burns before the magistrate later that afternoon, and addressed the court as to the bail amount and several other preliminary matters. Tr. 12/22/83 at 19-23. Over the next two weeks, Garber again filed several motions on Burns' behalf; each stated that it was filed "by defendant, by and through counsel." See, e.g., R. 23, 24, 25, 44, 53. On January 13, 1984, Judge Hogan inquired of Garber whether the question of Burns' pro se status had been resolved and Garber replied, "We have been having some discussions along that line." Tr. 1/13/84 at 23. Judge Hogan then specifically stated, "I only want one of you trying the case in court." Id. at 24. Garber said he understood, though alluding to the possibility that he would "address that maybe in another week or so." Id.

161 In February 1984, following the government's motion in opposition to the appointment of Garber as Burns' counsel, Burns filed ("by and through his appointed counsel") a pleading, signed by Garber, asserting that he was in fact indigent and requesting that his appointed counsel remain on the job. R. 46. In the pleading, Burns asserted that

162 Defendant has had the assistance of counsel since arraignment, and a ... vacation of counsel appointment would seriously and adversely affect the defendant's Sixth Amendment rights to effective assistance of counsel.

163 R. 46 at 4. Judge Hogan denied the government's motion on February 23, 1984, ruling that "appointed counsel shall continue representing Burns." R. 48.

164 Two months later at a status hearing, Burns attempted to address the court directly regarding some motions on which the court had ruled. The following colloquy then occurred:

165 The Court: Have you talked it over with Mr. Garber?

166 Mr. Burns: I'm talking to the beneh.

167 Mr. Garber: He's discussed this with me, your honor.

168 The Court: You aren't pro se quite. I think Mr. Garber is appointed to represent you and I've left him in representing you despite some concerns. And I really don't want to get involved in two people trying this case. I want to get to trial.

169 Mr. Burns: Yes, your honor.

170 The Court: All right. You understand that. All right.

171 Tr. 4/24/84 at 15-16.

172 At the first trial, Garber conducted cross-examination of government witnesses and

addressed the bench on motions and objections. At one point, Burns attempted to address the bench directly, and was told by Judge Hogan that he should address the court only through his attorney. The court then said to Burns, "Mr. Garber is going to handle the trial, you understand that?" Burns responded, "Yes, sir." Tr. 5/10/84 at 104. Garber proceeded to act as Burns' attorney until the court declared a mistrial on June 13.

173 The issue next surfaced on September 28 at a status hearing when, following a flurry of handwritten motions from Burns, the lead prosecutor asked the court to resolve once and for all Burns' status, reminding all present of the court's repeated rulings that Burns could not enjoy dual representation. Tr. 9/28/84 at 41-42. Judge Hogan again questioned Garber about the pro se issue.

174 The Court: Mr. Garber, Mr. Burns?

175 Mr. Garber, you're representing Mr. Burns still, and I haven't had any indication that you're not going to continue to.

176 Mr. Garber: No, Your Honor, I haven't either.

177 Id. at 44-45. The court then stated again that he would not allow hybrid representation. Id. at 45. Burns responded that he had no quarrel with Garber's assistance, but that as he understood it, he had been granted pro se status at the initial hearing with the magistrate, and Garber had only been appointed to assist him; he wondered "by what magic formula [his] pro se status ha[d] evaporated." Id. at 46. Judge Hogan again explained to Burns that Garber had been appointed as his lawyer, and that Burns could attain pro se status only by trying the case himself:

178 [M]y understanding was throughout the trial Mr. Garber was your lawyer. He tried the case. And as you said, he did an exceptional job throughout the part of the trial we did have. And it was not that he was sitting there at counsel table just helping you to ask questions, or telling you how to properly phrase the question, or telling you how to properly file a motion. That's the status of the standby-type counsel that I believe Magistrate Dwyer was addressing to you.

179 And I think that he is your lawyer, and that he's appointed to be your lawyer, and he has been working and had worked very hard as your lawyer, and continues to. And that's the way to leave it, unless he doesn't actively involve himself in the case. At that point, you become pro se, and then you're going to try the case.

180 Tr. 9/28/84 at 47. Although Burns protested that he did not want his (erroneously assumed) pro se status to "completely disappear," he stated that if he was not allowed to file the motions himself, "I may just have to go pro se myself." Id. at 48. The court reiterated that Burns should file motions only through his counsel, id. at 50, and agreed not to take action on the pending pro se motions until they were refiled by Garber, id. at 52. Despite this extended explanation of the choice facing him, Burns did not make a motion to proceed pro se.

181 The second trial began in January 1985, with Garber acting as counsel without objection from Burns. One month into the trial, the issue of Burns' pro se status arose for the final time. Burns addressed the court in order to state that he objected to "not being allowed to proceed pro se." Tr. 2962. In response, the court stated that, "You did not have a pro se status.... There has not been a motion to discharge [Garber]

made by you and to go pro se yourself or to try your case. I told you one of the two of you was going to try, if you wanted to try it or Mr. Garber, but not both." Id. The court then once again put Burns to the choice: "If you want Mr. Garber to be discharged and you want to take over, and that is your application, I can hear an application on that." Id. at 2963. Burns did not make a motion to dismiss Garber, or to try the case himself.

182 The tortuous history recounted above demonstrates that Burns was told several times that the court would not allow both Burns and Garber to conduct the defense, and had numerous opportunities to tell the court that he wanted to represent himself on the condition offered. Not onee, however, did he do so; Burns apparently was unwilling to proceed pro se if that meant he would have to forego the considerable benefits of Garber's representation. The trial court refused to let Burns have his cake and eat it. This is not a violation of the Sixth Amendment.

X. THE ERROR IN SENTENCING BELL

183 FED.R.CRIM.P. 32(c)(3)(A) allows a defendant on sentencing to challenge the factual aecuracy of items in the presentence report. If he does so, the trial court is to make findings on the disputed point or a determination that no such finding is necessary because the matter controverted will not be taken into account on sentencing. FED.R.CRIM.P. 32(c)(3)(D). The judge's findings or determination are to accompany any copy of the presentence report sent to the Bureau of Prisons or Parole Commission. Id.

184 The Rule was triggered by factual elarifications as to Bell's past drug use and past drug distribution activities. But the forwarding requirement was not met, evidently through inadvertence. The government agrees that remand is appropriate. Brief for the Government at 108. As to Bell we remand the case to the trial court for full compliance with Rule 32(c)(3)(D).

XI. CONCLUSION

185 The eonvictions of defendants Bell, Black, Burns, and Tarantino are affirmed on all counts. Bell's ease is remanded to the district eourt for further proceedings consistent with this opinion.

186 So ordered.

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[1] The Travel Act provides in relevant part:

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with inteut to--

(1) distribute the proceeds of any unlawful activity; or

* * *

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined ... or imprisoned ..., or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving ... narcotics or controlled substances....

[2] Tarantino was also eonvicted of four counts under the Travel Act, but does not raise the issue of the propriety of the instructions on appeal. We are entitled to notiee such an crror under a "plain error" standard. See Silber v. United States, 370 U.S. 717, 718, 82 S.Ct. 1287, 1288, 8 L.Ed.2d 798 (1962). As Tarantino, like Black, raised no timely objection at trial, the result is the same as for Blaek

[3] Black's trial counsel initially submitted requested instructions on the elements of the Travel Act that closely paralleled those later given by the trial court; the requested instructions defined the unlawful activity in the case as 'the distribution ofeocaine and other controlled substauces." Black's Requested Jury Instruction No. 11. He also submitted an instruction that essentially restated the statutory language, including the definition of "unlawful activity" as a "business enterprise." Black's Requested Instruction No. 10. Black's counsel did not, however, refer to tbe business enterprise requirement at the instructions conference. Tr. 5820-6039. Moreover, although he objected to the judge's instructions on unlawful activity at a conference following the charge to the jury, his grounds were that the alleged narcotics conspiracy could not constitute the unlawful activity for purposes of the Travel Act, not that the business enterprise element was missing. Tr. 6474-75. In sum, Black's trial eounsel never took exception to the judge's instructions on the grounds urged here either before or after the charge to the jury

[4] Black was tried aud acquitted for offenses under the CTRA in a separate trial

[5] On occasions the prosecutor suggested that Black's actions in structuring his deposits to avoid the bank's filing of CTRs were illegal, but only, so far as we can determine, in eolloquies with the court out of the earshot of the jury. Tr. 6027-31, 6114-16, 6161

[6] Burns' counsel cross-examined Strickland as to his role in the drug trade, Tr. 563-615, past income tax evasion, Tr. 647-62, 677-78, the possibility that Strickland married his wife in order to take advantage of the spousal privilege, Tr. 735-36, prior inconsistent statements to a government agent, Tr. 789-95, 800-02, 808-12, 814-16, 822-26, 828-34, 839-41, 860-66, 898-904, 906-08, prior inconsistent statements in the first trial (whieh had ended in a mistrial), Tr. 845-52, 859, 885-88, 893-98, and past statements to the grand jnry, Tr. 866-70, 875, 879-83, 909-12. Black's counsel cross-examined as to past drug use, Tr. 928-29, 1006-07, tax evasion, Tr. 935-40, Strickland's role in the drug trade, Tr. 946-54, Strickland's agreement with the government, Tr. 954-69, 980-90, past statements to the grand jnry, Tr. 1020-23, 1042-48, prior incousistent statements at the first trial, Tr. 1027-29, 1036-42, Strickland's preparation for testifying, Tr. 1055, aud a prior statement to a Mr. Hessler regarding Black, Tr. 1081-82. Tarantino's eounsel cross-examined Strickland regarding the use of aliases, Tr. 1125-26, 1183, his past use of hallueinogenic and other drugs, Tr. 1156-60, the drug smuggling ring, Tr. 1161-71, prior statements to the grand jury, Tr. 1214-15, 1231-34, 1237-40, 1253-59, 1269-73, inquiries to Tarantino regarding legal representation, Tr. 1287-89, and Strickland's and others' plea agreements with the government, Tr. 1294-96. Finally, Bell's attorney cross-examined as to Strickland's plea bargain and relationship with the government, Tr. 1420-27, 1434-38, 1440-47, 1457-69, Striekland's income from the conspiracy and tax evasion, Tr. 1470-99, inconsistent statements before a grand jury, Tr. 1509-12, Strickland's demeanor and credibility in court, Tr. 1524-26, his past lies in various situations, Tr. 1526-36, past drug use, Tr. 1536-40, and Strickland's motives in testifying for the government, Tr. 1547-50

[7] In any event, Black was later given the opportunity to explain his retainer of a criminal defense lawyer for Nicholls, Tr. 4903-05, and to cross-examine the lawyer about his arrangement with Black, Tr. 4039-42

[8] The rule may also serve to avoid unfair surprise. For example, where a defendant in a criminal case takes the stand and on cross-examination denies charges of unrelated misconduct, the government may not attempt to impeach his credibility with extrinsic evidence of such misconduct. See Lee v. United States, 368 F.2d 834, 836-37 (D.C.Cir.1966); see also Tinker v. United States, 417 F.2d 542, 545 n. 15 (D.C.Cir.), cert. denied, 396 U.S. 864, 90 S.Ct. 141, 24 L.Ed.2d 118 (1969); Dixon v. United States, 303 F.2d 226 (D.C.Cir.1962)

[9] That this was the grounds for the trial judge's decision to exclude is indicated by his statement that "I query whether or not it is collateral as to what she yelled at Sergeant Murphy [sic] when she got bounced out of this house, after having a fight." Tr. 4277-78

[10] Burns makes a similar objection to Ribera's testimony regarding details of drug transactions involving Burns, Strickland, and Kupits. Ribera testified as to how much Burns was charging for his services as a middleman, as well as other details. Ribera, like Rubin, was often not in the room while the sale was made, so much of his testimony was based on what would be hearsay, but for the rule. However, also like Rubin, Ribera had an active part in the conspiracy, and, in fact, in the very deals related to him by Strickland or Kupits. For this reason, the discussions among Ribera, Strickland and Kupits were clearly in the course of and in furtherance of the conspiracy

[11] Of course, under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the government has additional obligations deriving from the Fifth Amendment to disclose exculpatory material, and the limitations on discovery contained in the Jencks Act do not lessen those obligations. See United States v. Bernard, 607 F.2d 1257, 1263 (9th Cir.1979) (Brady is an independent foundation to preserve evidence); Murphy, 569 F.2d at 774; Haldeman, 559 F.2d at 77-78 and n. 112 (Brady duty may extend to material also covered by Jencks Act); United States v. Kaplan, 554 F.2d 577, 580 (3d Cir.1977) (Brady and Jencks Act may both cover same material); United States v. Harrison, 524 F.2d 421, 427 (D.C.Cir.1975) (Brady broadened beyond the Jencks Act the possible grounds for production of material to defense). See discussion infra at 1416-17

[12] We note, however, that trial judges, with the consent of the government, routinely fashion discovery procedures that entail production of Jencks material before trial or prior to direct examination, in order to facilitate the defense's preparation for cross-examination. Such a sensible procedure was used in this trial, and the defense received the bulk of the Jencks material 48 hours prior to direct testimony by government witnesses. See United States v. Algic, 667 F.2d 569, 571-72 (6th Cir.1982); Campagnuolo, 592 F.2d at 858 n. 3; Murphy, 569 F.2d at 773 n. 5; Percevault, 490 F.2d at 132

[13] For example, on direct examination, Strickland testified that he and Kohn had driven up to New Jersey from Washington to deliver cocaine and had met with Tarantino at a rest stop on the New Jersey Turnpike. Strickland testified that "[w]e

[Strickland and Kohn] found the rest stop, and Mr. Tarantino was there in his car. We gave him the kilo." Tr. 478. On cross-examination, Kohn testified he and Strickland drove to New Jersey with a suitcase of cocaine in the trunk and met with Tarantino at a rest stop, but that Strickland and Tarantino talked separately from him and that he did not see any transfer of cocaine. Tr. 3542-54. Rather than contradiction, Kohn's version could most accurately be described as a failure to corroborate an important detail of Strickland's testimony, although in almost all other particulars, the two versions matched very closely

[14] Appellant Burns joined in this argument

B v. Director of Public Prosecutions [2000] UKHL 13; [2000] 2 AC 428; [2000] 2 WLR 452; [2000] 1 All ER 833; [2000] Crim LR 403 (23rd February, 2000)

HOUSE OF LORDS

Lord Chancellor Lord Maekay of Clashfern Lord Nicholls of Birkenhead Lord Steyn Lord Hutton

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT

IN THE CAUSE

B.

(BY HIS MOTHER AND NEXT FRIEND)

(APPELLANT)

v.

DIRECTOR OF PUBLIC PROSECUTIONS

(RESPONDENT)

ON 23 FEBRUARY 2000

LORD IRVINE OF LAIRG L.C.

My Lords,

For the reasons given by my noble and learned friend, Lord Nicholls of Birkenhead, in his speech, which I have had the advantage of reading in draft, this appeal should be allowed.

LORD MACKAY OF CLASHFERN

My Lords,

I have had the advantage of reading in draft the speeches prepared by noble and learned friends Lord Nicholls of Birkenhead, Lord Steyn and Lord Hutton.

In the light of the authorities to which they refer I consider that a defendant is entitled to be acquitted of the offence of inciting a child under 14 to commit an act of gross indecency, contrary to section 1(1) of the Indecency with Children Act 1960, if he holds or may hold an honest belief that the child was aged 14 years or over, unless Parliament expressly or by necessary implication provided to the contrary. Clearly this has not been done expressly. For the reasons given by my noble and learned friends I consider that there is no sufficiently detailed legislative policy manifested by the Sexual Offences Act 1956 to which the Act of 1960 is an appendix to provide a basis for the necessary implication in respect of what was in 1960 a new offence. Aeeordingly this appeal should be allowed.

LORD NICHOLLS OF BIRKENHEAD

My Lords,

An indecent assault on a woman is a criminal offence. So is an indecent assault on a man. Neither a boy nor a girl under the age of sixteen can, in law, give any consent which would prevent an act being an assault. These offences have existed for many years. Currently they are to be found in sections 14 and 15 of the Sexual Offences Act 1956. They have their origins in sections 52 and 62 of the Offences against the Person Act 1861.

In the early 1950s a lacuna in this legislation became apparent. A man was charged with indecent assault on a girl aged nine. At the man's invitation the girl had committed an indecent act on the man. The Court of Criminal Appeal held that an invitation to another person to touch the invitor could not amount to an assault on the invitee. As the man had done nothing to the girl which, if done against her will, would have amounted to an assault on her, the man's conduct did not constitute an indecent assault on the girl. That was the case of *Fairclough v. Whipp* [1951] 2 A.E.R. 834. Two years later the same point arose and was similarly decided regarding a girl aged eleven: see *Director of Public Prosecutions v. Rogers* [1953] 1 W.L.R. 1017. Following a report of the Criminal Law Revision Committee in August 1959 (First Report: Indecency with Children (Cmnd. 835)), Parliament enacted the Indecency with Children Act 1960. Section 1(1) of this Act makes it a criminal offence to commit an act of gross indecency with

or towards a child under the age of fourteen, or to incite a child under that age to such an act. The question raised by the appeal concerns the mental element in this offence so far as the age ingredient is concerned.

The answer to this question depends upon the proper interpretation of the section. There are, broadly, three possibilities. The first possible answer is that it matters not whether the accused honestly believed that the person with whom he was dealing was over fourteen. So far as the age element is concerned, the offence created by section 1 of the Indecency with Children Act 1960 is one of strict liability. The second possible answer is that a necessary element of this offence is the absence of a belief, held honestly and on reasonable grounds by the accused, that the person with whom he was dealing was over fourteen. The third possibility is that the existence or not of reasonable grounds for an honest belief is irrelevant. The necessary mental element is simply the absence of an honest belief by the accused that the other person was over fourteen.

The common law presumption

As habitually happens with statutory offences, when enacting this offence Parliament defined the prohibited conduct solely in terms of the proscribed physical acts. Section 1(1) says nothing about the mental element. In particular, the section says nothing about what shall be the position if the person who commits or incites the act of gross indecency honestly but mistakenly believed that the child was fourteen or over.

In these circumstances the starting point for a court is the established common law presumption that a mental element, traditionally labelled mens rea, is an essential ingredient unless Parliament has indicated a contrary intention either expressly or by necessary implication. The common law presumes that, unless Parliament indicated otherwise, the appropriate mental element is an unexpressed ingredient of every statutory offence. On this I need do no more than refer to Lord Reid's magisterial statement in the leading case of *Sweet v. Parsley* [1970] A.C. 132, 148-149:

> '. . . there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that whenever a section is silent as to mens rea there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea. . . . it is firmly established by a host of authorities that mens rea is an essential ingredient of every offence unless some reason can be found for holding that that is not necessary.'

Reasonable belief or honest belief

The existence of the presumption is beyond dispute, but in one respect the traditional formulation of the presumption calls for re-examination. This respect concerns the position of a defendant who acted under a mistaken view of the facts. In this regard, the presumption is expressed traditionally to the effect that an honest mistake by a defendant does not avail him unless the mistake was made on reasonable grounds. Thus, in *The Queen v. Tolson* (1889) 23 Q.B.D. 168, 181, Cave J. observed:

> 'At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which a prisoner is indicted an innocent act has always been held to be a good defence. This doctrine is embodied in the somewhat uncouth maxim 'actus non facit reum, nisi mens sit rea'. Honest and reasonable mistake stands on the same footing as absence of the reasoning faculty, as in infancy, or perversion of that faculty, as in lunacy. . . . So far as I am aware it has never been suggested that these exceptions do not equally apply in the case of statutory offences unless they are excluded expressly or by necessary implication.'

The other judges in that case expressed themselves to a similar effect. In *Bank of New South Wales v. Piper* [1897] A.C. 383, 389-390, the Privy Council likewise espoused the 'reasonable belief' approach:

> '. . . the absence of mens rea really consists in an honest and reasonable belief entertained by the accused of facts which, if true, would make the act charged against him innocent.'

In *Sweet v. Parsley* [1970] A.C. 132, 163, Lord Diplock referred to a general principle of construction of statutes creating criminal offences, in similar terms:

> '. . . a general principle of construction of any enactment, which creates a criminal offence, [is] that, even where the words used to describe the prohibited conduct would not in any other context connote the necessity for any particular mental element, they are nevertheless to be read as subject to the implication that a necessary element in the offence is the absence of a belief, held honestly and upon reasonable grounds, in the existence of facts which, if true, would make the act innocent.'

The 'reasonable belief' school of thought held unchallenged sway for many years. But over the last quarter of a century there have been several important cases where a defence of honest but mistaken belief was raised. In deciding these cases the courts have placed new, or renewed, emphasis on the subjective nature of the mental element in criminal offences. The courts have rejected the reasonable belief approach and preferred the honest belief approach. When mens rea is ousted by a mistaken belief, it is as well ousted by an unreasonable belief as by a reasonable belief. In the pithy phrase of Lawton L.J. in *Regina v. Kimber* [1983] 1 W.L.R. 1118, 1122, it is the defendant's belief, not the grounds on which it is based, which goes to negative the intent. This approach is well encapsulated in a passage in the judgment of Lord Lane C.J. in *Regina v. Williams (Gladstone)* (1983) 78 Cr.App. R. 276, 281:

> 'The reasonableness or unreasonableness of the defendant's belief is material to question of whether the belief was held by the defendant at all. If the belief was in fact held, its unreasonableness, so far as guilt or innocence is concerned, is neither here nor there. It is irrelevant. Were it otherwise, the defendant would be convicted because he was negligent in failing to recognise that the victim was not consenting . . . and so on.'

Considered as a matter of principle, the honest belief approach must be preferable. By definition the mental element in a crime is concerned with a subjective state of mind, such as intent or belief. To the extent that an overriding objective limit ('on reasonable grounds') is introduced, the subjective element is displaced. To that extent a person who lacks the necessary intent or belief may nevertheless commit the offence. When that occurs the defendant's 'fault' lies exclusively in falling short of an objective standard. His crime lies in his negligence. A statute may so provide expressly or by necessary implication. But this

His crime lies in his negligence. A statute may so provide expressly or by necessary implication. But this can have no place in a common law principle, of general application, which is concerned with the need for a mental element as an essential ingredient of a criminal offence.

The traditional formulation of the common law presumption, exemplified in Lord Diplock's famous exposition in *Sweet v. Parsley*, cited above, is out of step with this recent line of authority, in so far as it envisages that a mistaken belief must be based on reasonable grounds. This seems to be a relic from the days before a defendant in a criminal case could give evidence in his own defence. It is not surprising that in those times juries judged a defendant's state of mind by the conduct to be expected of a reasonable person.

I turn to the recent authorities. The decision which heralded this development in criminal law was the decision of your Lordships' House in *Director of Public Prosecutions v. Morgan* [1976] A.C. 182. This was a case of rape. By a bare majority the House held that where a defendant had sexual intercourse with a woman without her consent but believing she did consent, he was not guilty of rape even though he had no reasonable grounds for his belief. The intent to commit rape involves an intention to have intercourse without the woman's consent or with a reckless indifference to whether she consents or not. It would be inconsistent with this definition if an honest belief that she did consent led to an acquittal only when it was based on reasonable grounds. One of the minority, Lord Edmund-Davies, would have taken a different view had he felt free to do so. In *Regina v. Kimber* [1983] 1 W.L.R. 1118, a case of indecent assault, the Court of Appeal applied the approach of the majority in *Morgan's* case. The guilty state of mind was the intent to use personal violence to a woman without her consent. If the defendant did not so intend, he was entitled to be found not guilty. If he did not so intend because he believed she was consenting, the prosecution will have failed to prove the charge, irrespective of the grounds for the defendant's belief. The court disapproved of the suggestion made in the earlier case of *Regina v. Phekoo* [1981] 1 W.L.R. 1117, 1127, that this House intended to confine the views expressed in *Morgan's* case to cases of rape.

This reasoning was taken a step further in *Reg.* v. *Williams (Gladstone)* (1983) 78 Cr. App. R. 276. There the Court of Appeal, presided over by Lord Lane C.J., adopted the same approach in a case of assault occasioning actual bodily harm. The context was a defence that the defendant believed that the person whom he assaulted was unlawfully assaulting a third party. In *Beckford v. The Queen* [1988] A.C. 130 a similar issue came before the Privy Council on an appeal from Jamaica in a case involving a defence of self-defence to a charge of murder. The Privy Council applied the decisions in *Morgan's* case and *Williams'* case. Lord Griffiths said, at page 144:

> 'If then a genuine belief, albeit without\ reasonable grounds, is a defence to rape because it negatives the necessary intention, so also must a genuine belief in facts which if true would justify self-defence be a defence to a crime of personal violence because the belief negatives the intent to act unlawfully.'

Lord Griffiths also observed, at a practical level, that where there are no reasonable grounds to hold a belief it will surely only be in exceptional circumstances that a jury will conclude that such a belief was or might have been held. Finally in this summary, in *Blackburn v. Bowering* [1994] 1 W.L.R. 1324, the

Court of Appeal, presided over by Sir Thomas Bingham M.R., applied the same approach to the exercise by the court of its contempt jurisdiction in respect of an alleged assault on officers of the court while in the execution of their duty.

The Crown advanced no suggestion to your Lordships that any of these recent cases was wrongly decided. This is not surprising, because the reasoning in these cases is compelling. Thus, the traditional formulation of the common law presumption must now be modified appropriately. Otherwise the formulation would not be an accurate reflection of the current state of the criminal law regarding mistakes of fact. Lord Diplock's dictum in *Sweet v. Parsley* [1970] A.C. 132, 163, must in future be read as though the reference to reasonable grounds were omitted.

I add one further general observation. In principle, an age-related ingredient of a statutory offence stands on no different footing from any other ingredient. If a man genuinely believes that the girl with whom he is committing a grossly indecent act is over fourteen, he is not intending to commit such an act with a girl under fourteen. Whether such an intention is an essential ingredient of the offence depends upon a proper construction of section 1 of the 1960 Act. I turn next to that question.

The construction of section 1 of the Indecency with Children Act 1960

In section 1(1) of the Indecency with Children Act 1960 Parliament has not expressly negatived the need for a mental element in respect of the age element of the offence. The question, therefore, is whether, although not expressly negatived, the need for a mental element is negatived by necessary implication. 'Necessary implication' connotes an implication which is compellingly clear. Such an implication may be found in the language used, the nature of the offence, the mischief sought to be prevented and any other circumstances which may assist in determining what intention is properly to be attributed to Parliament when creating the offence.

I venture to think that, leaving aside the statutory context of section 1, there is no great difficulty in this case. The section created an entirely new criminal offence, in simple unadorned language. The offence so created is a serious offence. The more serious the offence, the greater is the weight to be attached to the presumption, because the more severe is the punishment and the graver the stigma which accompany a conviction. Under section 1 conviction originally attracted a punishment of up to two years' imprisonment. This has since been increased to a maximum of ten years' imprisonment. The notification requirements under Part I of the Sex Offenders Act 1997 now apply, no matter what the age of the offender: see Schedule 1, paragraph 1(1)(*b*). Further, in addition to being a serious offence, the offence is drawn broadly ('an act of gross indecency'). It can embrace conduct ranging from predatory approaches by a much older paedophile to consensual sexual experimentation between precocious teenagers of whom the offender may be the younger of the two. The conduct may be depraved by any acceptable standard, or it may be relatively innocuous behaviour in private between two young people. These factors reinforce, rather than negative, the application of the presumption in this case.

The purpose of the section is, of course, to protect children. An age ingredient was therefore an essential ingredient of the offence. This factor in itself does not assist greatly. Without more, this does not lead to the conclusion that liability was intended to be strict so far as the age element is concerned, so that the offence is committed irrespective of the alleged offender's belief about the age of the 'victim' and

the offence is committed irrespective of the alleged offender's belief about the age of the 'victim' and irrespective of how the offender came to hold this belief.

Nor can I attach much weight to a fear that it may be difficult sometimes for the prosecution to prove that the defendant knew the child was under fourteen or was recklessly indifferent about the child's age. A well known passage from a judgment of that great jurist, Sir Owen Dixon, in *Thomas v. The King* (1937) 59 C.L.R. 279, 309, bears repetition:

> 'The truth appears to be that a reluctance on the part of courts has repeatedly appeared to allow a prisoner to avail himself of a defence depending simply on his own state of knowledge and belief. The reluctance is due in great measure, if not entirely, to a mistrust of the tribunal of fact - the jury. Through a feeling that, if the law allows such a defence to be submitted to the jury, prisoners may too readily escape by deposing to conditions of mind and describing sources of information, matters upon which their evidence cannot be adequately tested and contradicted, judges have been misled into a failure steadily to adhere to principle. It is not difficult to understand such tendencies, but a lack of confidence in the ability of a tribunal correctly to estimate evidence of states of mind and the like can never be sufficient ground for excluding from inquiry the most fundamental element in a rational and humane criminal code.'

Similarly, it is far from clear that strict liability regarding the age ingredient of the offence would further the purpose of section 1 more effectively than would be the case if a mental element were read into this ingredient. There is no general agreement that strict liability is necessary to the enforcement of the law protecting children in sexual matters. For instance, the draft criminal code bill prepared by the Law Commission in 1989 proposed a compromise solution. Clauses 114 and 115 of the bill provided for committing or inciting acts of gross indecency with children aged under thirteen or under sixteen. Belief that the child is over sixteen would be a defence in each case: see the Law Commission, Criminal Law, A Criminal Code for England and Wales, vol 1, Report and draft Criminal Code Bill, p. 81 (Law Com. No. 177).

Is there here a compellingly clear implication that Parliament should be taken to have intended that the ordinary common law requirement of a mental element should be excluded in respect of the age ingredient of this new offence? Thus far, having regard especially to the breadth of the offence and the gravity of the stigma and penal consequences which a conviction brings, I see no sufficient ground for so concluding.

Indeed, the Crown's argument before your Lordships did not place much reliance on any of the matters just mentioned. The thrust of the Crown's argument lay in a different direction: the statutory context. This is understandable, because the statutory background is undoubtedly the Crown's strongest point. The Crown submitted that the law in this field has been regarded as settled for well over one hundred years, ever since the decision in *Reg v. Prince* (1875) L.R. 2 C.C.R. 154. That well known case concerned the unlawful abduction of a girl under the age of sixteen. The defendant honestly believed she was over sixteen, and he had reasonable grounds for believing this. No fewer than fifteen judges held that this provided no defence. Subsequently, *in R. v. Maughan* (1934) 24 Cr.App.R. 130 the Court of Criminal Appeal (Lord Hewart C.J., Avory and Roche JJ.) held that a reasonable and honest belief that a girl was over sixteen could never be a defence to a charge of indecent assault. The court held that this point had

been decided in *Rex v. Forde* (1923) 17 Cr.App.R. 99. The court also observed that in any event the answer was to be found in *Prince's* case. Building on this foundation Mr. Scrivener Q.C. submitted that the Sexual Offences Act 1956 was not intended to change this established law, and that section 1 of the Indecency with Children Act 1960 was to be read with the 1956 Act. The preamble to the 1960 Act stated that its purpose was ro make 'further' provision for the punishment of indecent conduct towards young people. In this field, where Parliament intended belief as to age to be a defenee, this was stated expressly: see, for instance, the 'young man's defence' in section 6(3) of the 1956 Act.

This is a formidable argument, but I cannot accept it. I leave on one side Mr. O'Connor Q.C.'s sustained criticisms of the reasoning in *Prince's* case and *Maughan's* case. Where the Crown's argument breaks down is that the motley collection of offences, of diverse origins, gathered into the Sexual Offences Act 1956 displays no satisfactorily clear or coherent pattern. If the interpretation of section 1 of the Act of 1960 is to be gleaned from the contents of another statute, that other statute must give compelling guidance. The Act of 1956 as a whole falls short of this standard. So do the two sections, sections 14 and 15, which were the genesis of section 1 of the Act of 1960.

Accordingly, I cannot find, either in the statutory context or otherwise, any indication of sufficient cogency to displace the application of the common law presumption. In my view the necessary mental element regarding the age ingredient in section 1 of the Act of 1960 is the absence of a genuine belief by the accused that the victim was fourteen years of age or above. The burden of proof of this rests upon the prosecution in the usual way. If Parliament considers that the position should be otherwise regarding this serious social problem, Parliament must itself confront the difficulties and express its will in clear terms. I would allow this appeal.

I add a final observation. As just mentioned, in reaching my conclusion I have left on one side the criticisms made of *Prince's* case and *Maughan's* case. Those cases coneerned different offences and different statutory provisions. The correctness of the decisions in those cases does not call for decision on the present appeal. But, without expressing a view on the correctness of the actual decisions in those cases, I must observe that some of the reasoning in *Prince's* case is at variance with the common law presumption regarding mens rea as discussed above. To that extent, the reasoning must be regarded as unsound. For instance, Bramwell B. (at p. 174) seems to have regarded the common law presumption as ousted because the act forbidden was 'wrong in itself'. Denman J. (at p. 178) appears to have considered it was 'reasonably clear' that the Act of 1861 was an Act of strict liability so far as the age element was coneerned. On its face this is a lesser standard than necessary implication. And in the majority judgment, Blackburn J. reached his conelusion by inferenee from the intention Parliament must have had when enacting two other, ineptly drawn, seetions of the Act. But clumsy parliamentary drafting is an insecure basis for finding a necessary implication elsewhere, even in the same statute. *Prince's* case, and later decisions based on it, must now be read in the light of this decision of your Lordships' House on the nature and weight of the common law presumption.

LORD STEYN

My Lords,

The first certified question is whether a defendant is entitled to be acquitted of the offence of inciting a child under 14 to commit an act of gross indecency, contrary to section 1(1) of the Indecency with Children Act 1960, if he holds or may hold an honest belief that the child was 14 years or over. In other words, the question of statutory interpretation before the House is whether mens rea is an ingredient of the offence or whether the subsection creates an offence of strict liability.

The charge and proceedings below

On 19 August 1997 a girl aged 13 years was a passenger on a bus in Harrow. The appellant, who was aged 15 years, sat next to her. The appellant asked the girl several times to perform oral sex with him. She repeatedly refused. The appellant was charged with inciting a girl under 14 to commit an act of gross indecency contrary to section 1(1) of the Indecency with Children Act 1960. In January 1998 the appellant stood trial at the Harrow Youth Court. Initially, the appellant pleaded not guilty. The primary facts, as well as the fact that the appellant honestly believed that the girl was over 14 years, were admitted. The defence argued that on the admitted facts the appellant was entitled to be acquitted. The prosecution submitted that the offence was one of strict liability. The justices were asked to rule whether the appellant's state of mind could constitute a defence to the charge. They ruled that it could not. As a result of this ruling the appellant changed his plea to guilty. In law his plea of guilty constituted a conviction. The justices imposed a supervision order on the appellant for 18 months.

The justices were asked to state a case, and they did so. The case stated set out the primary facts. The admitted facts did not cover the question whether the appellant had reasonable grounds for his belief. And there was no finding on this point. The case stated raised the question of law of the correct interpretation of section 1(1) of the Act of 1960. The appellant appealed by way of case stated to the Divisional Court. In three separate judgments the Divisional Court (Brooke L.J., Tucker and Rougier J.J.) affirmed the ruling of the justices and dismissed the appeal; *R. v. B (A Minor) v. Director of Public Prosecutions* [1999] 3 W.L.R. 116.

The genesis of section 1(1) of the Act of 1960

Before the enactment of the Act of 1960 there was already in existence a relatively comprehensive statute, the Sexual Offences Act 1956, which served to protect young children against sexual exploitation. In particular the Act of 1956 contained provisions making it an offence to commit an indecent assault on a man or a woman: sections 14 and 15. The statute provided that girls and boys under 16 cannot in law give consent which would prevent the act being an assault. These provisions were effective so far as they went but decided cases revealed a gap in the protective net of the Act of 1956: *Fairclough v. Whipp* [1951] 2 All E.R. 834 and *Director of Public Prosecutions v. Rogers* [1953] 1 W.L.R. 1017. The statute made no provision for cases where an adult invited a child to touch or handle him indecently: in such cases there was sometimes no ingredient of assault which could trigger the indecent assault provisions of the Act of 1956, namely sections 14 and 15. In 1959 the Home Secretary invited the Criminal Law Revision Committee to consider the point and to make recommendations for an amendment of the law. The Committee produced a clear and succinct report dated 18 June 1959: Cmnd 835. The Committee cautioned itself against recommending too broad a provision: instead it concentrated on the gap in the Act of 1956. It considered the appropriate age limit. The Committee recommended the

creation of an entirely new offence in respect of acts of gross indecency towards children under the age of 14. The Committee annexed a Draft Bill to its Report. Clause 1(1) of the Bill was in due course enacted as section 1(1) of the Act of 1960. There is no discussion in the Report of the question whether the proposed new offence would be one of strict liability or not.

Section 1(1)

The long title of the Act of 1960 describes it as an Act "to make further provision for the punishment of indecent conduct towards young children." Section 1(1) provides as follows:

> "Any person who commits an act of gross indecency with or towards a child under the age of fourteen, or who incites a child under that age to such an act with him or another, shall be liable on conviction on indictment to imprisonment for a term not exceeding two years, or on summary conviction to imprisonment for a term not exeeeding six months, to a fine not exceeding the prescribed sum, or to both."

Section 1(1) creates an age-based offence. It is of the essence of the offence that the child is under the age of 14 years. The offence is an exception to the general law which does not make it an offence to commit or to incite another to commit an act of indecency or gross indecency. The only criminalisation of acts of gross indecency in the Act of 1956 is to be found in section 13 which makes acts of indecency between men an offence. This is, however, not an age-based offence. It is common ground that this link between the two Acts is neutral and throws no light on the problem before the House.

The Act of 1956

In the Divisional Court Rougier J. described the Act of 1960 as an appendix to the Act of 1956 and I would adopt this description. At the hearing of the appeal to the House counsel for the appellant demonstrated how the Act of 1956 consists of a collection of disparate offences deriving from diverse earlier enactments. Leaving to one side procedural provisions in the Act of 1956 regarding the powers and procedure for dealing with offences and powers of arrest and search, and concentrating on the substantive provisions, the immediate precursors of the present day offences is to be found in legislation dating from 1861, 1885, 1889, 1912, 1913, 1922, 1929 and 1933. And the precursors of some of the sexual offences in the Act of 1861 go back to medieval times. The Crown accepts that it would be wrong to describe the Act of 1956 as the product of a legislative initiative designed to devise a more rational system. It would be more accurate to describe it as the bringing together in one statute of a range of offences pragmatically created at different times in response, no doubt, to the perceived demands of public interest at the time. But, as counsel for the Crown pointed out, there is nevertheless a strong theme running through the various provisions of the Act of 1956, namely the protection of young children from sexual depredations.

For present purposes it is unnecessary to review all the detailed substantive provisions of the Act of 1956. But three matters need to be mentioned. First, sections 5 and 6 create a "pair" of offences, namely offences of having sexual intercourse with girls under 13 (section 5) and with girls under 16 (section 6). Under section 6(3) there is a so called "young man's defence." That is a defence available to men under the age of 24 who have not previously been charged with a like offence who act in the belief that the girl

the age of 24, who have not previously been charged with a like offence, who act in the belief that the girl is of the age of 16 or over and has reasonable cause for such a view. This defence is not available upon a charge under section 5 which plainly creates an offence of strict liability. Secondly, in the Statement of Facts and Issues and in oral argument counsel described sections 14 and 15 of the Act of 1956 as for present purposes the most relevant comparators in the Act of 1956. They provide as follows:

> "14. (1) It is an offence, subject to the exception mentioned in subsection (3) of this section, for a person to make an indecent assault on a woman.
>
> "(2) A girl under the age of sixteen cannot in law give any consent which would prevent an act being an assault for the purposes of this section.
>
> "(3) Where a marriage is invalid under section two of the Marriage Act 1949 or section one of the Age of Marriage Act 1929 (the wife being a girl under the age of sixteen), the invalidity does not make the husband guilty of any offence under this section by reason of her incapacity to consent while under that age, if he believes her to be his wife and has reasonable cause for the belief.
>
> "(4) A woman who is a defective cannot in law give any consent which would prevent an act being an assault for the purposes of this section, but a person is only to be treated as guilty of an indecent assault on a defective by reason of that incapacity to consent, if that person knew or had reason to suspect her to be a defective.
>
> "15. (1) It is an offence for a person to make an indecent assault on a man.
>
> "(2) A boy under the age of sixteen cannot in law give any consent which would prevent an act being an assault for the purposes of this section.
>
> "(3) A man who is a defective cannot in law give any consent which would prevent an act being an assault for the purposes of this section, but a person is only to be treated as guilty of an indecent assault on a defective by reason of that incapacity to consent, if that person knew or had reason to suspect him to be a defective.
>
> "(4) Section thirty-nine of this Act (which relates to the competence as a witness of the wife or husband of the accused) does not apply in the case of this section, except on a charge of indecent assault on a boy under the age of seventeen.
>
> "(5) For the purposes of the last foregoing subsection a person shall be presumed, unless the contrary is proved, to have been under the age of seventeen at the time of the offence charged if he is stated in the charge or indictment, and appears to the court, to have been so."

It has been held that it is no defence on charges under sections 14 and 15 that the defendant believed the girl or boy to be under 16 and to be consenting: *Rex v. Forde* [1923] 2 K.B. 400, C.A.; *Rex v. Maughan* (1934) 24 Cr.App.R. 130, C.C.A. Counsel for the appellant challenged the correctness of these decisions. The third point is a more general one. Counsel for the Crown submitted that a study of the Act of 1956 reveals a general legislative policy to protect young children under the age of 16 years

from sexual abuse. This proposition is uncontroversial: the legislative policy described by counsel is evidenced by numerous provisions of the Act of 1956. In these circumstances it is unnecessary to refer to other provisions of the Act of 1956.

The correct approach

My Lords, it will be convenient to turn to the approach to be adopted to the construction of section 1(1) of the Act of 1960. While broader considerations will ultimately have to be taken into account, the essential point of departure must be the words of section 1(1). The language is general and nothing on the face of section 1(1) indicates one way or the other whether section 1(1) creates an offence of strict liability. In enacting such a provision Parliament does not write on a blank sheet. The sovereignty of Parliament is the paramount principle of our constitution. But Parliament legislates against the background of the principle of legality. In *Reg. v. Secretary of State for the Home Department, Ex parte Pierson* [1998] AC 539 many illustrations of the application of the principle were given in the speech of Lord Browne-Wilkinson and in my speech: 573G-575D, 587C-590A. Recently, in *Reg. v. Secretary of State for the Home Department, Ex parte Simms* [1999] 3 WLR 328 the House applied the principle to subordinate legislation: see in particular the speeches of Lord Hoffmann (at 341F-G), myself (at 340G-H) and Lord Browne-Wilkinson (at 330E). In *Ex parte Simms* Lord Hoffmann explained the principle as follows (at 341F-G):

> 'But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."

This passage admirably captures, if I may so, the rationale of the prineiple of legality. In successive editions of his classic work Professor Sir Rupert Cross cited as the paradigm of the principle the "'presumption' that mens rea is required in the case of statutory crimes": *Statutory Interpretation* 3 ed. (1995), p. 166. Sir Rupert explained that such presumptions are of general applieation and are not dependent on finding an ambiguity in the text. He said they 'not only supplement the text, they also operate at a higher level as expressions of fundamental principles governing both civil liberties and the relations between Parliament, the executive and the courts. They operate as constitutional principles which are not easily displaced by a statutory text": ibid. In other words, in the absence of express words or a truly necessary implication, Parliament must be presumed to legislate on the assumption that the principle of legality will supplement the text. This is the theoretical framework against which section 1(1) must be interpreted.

It is now necessary to examine the practical application of the principle as explained by the House in *Sweet v. Parsley* [1970] A.C. 132. The decision is of great importance not for the actual decision but for the clear statement of general principle in the speeches. Lord Reid observed (at 148G-149E):

> "Our first duty is to consider the words of the Act: if they show a clear intention to create an absolute offence that is an end of the matter. But such cases are very rare. Sometimes the words of

> absolute offence that is an end of the matter. But such cases are very rare. Sometimes the words of the section which creates a particular offence make it clear that mens rea is required in one form or another. Such cases are quite frequent. But in a very large number of cases there is no clear indication either way. In such cases there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that whenever a section is silent as to mens rea there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea. . . . it is firmly established by a host of authorities that mens rea is an essential ingredient of every offence unless some reason can be found for holding that that is not necessary.

"It is also firmly established that the fact that other sections of the Act expressly require mens rea, for example because they contain the word "knowingly," is not in itself sufficient to justify a decision that a section which is silent as to mens rea creates an absolute offence. In the absence of a clear indication in the Act that an offence is intended to be an absolute offence, it is necessary to go outside the Act and examine all relevant circumstances in order to establish that this must have been the intention of Parliament. I say "must have been" because it is a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted."

Lord Reid drew a distinction between "a truly criminal act" and acts which are not truly criminal in any real real sense, but are "acts which in the public interest are prohibited under a penalty": at 149F. He reaffirmed his observations in *Reg. v. Warner* [1969] A.C. 256 where he gave examples of the latter category of offences. In *Sweet v. Parsley* he said that in cases of truly criminal acts it is wrong to take into account "no more than the wording of the Act and the character and seriousness of the mischief which constitutes the offence": at 150A. Lord Morris of Borth-y-Gest and Lord Pearce delivered concurring speeches which do not differ in any material way from the approach outlined by Lord Reid. Lord Wilberforce dealt with the case on a narrower basis. Subject to one qualification the speech of Lord Diplock is to the same effect as the speech of Lord Reid. Lord Diplock invoked (at 163A-B):

> "a general principle of construction of any enactment, which creates a criminal offence, that, even where the words used to describe the prohibited conduct would not in any other context connote the necessity for any particular mental element, they are nevertheless to be read as subject to the implication that a necessary element in the offence is the absence of a belief, held honestly and upon reasonable grounds, in the existence of facts which, if true, would make the act innocent." (my emphasis).

The qualification is contained in the underlined words. It is not to be found in the other speeches in *Sweet v. Parsley*. It is a point to which I will return later in this judgment. Counsel for the Crown accepted that the approach as outlined in *Sweet v. Parsley*, and in particular in the speech of Lord Reid, is an authoritative and accurate statement of the law. It is only necessary to refer one further decision. In *Lim Chin Aik v. The Queen* [1963] A.C. 160, at 174, the Privy Council observed that in considering how the presumption can be displaced "it is not enough in their Lordships' opinions merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended." Their Lordships no doubt had in mind that the prevalence of even a grave social evil does not necessarily throw

light on the question of what technique was adopted to combat the evil, viz. the creation of an offence of strict liability or an offence of which mens rea is an ingredient.

Concentrating still on the wording of section 1(1) of the Act of 1960, I now address directly the question whether the presumption is prima facie applicable. Two distinctive features of section 1(1) must be taken in to account. First, the actus reus is widely defined. Unlike the position under sections 14 and 15 of the Act of 1956, an assault is not an ingredient of the offence under section 1(1). Any act of gross indecency with or towards a child under the age of 14, or incitement to such an act, whether committed in public or private, is within its scope. The subsection is apt to cover acts of paedophilia and all responsible citizens will welcome effective legislation in respect of such a great social evil. But it also covers any heterosexual or homosexual contact between teenagers if one of them is under 14. And the actus reus extends to incitement of a child under 14: words are enough. The subsection therefore extends to any verbal sexual overtures between teenagers if one of them is under 14: see the telling examples given by Brooke L.J. in the instant case: at 128H-129C. For the law to criminalise such conduct of teenagers *by offences of strict liability* would be far reaching and controversial. The second factor is that section 1(1) creates an offence of a truly criminal character. It was initially punishable on indictment by a custodial term of up to two years and by subsequent amendment the maximum term has been increased to ten years' imprisonment. Moreover, as Lord Reid observed in *Sweet v. Parsley* (at 146H) "a stigma still attaches to any person convicted of a truly criminal offence, and the more serious or more disgraceful the offence the greater the stigma." Taking into account the cumulative effect of these two factors, I am persuaded that, if one concentrates on the language of section 1(1), the presumption is prima facie applicable. It is, however, now necessary to examine weighty contrary arguments based on the broader context in which section 1(1) must be seen. Since counsel for the Crown adopted as part of his argument the reasoning of the Divisional Court, and in particular the reasoning of Rougier J., it is unnecessary to summarise the judgments. Instead I propose to examine directly the major planks of the reasoning contained in the judgments of the Divisional Court and in the submissions of counsel for the Crown. But I would respectfully record my tribute to the careful and elegant judgments in the Divisional Court.

The Acts of 1960 and 1956 are a code

Counsel for the Crown submitted that the Acts of 1960 and 1956 are a code of sexual offences. He said that the two Acts should be read as one always speaking statute to be interpreted in the world of today: *Reg. v. Ireland* [1998] AC 147, at 158D-G. I regard this approach as sound but by itself it constitutes no positive reason in favour of the displacement of the presumption. If the Act of 1956 is to impress a particular meaning on the Act of 1960 it must be on the basis that its concrete terms provide a consistency of theme.

Counsel for the Crown was faced with the immediate difficulty that the weight to be attached to a comparison of the language of the two statutes is materially diminished by the history of the evolution of the legislation, which I have already described. The point can be illustrated from a citation in *Reg. v. Ireland*, supra. The context was an argument based on differences in the wording of sections 18, 20 and 47 of the Offences Against the Person Act 1861. Observing that the difference in language was not a significant factor, I quoted in *Ireland* from the commentary of *Greaves*, the draftsman: The Criminal Law Consolidation and Amendment Acts (1861). The passage is at page 159E-F of my judgment which was

given with the approval of all members of the Appellate Committee. For convenience I set it out:

> "If any question should arise in which any comparison may be instituted between different sections of any one or several of these Acts, it must be carefully borne in mind in what manner these Acts were framed. None of them was rewritten; on the contrary, each contains enactments taken from different Acts passed at different times and with different views, and frequently varying from each other in phraseology, and . . . these enactments, for the most part, stand in these Acts with little or no variation in their phraseology, and, consequently, their differences in that respect will be found generally to remain in these Acts. It follows, therefore, from henee, that any argument as to a differenee in the intention of the legislature, which may be drawn from a difference in the terms of one elause from those in another, will be entitled to no weight in the construction of such elauses; for that argument can only apply with force where an Act is framed from beginning to end with one and the same view, and with the intention of making it thoroughly consistent throughout."

This explanation led to the description of the Act of 1861 (a preeursor of the Act of 1956) as containing "a rag-bag of offences brought together from a variety of sources with no attempt, as the draftsman frankly acknowledged, to introduce eonsistency as to substance or as to form": *Reg. v. Parmenter* [1992] 1 A.C. 699, at 752, *per* Lord Ackner, quoting Sir John Smith Q.C. [1991] Cr. L.R. 43. Counsel for the Crown aceepted that this is an aceurate characterisation of the genesis of the Acts of 1960 and 1956 read together.

The express provision in the Act of 1956

Adopting the reasoning of Rougier J. counsel for the Crown laid stress on express provisions in the Act of 1956 allowing a defence of mistake. The argument is that where the legislature has been silent on mistake the offence must be one of strict liability. Counsel drew attention to the following provisions. Section 6(3) permits a statutory defence for young men who believe on reasonable grounds a girl to be aged 16 or over. Section 7(2) provides for proof of knowledge in the case of intercourse with an idiot or imbecile. The same applies to procurement of a defective: section 9(2). It also applies to indecent assault on a female defeetive: seetion 14(4). Finally, there is such a defence in respect of the offence of permitting a defective to use premises for intercourse: section 27(2). This argument fails to make adequate allowance for the haphazard way in which the Act of 1956 evolved. It is not the product of a rational seheme. The appeal to its diverse provisions enacted in response to the felt necessities of different times does not deserve the weight which the Divisional Court and counsel for the Crown put on it. Moreover, it fails to take account of the force of the presumption, and in particular Lord Reid's observation in *Sweet v. Parsley*, supra, at 149D that it is "firmly established that the fact that other sections of the Act expressly require mens rea, for example because they contain the word "knowingly," is not in itself sufficient to justify a deeision that a section which is silent as to mens rea creates an absolute offence." In my view the express references to knowledge in the Act of 1956 does not sufficiently clearly displace the presumption.

Sections 14 and 15 of the Act of 1956.

Counsel for the Crown also put forward a narrower but more formidable argument. Section 13 of the Act of 1956, which deals with acts of gross indecency between men, is the closest comparator to section 1(1) of the Act of 1960. But it does not involve an age-based offence. In these circumstances he

1(1) of the Act of 1960. But, it does not involve an age-based offence. In these circumstances he described section 14 and 15 as the most significant comparators in the present context. He relied on the fact that it had been held in the cases of *Forde* and *Maughan* that an honest belief that the girl or boy is under 16 is no defence. On that basis he rhetorically asked: Why should the same not apply to section 1(1) of the Act of 1960? As I have already pointed out counsel for the appellant challenged the correctness of these decisions. For my part it is not necessary to examine the legal position under section 14 and 15. While I accept that the matter is finely balanced, I am persuaded that the balance of arguments point to a rejection of this submission. The scope of sections 14 and 15 is markedly narrower than section 1(1) with which this case is concerned. Under sections 14 and 15 an assault is an ingredient of the offence. And an assault necessarily requires an intentional act: an accidental contact would not be an assault. To that extent at least mens rea is an ingredient. By contrast section 1(1) does not require an assault. It criminalises a far wider spectrum of acts. And the age of the victim is of the essence of the offence. Absent the age factor, such conduct is not criminal. By contrast any indecent assault has been a crime for centuries. In my view a comparison of the language of sections 14 and 15 and section 1(1) does not point towards the displacement of the presumption. It is not a solid basis for a necessary implication rendering the principle enunciated in *Sweet v. Parsley* inapplicable.

The legislative policy of the Act of 1956.

Counsel for the Crown next submitted that a necessary implication negativing mens rea as an ingredient of the offence is to be found in the general legislative policy of the Act of 1956 to protect girls under the age of 16: see section 5, 6, 14, 15, 26 and 28. It is undoubtedly right that there is a clear legislative policy prohibiting the sexual exploitation of girls. It is unquestionably a great social evil as Lord Hutton has so clearly explained. Whatever can be done sensibly and justly to stamp it out ought to be done. The real question is: what does this policy tell us about the critical question whether section 1(1) is an offence of strict liability or not? It is not enough to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended: see *Lim Chin Aik v. The Queen*, supra, at 174. Moreover, upon analysis the argument is far from compelling. It infers from the premise of the legislative policy directed against the mischief a conclusion that the legislature gave clear expression to a choice of the solution of creating an offence of strict liability rather than an offence containing mens rea as an ingredient. The cardinal principle of construction described by Lord Reid in *Sweet v. Parsley* is not to be displaced by such speculative considerations as to the chosen legislative technique. I would reject this argument.

Prince's case

Counsel for the Crown also relied on what he described as a principle of construction established in *Reg. v. Prince* (1875) L.R. 2 C.C.R. 154. In *Prince* the defendant was convicted under a Victorian statute of unlawfully taking an unmarried girl under the age of 16 out the possession of her father. The defendant bona fide and on reasonable grounds believed that the girl was under 16. The judge referred the question of the availability of the defence to the Court for Crown Cases Reserved. The court consisted of 16 judges. The prisoner was not represented. By a majority of 15 to 1 the court held that there was no such defence. The leading judgment was given by Blackburn J. with the concurrence of nine other judges. Blackburn J. relied strongly on a drafting flaw in sections 50 and 51 of the Offences Against the Person Act 1861. The two sections respectively provided for offences of sexual intercourse with a girl

under ten (section 50) and above the age of ten years and under the age of twelve years (section 51). The first was a felony and the latter a misdemeanour. Blackburn J. produced what Professor Sir Rupert Cross in a magisterial article described as a "knock-out" argument: Centenary Reflections on *Prince's* case (1975) 91 L.Q.R. 540. The passage in Blackburn's J. judgment reads as follows.

> "It seems impossible to suppose that the intention of the legislature in those two sections could have been to make the crime depend upon the knowledge of the prisoner of the girl's actual age. It would produce the monstrous result that a man who had carnal connection with a girl, in reality not quite ten years old, but whom he on reasonable grounds believed to be a little more than ten, was to escape altogether. He could not, in that view of the statute, be convicted of the felony, for he did not know her to be under ten. He could not be convicted of the misdemeanour, because she was in fact not above the age of ten. It seems to us that the intention of the legislature was to punish those who had connection with young girls, though with their consent, unless the girl was in fact old enough to give a valid consent. The man who has connection with a child, relying on her consent, does it at his peril, if she is below the statutable age. The 55th section, on which the present case arises, uses precisely the same words as those in sections 50 and 51, and must be construed in the same way."

Eventually the distinction between felonies and misdemeanours was abolished and the drafting flaw in the earlier legislation no longer exists. The principal ground of the decision of Blackburn J. has disappeared. It is true that Bramwell B. gave a separate judgment in which seven judges concurred. This judgment is largely based on the view that the defendant was guilty in law because if the facts had been as he supposed he would have acted immorally. For the further reasons given by Sir Rupert Cross in his article one can be confident that the reasoning of Bramwell B., if tested in a modern court, would not be upheld: see also *DPP v. Morgan* [1976] A.C. 182, at 238, *per* Lord Fraser of Tullybelton: and the valuable discussion by Brooke L.J. of the context of *Prince's* case: at 130B-132B. Significantly, *Prince's* case was cited in *Sweet v. Parsley* but was not mentioned in any of the judgments. The view may have prevailed that it was not necessary to overrule it because its basis had gone and that the principle laid down in *Sweet v. Parsley* would in future be the controlling one. In any event, I would reject the contention that there is a special rule of construction in respect of age- based sexual offences which is untouched by the presumption as explained in *Sweet v. Parsley*. Moreover, *Prince's* case is out of line with the modern trend in criminal law which is that a defendant should be judged on the facts as he believes them to be: *D.P.P. v. Morgan* [1976] A.C. 182; *Williams* (1984) 78 Cr.App.R. 276; *Beckford v. R.* [1988] A.C. 130. This development has led the Criminal Law Revision Committee to recommend that the rules be harmonised and that the prosecution should prove that the man realised that the girl was under 16: Fifteenth Report, 1984, paras. 5.5-5.15. Its recommendation was repeated by Brooke L.J. in the instant case: at 136B-E. For all these reasons I would reject counsel's attempt to reinvigorate *Prince's* case: it is a relic from an age dead and gone. It is no longer possible to extract from *Prince's* case a special principle of construction applicable only to age-based sexual offences.

Practical difficulties

Counsel for the Crown finally submitted that it would in practice be difficult for the Crown to disprove defences of lack of knowledge of the age of the victim. In my view counsel has overstated the difficulties.

After all, the legislature expressly made available such an excuse in the case of the so-called "young man's defence" under section 6(3). Moreover, as Brooke L.J. pointed out in the Divisional Court recklessness or indifference as to the existence of the prohibited circumstance would be sufficient for guilt: at 129B. And in practice the Crown would only have to shoulder the burden of proving that the defendant was aware of the age of the victim if there was some evidential material before the jury or magistrates suggesting the possibility of an honest belief that the child was over 14. In these circumstances the suggested evidential difficulties ought not to divert the House from a principled approach to the problem.

Conclusion

My Lords, for these reasons, as well as reasons given by Lord Hutton, I would answer the principal certified question in the affirmative.

The supplementary certified questions:

Given my conclusion on the first certified question the following supplementary certified questions arise:

(a) Must the belief be held on reasonable grounds?

(b) On whom does the burden of proof lie?

Counsel for the Crown did not argue, in the alternative, that the belief must be held on reasonable grounds. Nevertheless, I initially regarded such a requirement as an acceptable solution. A basis for this view would be Lord Diplock's observation in *Sweet v. Parsley*. This view is however contrary to the way in which our criminal law has subsequently developed. In *D.P.P. v. Morgan* [1976] A.C. 182 the House of Lords held by a majority of three to two that when a defendant had sexual intercourse with a woman without her consent, genuinely believing that she did consent, he was not guilty of rape, even if he had no reasonable grounds for his belief. The importance of this decision for the coherent development of English law was not immediately appreciated. The next stage in the development was the decision of the Court of Appeal in *Reg. v. Williams* (1983) 78 Cr.App.R. 276. The charge was assault. The defendant argued that he used force in the honest belief that he was protecting somebody else from an unlawful assault. Holding that the jury had been materially misdirected, the Court of Appeal, applying the logic of *Morgan*, held that if the defendant believed, reasonably or not, in the existence of facts which would justify the force used in self- defence, he did not intend to use *unlawful* force. The decision in *Williams* was followed and approved and applied by the Privy Council in *Beckford v. The Queen* [1988] A.C. 130. It was held that if the defendant honestly believed the circumstances to be such as would, if true, justify his use of force to defend himself from attack and the force was no more than reasonable to resist the attack, he was entitled to be acquitted of murder; since the intent to act unlawfully would be negatived by his belief, however mistaken or unreasonable. *Morgan* was described as the "a landmark decision in the development of the common law": *Beckford v. R.* supra, at 145C. There has been a general shift from objectivism to subjectivism in this branch of the law. It is now settled as a matter of general principle that mistake, whether reasonable or not, is a defence where it prevents the defendant from having the mens rea which the law requires for the crime with which he is charged. It would be in disharmony with this development now to rule that in respect of a defence under subsection 1(1) of the Act of 1960 the belief must be based on reasonable grounds. Moreover, if such a special solution were to be adopted, it would

must be based on reasonable grounds. Moreover, if such a special solution were to be adopted, it would almost certainly create uncertainty in other parts of the criminal law. It would be difficult to confine it on a principled basis to subsection 1(1). I would answer question (a) in the negative.

That leaves question (b). In *Woolmington v. D.P.P.* [1935] A.C. 462, at 481, Viscount Sankey L.C. observed that "throughout the web of the English criminal law one golden thread is to be seen, that it is the duty of the prosecution to prove the prisoner's guilt." It provides the answer to question (b). There is no legally sound basis on which it would be possible to rule that the burden is on the defendant to prove an honest belief that the victim was over 14 years.

Conclusion

My Lords, I am in general agreement with the speech of Lord Hutton. For the reasons I have given, as well as for reasons given by Lord Hutton, I would allow the appeal and quash the conviction of the appellant.

LORD HUTTON

My Lords,

The governing principle on the issue of strict liability in a statutory offence was stated by Lord Reid in *Sweet v. Parsley* [1970] A.C. 132, 148H:

> "... whenever a section is silent as to mens rea there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea.
>
> . . .it is firmly established by a host of authorities that mens rea is an essential ingredient of every offence unless some reason can be found for holding that that is not neeessary.
>
> It is also firmly established that the fact that other sections of the Act expressly require mens rea, for example because they contain the word 'knowingly', is not in itself sufficient to justify a decision that a section which is silent as to mens rea creates an absolute offence. In the absence of a clear indication in the Act that an offence is intended to be an absolute offence, it is necessary to go outside the Act and examine all relevant circumstances in order to establish that this must have been the intention of Parliament. I say 'must have been' because it is a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted."

And at page 163B Lord Diplock said:

> ". . . [it is] a general principle of construction of any enactment, which creates a criminal offence, that, even where the words used to describe the prohibited conduct would not in any other context connote the necessity for any particular mental element, they are nevertheless to be read as subject to the implication that a necessary element in the offence is the absence of a belief, held honestly and upon reasonable grounds, in the existence of facts which, if true, would make the act innocent. As was said by the Privy Council in *Bank of New South Wales v. Piper* [1897] A.C. 383, 389

> As was said by the Privy Council in *Bank of New South Wales v. Piper* [1897] A.C. 383, 389, 390, the absence of mens rea really consists in such a belief by the accused."

The prineiple has also been formulated by stating that the requirement for mens rea is only ruled out if by neeessary implication this is the effect of the statute. In *Brend v. Wood* [1946] 175 L.T. 306, 307 Lord Goddard C.J. said:

> "It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute, either clearly or by necessary implication, rules out mens rea as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind."

And in *Gammon (Hong Kong) Ltd. v. Attorney-General of Hong Kong* [1985] A.C. 1, 14, in delivering the judgment of the Board Lord Scarman referred to "necessary implication" in the third proposition:

> "In their Lordships' opinion, the law relevant to this appeal may be stated in the following propositions (the formulation of which follows closely the written submission of the appellants' counsel, which their Lordships gratefully acknowledge): (1) there is a presumption of law that mens rea is required before a person can be held guilty of a eriminal offence; (2) the presumption is particularly strong where the offence is 'truly criminal' in character; (3) the presumption applies to statutory offences, and ean be displaced only if this is clearly or by necessary implication the effect of the statute; (4) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of soeial concern, and public safety is such an issue; (5) even where a statute is coneerned with such an issue, the presumption of mens rea stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of thc statute by encouraging greater vigilance to prevent the commission of the prohibited act."

Section 1(1) of the 1960 Act does not elearly rule out mens rea as a constituent part of an offence, and therefore the erucial question is whether it rules it out by necessary implication. On this issue I consider the arguments for the appellant and the Crown to be almost evenly balanced. In my opinion the points advanced by the Crown carry eonsiderable weight. The purpose of Section 1(1) is clearly to protect children under the age of fourteen from sexual corruption: to protect their "sexual integrity" (to employ the term used by Professor Ashworth in his illuminating article on "Interpreting Criminal Statutes: A Crisis of Legality?" 107 L.Q.R. 419, 446). This purpose may be impeded if the happiness and stability of a ehild under fourteen is harmed hy the violation of his or her innocence by some act of gross indecency or ineitement to gross indecency committed by a person who honestly believes that the child is older than fourteen. Although more than a century has passed sinee the judgments in *Regina v. Prince* (1875) L.R. 2 C.C.R. 154, and although his reasoning was strongly influeneed by the drafting error in Sections 50 and 51 of the Offences Against the Person Act 1861, I consider that there is still force in the view of Blackburn J., at page 171 which, although stated in relation to carnal knowledge of a girl under the age of ten or under the age of twelve, is also applicable to indecent conduct towards a child under fourteen:

> "It seems to us that the intention of the legislature was to punish those who had connection with young girls, though with their consent, unless the girl was in fact old enough to give a valid consent

young girls, though with their consent, unless the girl was in fact old enough to give a valid consent. The man who has connection with a child, relying on her consent, does it at his peril, if she is below the statutable age."

Therefore I recognise the force of the approach taken by Rougier J. in the Divisional Court at page 120G:

> "Though any violation of a child's innocence attracts very grave stigma, yet the protection of children from sexual abuse is a social and moral imperative."

This approach recognises, rightly in my opinion, that in a criminal statute intended to protect children the courts should not focus solely on the rights of the accused but should also take into account the right of children to be protected. In the article to which I have referred Professor Ashworth states at page 446 that most English writers on criminal law "have laid emphasis on liberal ideals such as the principle of legality (in terms of non-retroactivity, maximum certainty and restrictive construction), the presumption of innocence, the prineiple of autonomy and subjective principles of liability, the doctrine of fair opportunity and so forth".

In the next paragraph Professor Ashworth says:

> "It is not sought to deny that the liberal ideals mentioned in the last paragraph have a central place in criminal law doctrine, but they should not be presented as if they stand alone as absolutes. It was suggested above that some judges derive their motivation directly from a conception of the aim of criminal law as penalising those who cause major harms. One of the policies derived from this perspective is the 'thin ice' prineiple, discussed above; whilst there is a tendency to use a broad phrase such as 'public policy' or 'social defence' to encompass these policies, it is neeessary to look more closely at distinct polieies and the ends they are claimed to serve. It would not streteh the truth too far to suggest that the typical academic approach has been to emphasisc liberal values and the traditional judicial approach to emphasise what they regard as social values in these matters. The first step is to recognise that values of both kinds do and should form part of eriminal law doctrine. The next step is to recognise that they will frequently confliet and that, whilst eareful discussion of the principles and policies will give some indication as to how confliets should be resolved, situations will occur in whieh the courts must make that ehoiec. This makes it crucial that the policies and principles are openly discussed, rather than concealed behind high-sounding phrases about 'legislative intent', 'public poliey' or 'the principle of legality'."

Two further interrelated points support the argument of the Crown. One is that, as Rougier J. states, the Act of 1960 is an appendix to the Act of 1956, and the wording of Sections 5 and 6 of the 1956 Act relating respectively to intercourse with a girl under thirteen and to intercourse with a girl under sixteen, but with the latter section providing in subsection (3) for "the young man's defenee", makes it plain that the offence under Section 5 is an offence of strict liability. Therefore it is clear that in the Act of 1956 Parliament intended that there should be strict liability when a man had sexual intereourse with a girl under thirteen, and accordingly it ean be argued that it is in accordanee with the intention of Parliament that there should be strict liability when a person is guilty of gross indecency towards a child under fourteen. The second point is that in addition to Section 6(3) there are a number of sections in the Act of 1956 which

second point is that in addition to Section 6(3) there are a number of sections in the Act of 1956 which expressly provide for a defence of mistake. In the case of intercourse with a woman who is a defective Section 7(2) provides a defence if the man does not know and has no reason to suspect the woman to be a defective. The same applies to the offence of procurement of a defective: see Section 9(2). The same defence applies to indecent assault on a woman defective: see Section 14(4). The same defence is available in respect of permitting a defective to use premises for intercourse or causing or encouraging the prostitution of a defective: see Section 27(2) and Section 29(2). Therefore the Crown can argue with considerable force that when Parliament intends that there should be a defence of mistake it makes express provision for this defence, so that where there is no express provision for such a defence the statute by implication intends that the defence will not be available. This point is well stated by Tucker J. in his judgment at page 127H:

> "I deduce from all these statutory provisions that it is the clear intention of Parliament to protect young children and to make it an offence to commit offences against children under a certain age whether or not the defendant knows of the age of the victim, and that it was intended that, save where expressly provided, a mistaken or honest belief in the victim's age should not afford a defence."

Therefore I consider that it would be reasonable to infer that it was the intention of Parliament that liability under Section 1(1) of the Act of 1960 should be strict so that an honest belief as to the age of the child would not be a defence. But the test is not whether it is a reasonable implication that the statute rules out mens rea as a constituent part of the crime - the test is whether it is a necessary implication. Applying this test, I am of opinion that there are considerations which point to the conclusion that it is not a neeessary implication. One is that the various provisions of the Act of 1956 have not been drafted to give effect to a consistent scheme but are a collection of diverse provisions derived from a variety of sources: see the description of the Offences Against the Person Act 1861, a precursor of the Act of 1956, by Lord Ackner in *Regina v. Savage* [1992] 1 A.C. 699, 752, quoting Sir John Smith Q.C. (1991) Cr. L.R. 43. A further consideration is that in *Sweet v. Parsley* Lord Reid stated at page 149D:

> "It is also firmly established that the fact that other sections of the Act expressly require mens rea, for example because they contain the word 'knowingly', is not in itself sufficient to justify a decision that a section which is silent as to mens rea creates an absolute offence."

Whilst, as I have stated, I think there is force in the view expressed by Blackburn J. at page 171-2 of *Regina v. Prince*, I am of opinion that to the extent that *Prince's* case can be viewed as establishing a general rule that mistake as to age does not afford a defence in age-based sexual offences, that rule cannot prevail over the presumption stated by this House in *Sweet v. Parsley*.

Therefore, for the reasons which I have stated, I would allow this appeal and I would answer the first certified question in the affirmative. For the reasons which have been stated by my noble and learned friend Lord Steyn, and with which I agree, I would answer part (a) of the second certified question in the affirmative, and I would answer part (b) by stating that the burden of proof rests on the Crown once the defendant has raised some evidence before the jury or magistrates that he or she honestly believed the child was over fourteen.

I am conscious that the decision by this House to allow this appeal may make it more difficult to convict those who are guilty of an offence under Section 1(1) of the Act of 1960 and thus reduce the protection given to children, but I have come to the conclusion that as Parliament has failed to state by express provision or by necessary implication that mens rea as to age is not necessary, the legal presumption stated by Lord Reid that mens rea is required must be applied. If Parliament regards the decision in this case as giving rise to undesirable consequences it will be for it to change the law, and I share the regret of Brooke L.J. expressed in his judgment at page 136A-H that Parliament does not take account of the expert advice which it has received over the years from the Criminal Law Revision Committee and the Law Commission, and does not address its mind, in enacting legislation creating or restating criminal offences, to the issue whether mens rea should be a constituent part of the offences and does not state in clear terms whether or not mens rea is required.

Juridical status and human rights of the child, Advisory Opinion OC-17/02, August 28, 2002, Inter-Am. Ct. H.R. (Ser. A) No. 17 (2002).

INTER-AMERICAN COURT OF HUMAN RIGHTS

ADVISORY OPINION OC-17/2002
OF AUGUST 28, 2002,
REQUESTED BY THE INTER-AMERICAN COMMISSION ON
HUMAN RIGHTS

Juridical Condition and Human Rights of the Child

Present:

Antônio A. Cançado Trindade, President;
Alirio Abreu Burelli, Vice-President;
Máximo Pacheco Gómez, Judge;
Hernán Salgado Pesantes, Judge;
Oliver Jackman, Judge;
Sergio García Ramírez, Judge and
Carlos Vicente de Roux Rengifo, Judge.

Also present:

Manuel E. Ventura Robles, Secretary and
Pablo Saavedra Alessandri, Deputy Secretary.

THE COURT

composed as above,

renders the following Advisory Opinion:

I
SUBMISSION OF THE REQUEST

1. On March 30, 2001 the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission"), in view of the provisions of Article 64(1) of the American Convention on Human Rights (hereinafter "the American Convention", "the Convention" or "Pact of San José"), filed a request for an Advisory Opinion (hereinafter "the request") before the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court") regarding interpretation of Articles 8 and 25 of the American Convention, with the aim of determining whether the special measures set forth in Article 19 of that same Convention establish "limits to the good judgment and discretion of the States" with respect to children, and it also requested that the Court express general and valid criteria on this matter in conformance to the framework of the American Convention.

2. According to the Inter-American Commission, the background for the request is that

[i]n various legal frameworks and practices of countries of the Americas, effective exercise of the rights and guarantees recognized by Articles 8 and 25 of the American Convention is not complete with respect to children as individuals and actors under criminal, civil and administrative jurisdictions, as there is the assumption that the obligation of the State to supplement the minors' lack of full discernment can make said guarantees occupy a secondary position. This involves abridgment or restriction of minors' right to fair trial and to judicial protection. Therefore, it also affects other recognized rights whose effective exercise depends on effectiveness of the right to fair trial as well as the rights to humane treatment, to personal liberty, to privacy, and the rights of the family.

3. The Commission expressed that there are certain "interpretive premises" that State authorities apply when they adopt special protection measures in favor of minors, which tend to weaken their right to free trial. These measures are as follows:

a. Minors are incapable of full discernment of their acts and therefore their participation, whether personally or through their representatives, is reduced or annulled both in civil and in criminal proceedings.
b. This lack of discernment and legal capacity is presumed by the judicial or administrative officials who, in making decisions based on what they believe to be the "best interests of the child," attach less importance to those guarantees.
c. Conditions in the child's family milieu (economic situation and family cohesion, the family's lack of material resources, educational situation, etc.) become key decision-making factors with respect to treatment when a child or adolescent is placed under criminal or administrative jurisdiction to decide on his or her responsibility and situation in connection with an alleged offense, or to determine measures that affect rights such as the right to a family, right of abode, or right to liberty.
d. Considering that the minor is in an irregular situation (abandonment, dropping out of school, the family's lack of resources, and so forth) may be used to justify application of measures usually reserved for punishment of crimes applicable only under due process.

4 In its request, the Commission asked this Court to issue a specific ruling on the compatibility with Articles 8

and 25 of the American Convention of the following measures that some States adopt regarding minors:

a. separation of young persons from their parents and/or family, on the basis of a ruling by a decision-making organ, made without due process, that their families are not in a position to afford their education or maintenance;
b. deprivation of liberty of minors by internment in guardianship or custodial institutions on the basis of a determination that they have been abandoned or are prone to fall into situations of risk or illegality, motives which should not be considered of a criminal nature, but, rather, as the result of personal or circumstantial vicissitudes[;]
c. the acceptance of confessions by minors in criminal matters without due guarantees;
d. judicial or administrative proceedings to determine fundamental rights of the minor without legal representation of the minor[; and]
e. determination of rights and liberties in judicial and administrative proceedings without guarantees for the right of the minor to be personally heard; and failure to take into account the opinion and preferences of the minor in such determination.

II
PROCEEDINGS BEFORE THE COURT

5. In its April 24, 2001 note, the Secretariat of the Court (hereinafter "the Secretariat"), in compliance with the provisions of Article 62(1) of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"), forwarded the text of the request to the Member States of the Organization of American States (hereinafter "OAS"), to the Inter-American Institute of Children, to the Permanent Council and, through the General Secretary of the OAS, to the bodies of the Organization that –due to their competence- might have an interest in the matter. Likewise, the Secretariat informed them that the President of the Court (hereinafter "the President"), in consultation with the other judges of the Court, ordered that the observations in writing and other significant documents regarding the request must be submitted to the Secretariat no later than October 31, 2001.

6. On August 7, 2001 the Inter-American Institute of Children filed its written observations regarding the request for an Advisory Opinion.

7. Mexico and Costa Rica filed their observations in writing on October 31, 2001.

8. In accordance with the extension for filing of observations granted to the Inter-American Commission by the President, the Commission filed additional specific comments on November 8, 2001.

9. The following non-governmental organizations filed their briefs as amici curiae, between October 16 and 29, 2001:

- Coordinadora Nicaragüense de ONG's que trabajan con la Niñez y la Adolescencia (hereinafter "CODENI");
- Instituto Universitario de Derechos Humanos, A.C., of Mexico; and
- Fundación Rafael Preciado Hernández, A.C., of Mexico.

10. In his April 12, 2002 Order, the President convened a public hearing regarding the request, to be held at the seat of the Court on June 21, 2002, beginning at 10:00 a.m., and instructed the Secretariat to, in a timely manner, invite those who submitted their viewpoints to the Court in writing, to participate in the oral proceedings.

11. The following organizations filed their briefs as amici curiae, between June 18 and August 2, 2002:

- United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (hereinafter "ILANUD");
- Center for Justice and International Law (hereinafter "CEJIL"); and
- Comisión Colombiana de Juristas.

12. On June 21, 2002, before opening the public hearing convened by the President, the Secretariat gave the appearing parties the set of briefs with observations and documents submitted until then.

13. The following parties appeared at the public hearing:

on behalf of the Inter-American Commission on Human Rights:
Mary Ana Beloff.

on behalf of Mexico:
Ambassador Carlos Pujalte Piñeiro;
Ruth Villanueva Castilleja; and
José Ignacio Martín del Campo.

on behalf of Costa Rica:
Arnoldo Brenes Castro;
Adriana Murillo Ruin;
Norman Lizano Ortiz;
Rodolfo Vicente Salazar;
Mauricio Medrano Goebel; and
Isabel Gámez Pácz.

on behalf of Instituto Universitario de Dereehos Humanos, A.C., of Mexico:
María Engracia del Carmen Rodríguez Moreleón;
Enoc Escobar Ramos;
María Cristina Alcayaga Núñez; and
Silvia Oliva de Arce.

on behalf of Fundación Rafael Preciado Hernández, A.C, of Mexico:
Dilcya Samantha García Espinosa de los Monteros.

on behalf of the Center for Justice and International Law:
Juan Carlos Gutiérrez;
Luguely Cunillera; and

Lourdes Bascary.

on behalf of the United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders:
Carlos Tiffer.

14. During the public hearing, the President pointed out to the participants that they could send additional observations until July 21 of this same year at the latest. On July 12 of this year he informed the intervening parties that the Court had scheduled deliberations on the request in the agenda of its LVI Regular Session, from August 26 to September 6, 2002. Mexico, the Commission, CEJIL and the Fundación Rafael Preciado Hernández, A.C., of Mexico filed their observations within the term granted to this end.

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* *

15. The Court summarizes as follows the relevant part of the written observations of the Inter-American Institute of Children, the States participating in these proceedings, the Inter-American Commission, and the Non-Governmental Organizations:

The Inter-American Institute of Children: In its August 7, 2001 brief it stated:

Once the 1989 Convention on the Rights of the Child was adopted, the States of this hemisphere began a process of adapting their legislation in view of the doctrine of comprehensive protection, which considers the child fully as subject of rights, leaving behind the concept that the child is passively the object of protective measures. The latter involves a highly discriminating and non-inclusive jurisdiction, lacking in due process guarantees, and grants the judges broad discretionary powers regarding how to proceed in connection with the general situation of the children. There was thus a transition from a "protective repressive" system to one based on responsibilities and guarantees with respect to children, where special jurisdiction is set within the principle of lawfulness, where due process is respected, and where steps taken are "geared toward redressing the victim and reeducating the juvenile offender, while internment is restricted to those cases in which it is absolutely necessary."

The American Convention on Human Rights establishes that the rights set forth therein pertain to all human beings and, therefore, their full enjoyment and exercise by children are also guaranteed (Articles 3 and 1(2) of the American Convention). In this regard, the ability to enjoy rights, inherent to the human person and which is a ius cogens rule, must not be confused with the relative or absolute inability of children under 18 to exercise certain rights on their own.

Regarding the specific measures identified by the Inter-American Commission, it stated the following:

- Separation of minors from their parents because the authorities deem that the family cannot provide adequate conditions for their education and support: lack of material resources cannot be the only basis for the judicial or administrative decision to order separation from the family. To act in this way breaches rights such as, among others, legality of proceedings, inviolability of the right to proper defense, and humaneness of the measure. Such measures should be impugned and considered not valid;

- Internment of minors deemed abandoned or at risk, who have not committed any crimes: internment of youths who are in situations of social risk, applying the principles of the doctrine of the "irregular situation" that viewed them as objects of protection rather than subjects of rights, involves applying an undefined sanction, which breaches the principle of lawfulness of punishment, aggravated by the fact that generally this is ordered without defining its duration. It is also contrary to the rules of due process.

- Acceptance of confessions by minors in criminal matters without respecting the right to fair trial: even though most legislation in this continent recognizes the right to fair trial, confessions of minors are generally taken without having followed adequate detainment procedures or without the presence of a legal representative of the child or of one of his next of kin, which should suffice for the procedure to be declared null;

- Administrative or judicial proceedings pertaining to fundamental rights of minors, conducted without respecting the right to fair trial and without considering their opinion or preferences: proceedings conducted in the manner described above violate fundamental guarantees such as the principles of guilt, lawfulness, and humane treatment, as well as procedural guarantees (jurisdictionality, the presence of both parties, inviolability of the right to proper defense, presumption of innocence, impugnation, legality of the proceeding, and public nature of the proceedings).

In view of the practices described above, the Institute determined the need to review the process of adjusting legislation of the States of the hemisphere to the principles of the Convention on the Rights of the Child and the American Convention, as today there are still countries that have not fully harmonized their laws to those principles, pursuant to Article 2 of the American Convention. The Institute concluded that Articles 8, 19 and 25 of the American Convention must constitute limits on States' discretionary power to issue special measures of protection with respect to children. Therefore, they must "adjust their domestic legislation and practices in accordance with those principles."

On the other hand, the Institute expressed, in its appendices, that reality shows that especially vulnerable sectors of society are deprived of protection of their human rights, which is contrary to the principle of universality of those same rights.

In this regard, the Institute pointed out that the perception of children as objects rather than subjects of rights considers "children" to be those whose basic needs are satisfied and "minors" to be those who are socially marginalized and cannot satisfy their basic needs. To address the situation of the latter, legislation has been enacted that considers children to be "objects of protection and control," and special jurisdictions are established, which exclude and discriminate, deny children their status as legal persons, and breach their fundamental guarantees. Such legislation also "judicializes" the psychosocial problems of children and establishes the Juvenile Court which, having broad discretionary powers, has the function of solving problems of this social group, in view of the lack of social protection policies by the State.

The aforementioned jurisdictions disregard the principle of lawfulness, the distinction between the abilities to exercise and to enjoy rights, as well as proportionality of punishment and due process. Likewise, the system does not respect the ages for various types of intervention, it is not inspired by policies for re-socialization or reeducation, and it is conducive to internment of children who are not offenders in an undifferentiated manner

with minors who have broken the law. A study by the United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (hereinafter "ILANUD") showed that the profile of juvenile offenders is in accordance with the following data: male, 4 years behind in terms of schooling, residents of marginal zones, conducting illegal activities to contribute to support their household, disintegrated families, or the father performing a low-income job or unemployed, and the mother working as a maid or as an unskilled worker.

The Convention on the Rights of the Child developed a new concept that establishes a distinction between abandonment and irregular conduct. The former requires administrative policies, while the latter requires jurisdictional decisions.

It also sets forth that children are immune from criminal prosecution, although those between 12 and 18 who break the law are subject to special jurisdiction that can apply sanctions consisting of socio-educational measures. This system of special justice, in addition to the basic features of all jurisdictional bodies, is based on the following principles:

a. responsibility for infractions: the sanctions contained in the new jurisdiction should only be applied to children older than 12 and under 18 who have broken a criminal law –due to immunity of minors under 18 from criminal prosecution- and the measures adopted can be appealed by the children themselves. The State must adopt a rehabilitation policy regarding these persons, so that adolescents who break the law "merit legal intervention" that is different from that foreseen for adults by the criminal code. Specifically, specialized jurisdictions should be established to hear offenses by children who have broken the law. In addition to fulfilling the common features of any jurisdiction (impartiality, independence, respect for the principle of lawfulness), they must safeguard the subjective rights of children, a task that does not fall under the competence of the administrative authorities.

b. decriminalization of the juvenile justice system: since sanctions under this special jurisdiction seek to rehabilitate rather than to repress, internment should be a measure of last resort. Other socio-educational measures should be considered first, such as family counseling, imposing rules of conduct, community service, obligation to redress damage, and supervised freedom with the obligation to attend educational programs. Measures must always be proportional and be based on the best interests of the child and his or her resettlement into the family and community;

c. separation of administrative and jurisdictional functions: a distinction must be made between social protection, which seeks to attain the conditions required for the child to develop his or her personality and fulfill his or her fundamental rights, and juridical protection, as a guarantee function with the aim of deciding on the subjective rights of children;

d. guarantee of rights: due process rights must be respected at three moments: i. at the time of detention, which must be based on a court order, except in cases of in fraganti situations, and it must be carried out by police staff trained for treatment of adolescent offenders, that is, special staff; ii. during the development of the judicial proceedings, both substantive (principles of guilt, of lawfulness, and of humane treatment), and procedural (principles of jurisdictionality, presence of both parties, inviolability of the right to proper defense, presumption of innocence, impugnation, lawfulness of the proceedings and public nature of the proceedings); and iii. during compliance with a re-educational or internment measure. This must be supervised by the

and iii. during compliance with a re-educational or internment measure. This must be supervised by the competent body. In case of incarceration, the prohibition to intern children in establishments for adults must be respected, and also, in general, the rights of the child to know the regime he or she is subject to, to receive effective legal counsel, to continue his or her educational or professional development, to carry out recreational activities, to know the procedure to file complaints, to be in an appropriate physical and hygienic environment, to receive sufficient medical attention, to be visited by next of kin, to remain in contact with the local community, and to gradually resettle into social normalcy.

e. community participation in policies on re-education and resettlement into family and society: this is an essential element of the new juvenile justice, as measures seek gradual and progressive resettlement of juvenile offenders into society.

Costa Rica: In its written and oral observations, the State of Costa Rica expressed the following:

a. Regarding interpretation of Articles 8, 19 and 25 of the American Convention:

Guarantees set forth in Articles 8 and 25 of the American Convention, in connection with Article 19 of that same instrument, must be interpreted in two ways: one, in a negative sense, because said provisions do limit the good judgment of the States, as these cannot legislate to the detriment of those basic guarantees; and another, positive sense, which involves allowing their adequate exercise, taking into account that the aforementioned Articles do not hinder adoption of specific measures regarding children that expand the guarantees set forth therein.

Rights guaranteed by Articles 8 and 25 of the American Convention must be applied in light of the specialization recognized by the San José Covenant itself regarding childhood and adolescence, to "enhance protection of the rights of children," as occurs in other special situations such as those reflected in Articles 5(5) and 27 of the Convention. Therefore, they must be "read cross-cutting"—and applying broad interpretive criteria- together with the provisions of the Convention on the Rights of the Child. For this reason, application of said Articles must take into account the principles of the best interests of the child, comprehensive protection, specialized justice, presumption of minority, the principle of injuriousness, confidentiality and privacy, and comprehensive training and resettlement into family and society, as well as specification of the ways and conditions for children to have access to those judicial remedies, taking into account that their ability to act is not complete, "but rather linked to exercise of parental authority, and determined by their emotional maturity and discernment."

Article 19 of the American Convention obligates the States to develop legal norms to ensure protection measures required by children as such. Therefore, any legal development by the States regarding measures for protection of children must take into account that children are subjects of their own rights, which must be realized within a comprehensive protection concept. These positive measures "do not enshrine a discretionary power of the State" regarding this population group.

The rights recognized by Articles 8 and 25 of the Convention have been taken into account and developed in Article 40 of the Convention on the Rights of the Child. Furthermore, it added that Articles 3, 9, 12(2), 16, 19, 20, 25 and 37 of that same international instrument are significant for this request for an Advisory

19, 20, 25 and 37 of that same international instrument are significant for this request for an Advisory Opinion.

The Convention on the Rights of the Child recognizes the special protection that the State must provide to children, especially regarding administration of justice, and it recognizes that it is a high priority to solve conflicts in which children are involved, insofar as possible, without resorting to criminal proceedings; if it is necessary to resort to the latter, they must have the rights that adults have, as well as those that are specific to children. Said Convention also refers to other international instruments such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.

In Costa Rica, specifically, these international norms have been included at the administrative, judiciary, and penitentiary levels. There is also a Childhood and Adolescence Code (1998), which establishes a special process for protection in cases of action or omission by society or the State, by the parents or by those exercising custody, or of actions or omissions committed by the children to their own detriment. This process is entrusted to the institution called Patronato Nacional de la Infancia, as the first instance, and its decisions may be appealed through the judiciary. On the other hand, there is also the Juvenile Criminal Justice Law (1996), which establishes rigorous guarantees and measures of protection that are diverse in their nature and content, applicable to children who break the criminal law. Observance of said guarantees in the judiciary would require the "establishment of Juvenile Criminal Courts, of the Juvenile Criminal High Court, of Sentence Execution Courts, Juvenile Criminal Defense, a specialized Prosecutors' Office, [and] a Juvenile Judicial Police."

In connection with the concrete measures identified by the Commission, Costa Rica stated that said "situations cannot [be understood] as valid 'measures of protection' under the terms of Article 19 of the American Convention." as they respond to situations that existed in Costa Rica before entry into force of the current legislation, which is in accordance with the Convention on the Rights of the Child.

- Separation of youths from their parents because the authorities deem that their family cannot provide conditions for their education or support: this "would breach Article 19 of the American Convention, as well as Articles 8 and 25 [of that] same legal instrument and Articles 9, 12(2) and 40 of the Convention on the Rights of the Child." In Costa Rica there is a measure that can be applied, pursuant to the Childhood and Adolescence Code, respecting due process, and that is a provisional protection measure in substitute families, or temporary shelter in public or private institutions.

- Internment of minors in guardianship institutions because they are deemed abandoned or at risk or in a situation of illegality, without their having committed a crime: this measure reflects the doctrine that perceives children as objects rather subjects of rights, and therefore would breach Articles 7, 8, 19 and 25 of the American Convention, as well as Articles 25, 37 and 40 of the Convention on the Rights of the Child. In Costa Rica, when a measure such as the one described is involved, there is the possibility of an appeal through the judiciary, under the parameters of due process and hearing the opinion of the child.

- Acceptance of confessions of minors in criminal matters without due guarantees: this would breach Articles 19, 8(2) subparagraph g) and 8(3) of the American Convention, in addition to the guarantee set forth in Article 40, subparagraph 2.b). Under Costa Rican legislation, the child has the right to abstain from rendering testimony.

- Administrative proceedings pertaining to the fundamental rights of the child, conducted without legal representation of the minor being guaranteed: this hypothesis would breach Articles 8, 19 and 25 of the San José Covenant, as well as Articles 12, subparagraph 2) and 40 of the Convention on the Rights of the Child. In Costa Rica, legislation has been adapted to the aforementioned international instruments.

The State concluded that the concept of children being "incomplete beings who must be the object of protection" has been left behind, from a technical standpoint; Articles 8 and 25 of the American Convention do not constitute limits to the activity of the State "insofar [...] as they do not hinder improvement of the standard of protection and guarantee by specifying these provisions with respect to children." Thus, "minors because they are minors can and must enjoy greater and special guarantees beyond those of adults, but in no case lesser guarantees nor a weakening of those guarantees under the pretext of a misconceived protection."

b. Regarding the Convention on the Rights of the Child:

The existence of a universal principle of protection of children has been recognized internationally, in view of the fact that they are in a position of "disadvantage and greater vulnerability" vis-à-vis other sectors of the population, and because they have specific needs. The Declaration on the Rights of the Child, adopted by the UN General Assembly in 1959, made a statement along these lines. However, it was not until 1989, with the Convention on the Rights of the Child, that there was "a true qualitative transformation of interpretation, understanding of and attention to minors, and therefore of their social and juridical condition." Said Convention includes a number of principles and provisions pertaining to the protection of children, and it is a paradigm that should provide guidance regarding this matter. Specifically, it dealt with the need to address the best interests of the child, the rule that children should not be separated from their parents against their will, and the possibility that the child be heard in all judicial or administrative proceedings that affect him or her; children who break the law must be treated "in such a manner as to foster their sense of dignity and the importance of promoting a constructive function in society."

c. Doctrine of comprehensive protection:

With the Convention on the Rights of the Child, the former doctrine that pereeived children as objects rather than subjects of rights was left behind, as it considered the children incapable of assuming responsibility for their actions. Therefore, they were passive objects of the "protective" or repressive intervention of the State. That doctrine also established a distinction between "children", whose basic needs were covered, and "minors", who were members of the infantile population whose basic needs were not being satisfied, and who were therefore in an "irregular situation." For the latter group, the system tended to judicialize or institutionalize any problems pertaining to their status as minors, and the "wardship judge" was prominent as a way to compensate for what the child lacked.

This Convention, together with the other international instruments, reflected the doctrine of comprehensive

This Convention, together with the other international instruments, reflected the doctrine of comprehensive protection, which recognizes that children are legal persons and granted them a major role in building their own destiny. With respect to criminal matters, specifically, it involved a change from protective jurisdiction to one that combines punitive measures and guarantees, where, among other measures, the rights and guarantees of children are fully recognized; they are considered responsible for their criminal acts; intervention of criminal justice is limited to the indispensable minimum; the range of sanctions is expanded, based on educational principles; and punishment through incarceration is minimized.

d. Development of childhood and adolescence Law:

The Convention on the Rights of the Child, among other international instruments, and the doctrine of comprehensive protection brought with them the development of childhood Law as a new juridical branch, based on three fundamental pillars: the best interests of the child, understood as the premise for interpretation, integration and application of laws pertaining to childhood and adolescence, and therefore a limitation to the discretion of authorities in adopting decisions regarding children; minors as legal persons, thus recognizing both their basic human rights and those that pertain to their status as children; and the exercise of fundamental rights and its ties to parental authority: since the only purpose of parental authority is to provide protection and indispensable care of the child to guarantee his or her complete development, it is a responsibility and a right of the parents, but also a fundamental right of the children to be protected and guided until they attain full autonomy. Therefore, exercise of authority must diminish as the child grows older.

Costa Rica concluded that "the provisions of Articles 8 and 25 of the American Convention on Human Rights are insufficient, in and of themselves, to ensure respect for minors of the guarantees and rights recognized by this instrument for all persons," and therefore a series of principles and guarantees specifically pertaining to childhood must be taken into account. Thus, a fundamental nucleus regarding the rights of children takes shape that includes a principle of positive discrimination with the aim of attaining equity and compensating, "by means of recognition of greater and more specific guarantees, these situations of clear inequality that exist in reality." For this, it argued, there is a need for all States to ratify the Convention on the Rights of the Child and to harmonize their legislation with respect to the principles set forth therein.

Mexico: In its written and oral comments, Mexico stated:

Children must not be considered "objects of segregative protection", but rather full legal persons who must receive comprehensive protection, and enjoy all the rights of adult persons, in addition to "a set of specific rights granted to them due to the particular property of children being in a process of development." Not only must their rights be protected, but it is also necessary to adopt special measures of protection, pursuant to Article 19 of the American Convention and to a set of international instruments pertaining to childhood.

The two major principles that govern human rights are non-discrimination and equality before the law, and they must be recognized for all persons, "with no distinction as to whether the beneficiaries of these [rights is a child, a youth or an adult]." Therefore, the measures proposed by the Inter-American Commission in its request "would be related to issues of efficacy of the provisions of the Convention, rather than of compatibility of their respective scopes."

- Separation of youths from their parents because the authorities deem that the family cannot provide conditions for their education or support: the term "youths" is rejected due to its ambiguity, and instead the term "minors" is preferred, as it is refers more precisely to that sector of the population. The State also deems that a distinction should be made between "separation of the minor due to lack of conditions of the next of kin to provide for his or her education, and secondly, separation of the minor due to lack of conditions for his or her support. In this regard, undoubtedly in both cases the body with authority to reach said decision must always respect the rules of due legal process." Pursuant to Article 9 of the Convention on the Rights of the Child, separation of the child from his or her parents must be exeeptional, limited to cases of mistreatment or abandonment, and decided to protect the best interests of the child.

In this regard, Articles 8 and 25 of the American Convention, "rather than constituting a limit on States' good judgment or discretion to issue special measures of protection pursuant to Article 19 of that Convention, are the necessary channel for such actions" to be considered in accordance with the obligations of the State derived from the Convention itself.

- Internment of minors in guardianship institutions because they are deemed to be abandoned or at risk or in a situation of illegality, even though they have not committed any crime: in all three hypotheses, abandonment, risk or illegality, the States have the responsibility of implementing social protection programs for the children. Said programs must include control bodies to oversee application and legality of the former, as well as adoption of appropriate measures to prevent or eorrect the situations in which children find themselves, as described by the Commission.

The State must adopt measures for protection and care of abandoned children, as they are a very vulnerable social sector, subject to even greater protection than the population at risk, pursuant to Article 19 of the American Convention, Articles 3(2) and 20 of the Convention on the Rights of the Child and Article 9 of the Riyadh Guidelines. Internment of children in guardianship institutions must be provisional and be considered "a measure that will help the child to adequately channel his or her life project." States must ensure that internment of children in guardianship or wardship institutions is preventive or provisional, and that its relevance and duration must be duly supported by specialized studies and be reviewed periodically by administrative or judicial authorities. In Mexico, abandonment of children is a crime.

Children who are at risk, or "street children" as they are called, must also be covered by preventive and protective measures. Pursuant to the terms set forth by this Court in the Villagrán Morales et al. Case, States must adopt legislative as well as institutional measures to protect and guarantee the rights of children who are at risk. These measures may include, as in the case of children who have been abandoned, internment in guardianship or wardship institutions, insofar as these fulfill the objective of "ensuring full and harmonious development of [the] personality [of the child]." These measures should be taken with due respect for relevant guarantees, having previously taken into account the viewpoint of the child, his or her age and maturity, and such measures must always be subject to appeal.

The State has the obligation to develop crime prevention programs. Internment of children who have not broken the law and without respecting due process would be a violation of Articles 7 and 8 of the American Convention, of Article 40 of the Convention on the Rights of the Child, of the Mexican Constitution, and of

the fundamental principle of criminal Law, nulla poena sine lege.

In the hypothesis of incarceration of children, detention must be conducted in accordance with the law, during the briefest appropriate period and respecting the principles of exceptionality, temporal determination and last resort. Also, detainment of children "requires much more specific conditions in which it is impossible to solve the situation through any other measure."

- Confessions made by minors in criminal matters without due process: the State pointed out that all children should enjoy minimum guarantees when facing judicial proceedings against them, including: presumption of innocence, obligation of the authorities to advise the representatives of the child of any actions taken for or against him or her, the right to receive legal assistance and the right to tender evidence. Therefore, any statement in criminal courts that is obtained without minimum procedural guarantees must not be given probatory value.

- Administrative proceedings pertaining to fundamental rights, conducted without legal representation of the minor being guaranteed: children have the right to legal assistance in any proceedings brought against them. Development of administrative processes or proceedings against them without that guarantee breaches rights protected by Articles 8 and 25 of the American Convention.

- Establishment of the fundamental rights of minors in administrative or judicial proceedings without hearing the minor and taking into account his or her opinion: pursuant to the Convention on the Rights of the Child, the State must ensure conditions for children to develop their own judgment and express an opinion on matters affecting them. However, freedom to express an opinion is not unlimited; the authorities must assess it according to the possibility the child has of developing his or her own judgment, given his or her age and maturity, pursuant to Article 12 of the Convention on the Rights of the Child. Likewise, the right to be heard is a fundamental guarantee that must be respected in all administrative or judicial proceedings, as has been recognized by the inter-American system for the protection of human rights and by the Mexican legal system, both regarding legislation and case law.

Given the lack of an inter-American instrument that specifically regulates the rights of children, the Convention on the Rights of the Child is, as this Court has pointed out, part of the corpus iuris "that must serve the purpose of setting the content and scope of the general provision that was defined, precisely in the aforementioned Article 19."

Finally, the State pointed out that the child is a subject of rights, even before his or her birth, even though the ability to exercise them is acquired upon becoming an adult, in other words "whether a minor is a worker, a student, disabled, or an offender, he or she has the right to protection due to his or her special condition as a minor."

Inter-American Commission on Human Rights: In its written and oral comments, the Inter-American Commission stated:

Adoption of the Convention on the Rights of the Child was "the culmination of a process during which the model or doctrine of comprehensive protection of the rights of the child, as it is called, was constructed." This new system has the following characteristics:

new system has the following characteristics:

i. it recognizes children as subjects of rights and the need to provide special measures of protection for them, which must impede illegitimate interventions of the State that violate their rights, and provide positive benefits that allow them to effectively enjoy their rights;

ii. it arose from "the critical aspects" of the "irregular situation" model that perceived children as objects rather than subjects of rights, predominant in our region for over eighty years;

iii. it left behind the "judicialization" of exclusively social matters as well as internment of children or youths whose economic, social and cultural rights are breached;

iv. it avoids "euphemisms justified by the argument of protection," which hinder the use of due process mechanisms for protection of fundamental rights;

v. it provides differentiated treatment to children whose rights have been breached and to those who are charged with committing a crime;

vi. it adopts protection measures that promote the rights of the child and in no way must breach them, taking into account consent by the child and his or her next of kin;

vii. it develops universal as well as "focused and decentralized" public policies, which tend to make the rights of children effective; and
viii. it establishes a special responsibility system for adolescents, which respects all material and procedural guarantees.

With this new model, "the States undertake to transform their relations with children," leaving behind the concept of the child as one who is "incapable" and attaining respect for all his or her rights, as well as recognition of additional protection. Protection of the family is also emphasized as it is "the pre-eminent place to first make the rights of children and adolescents effective, where their opinions should be given a high priority in household decision-making." This protection of the family is based on the following principles:

a. Importance of the family as the "entity where children are raised and [...] their primary nucleus for socialization;"
b. The right of the child to have a family and to live with it, so as to avoid estrangement from his or her biological parents or extended family; if that were not possible, other "modes of family placement" should be sought or, finally, "community shelter entities"; and
c. "De-judicialization" of matters pertaining to socio-economic issues and adoption of social aid programs for the family group, taking into account that mere lack of resources by the State does not justify the lack of such policies.

Even though the Convention on the Rights of the Child is one of the international instruments that has the greatest number of ratifications, not all countries of this continent have harmonized their domestic legislation with the principles set forth in that Convention, and those that have done so face difficulties applying them.

The Convention on the Rights of the Child establishes two areas of protection: a) the human rights of children and adolescents in general, and b) the situation of children who have committed a crime. In the latter area, children should not only have the same guarantees as adults, but also special protection.

The State, including the Judiciary, is under the obligation to apply international treaties. In this regard, the Commission recognizes that the Convention on the Rights of the Child, together with other international instruments, is an international corpus iuris for protection of children, which can serve as an "interpretive guide", in light of Article 29 of the American Convention, to analyze the content of Articles 8 and 25 and their relation to Article 19, of that same Convention.

Furthermore, those instruments –including the "Beijing Rules," the "Tokyo Rules" and the "Riyadh Guidelines"- develop comprehensive protection of children and adolescents. This involves considering the child fully as a subject of rights and recognizing the guarantees that he or she has in any proceedings that affect those rights. In the inter-American system, the child must enjoy certain specific guarantees "in any proceeding where his or her liberty or any other right is at stake. This includes any administrative proceedings," Articles 8 and 25 of the American Convention. Said guarantees must be observed, especially, when the proceedings involve the possibility of applying a measure that deprives the child of liberty (whether an "internment measure" or a "protective measure"). When applying measures that deprive the child of liberty, two principles must be taken into account: a) deprivation of liberty is the ultima ratio , and therefore other types of measures must be preferred, without resorting to the judiciary, whenever this is adequate; and b) the best interests of the child must always be taken into account, and this involves recognizing that he or she is the subject of rights. This recognition requires that, in the case of children, special measures be considered that involve "greater rights than [those recognized for] all other persons."

Articles 8 and 25 of the American Convention, in combination with Article 40 of the Convention on the Rights of the Child, include guarantees that must be observed in any proceedings where the rights of a child are established, including:

a. Competent, independent and impartial court previously established by law: "Every person has the right to be tried by a competent, independent and impartial tribunal, previously established by law." In this regard, Article 5(5) of the American Convention states the need for proceedings regarding minors to be conducted by specialized tribunals.

Article 40 of the Convention on the Rights of the Child extends the guarantee of a competent, independent and impartial judge to situations involving State authorities other than jurisdictional bodies, or alternative, non-judicial mechanisms for conflict resolution.

b. Presumption of innocence: a person charged with a crime must not be treated as if he or she were guilty until his or her responsibility has effectively been established. This guarantee applies to children, whether chargeable or not.

With respect to children, Latin American legislation tends to consider that the criminal law system is based on the situation of the perpetrator rather than on the crime committed, which breaches presumption of innocence.

Before the entry into force of the Convention on the Rights of the Child, judges played a "protectionist" role which gave them the authority, when the child was at risk or in a vulnerable situation, to breach his or her rights and guarantees. The mere fact of being charged with a crime would suffice to assume that the child was at risk, which gave rise to measures such as internment. However, thanks to adoption of the Convention on the Rights of the Child, judges are now under the obligation to respect children's rights. They must "take into account investigation of and possible sanctions applicable to the child, based on the act committed and not on personal circumstances." Clearly, due process guarantees cannot be set aside for the best interests of the child. Therefore, when a child charged of a crime is brought before the Judge, and he or she is in a special state of vulnerability, there must be an "intervention by the mechanisms created by the State to address that particular situation," and the child must be treated as an innocent person, whatever his or her personal situation.

c. Right to legal defense: this includes several rights: to have the time and means to prepare his or her defense, to have an interpreter or translator, to be heard, to be informed of the charges and to examine and offer witnesses. This is also set forth in Article 40 of the Convention on the Rights of the Child.

The principle of presence of both parties underlies this guarantee, and it leaves behind the idea that a child needs no defense because the Judge undertakes defense of his or her interests.

The right of children to be heard addresses the opportunity to express their opinion in any proceedings where their rights are discussed, insofar as they are able to form their own judgment on the matter. This is a key element of due process for the child, for it to be "understood as an opportunity for dialogue, where the child's voice is taken into account, so as to consider his or her opinion regarding the problem he or she is involved in."

d. Right to appeal (Articles 8(2)h of the American Convention and 40(b)v of the Convention on the Rights of the Child): the child has the right for a court to review the measure imposed upon him or her, so as to control the punitive power of the authorities. Said guarantee must be in force in any proceedings where the rights of the child are established, and especially when measures that deprive the child of liberty are applied.

e. Non bis in idem: (Article 8(4) of the American Convention): the guarantee that a child who has been tried for certain facts cannot be tried again for those same facts, is set forth in Article 8(4) of the American Convention. There is no similar provision in the Convention on the Rights of the Child.

f. Public nature of the proceedings (Article 8(5) of the American Convention): this guarantee, linked to the democratic system of government, must take into account the privacy of the child, without diminishing the right of the parties to defense nor the transparency of judicial actions, to "avoid absolute secrecy of what occurs during the proceedings, especially with respect to the parties." There is no similar provision in the Convention on the Rights of the Child.

Due process guarantees, protected by Article 8 of the American Convention, have a double value: an intrinsic one, by means of which the person is considered a subject in the development of this dialog; and an instrumental one, as a means to attain a fair solution. In this regard, the Convention on the Rights of the Child "demands recognition of the child's autonomy and subjectivity and determines the weight that his or her opinion can and should have in the decisions of adults."

opinion can and should have in the decisions of adults."

The right to effective remedy, set forth in Article 25 of the American Convention, involves not only the existence of a procedural instrument that protects the rights breached, but also the duty of the authorities to establish the grounds for a decision on the claim and the possibility of judicial review of the measure adopted.

The Commission concluded that the bodies of the inter-American system for protection of human rights must resort to the Convention on the Rights of the Child to interpret all provisions of the American Convention, in matters that involve children, and specifically with respect to interpretation and application of Article 19 of the American Convention. Application of the latter provision must also be "preceded and accompanied" by respect for the guarantees set forth in Articles 8 and 25 of the American Convention. Finally, the Commission stressed the importance of "States, and especially judges, complying with the obligation to apply international treaties, adapting their legislation, or issuing decisions that comply with the standards set forth in Human Rights treaties."

Instituto Universitario de
Derechos Humanos, A.C., of Mexico,
and other organizations in the field.

In its written and oral comments, it stated that:

The principles of non-discrimination, best interests of the child and equality are fundamental in all activities pertaining to children and in the respective legislation. Children's opinions should be taken into account in matters that concern them. Legal systems must establish childhood jurisdictions that favor prevention, as well as promote their rehabilitation and social resettlement, avoiding criminalization and deprivation of freedom insofar as possible. At the hearing, it argued that the various spheres of prevention should be taken into account: primary, in the family; secondary, in society; and tertiary, when the State must intervene by adopting a given measure.

- Separation of the youths from their parents because the authorities deem that the family cannot provide conditions for their education or support: the term "youth" should be rejected, because it includes persons older than as well as under 18. The term "minor" is juridical, and it takes into account assistance and protection that must be given to persons who, due to their age, are not capable of exercising their rights.

Separation of children from their parents must be decided following due legal process, "always favoring the best interests of the minor, which may be impaired by lack of conditions for their due comprehensive development." For this reason, in its role or promoting and protecting the rights of the child, the State can only decide such a separation in face of circumstances that place the child at risk of suffering violence, mistreatment, sexual exploitation and abuse, among other dangers.

- Internment of minors in guardianship institutions because they are deemed abandoned or at risk or in a situation of illegality, without their having committed a crime, but rather due to personal or circumstantial conditions of the minor: the State must adopt measures of protection, by means of legitimate intervention procedures and with due enforcement of the law, when children are in a real situation of abandonment by family or society, which translates into risk or into abridgement of the best interests of children. One such

family or society, which translates into risk or into abridgement of the best interests of children. One such measure is internment of children in guardianship institutions that pursue the objective of ensuring their development and exercise of their rights. Being at risk and in a situation of illegality are not synonymous, as they seem to be in the proposed situation.

- Confessions made by minors in criminal matters without due process: children's confessions, meaning self-incriminating statements, must always be made with due guarantees and full respect for their rights. It is necessary to establish a special procedure for child justice, which does not necessarily entail the development of criminal proceedings.

- Administrative procedures pertaining to the fundamental rights of the minor, without due guarantees of legal representation of the minor: a distinction should be made between administrative procedures to deal with minors who are offenders and other proceedures pertaining to behaviors that are not characterized as offenses in criminal legislation. In the latter cases, absence of defense counsel does not connote violation of those rights.

- Establishment, in administrative or judicial proceedings, of fundamental rights of the minor without having heard him or her nor taken into account his or her opinion: a distinction should be made between the possibility of the child freely expressing his or her opinion, personally or through a representative, and the right pursuant to Article 12 of the Convention on the Rights of the Child. This involves "the need to analyze in depth the manner in which that right should be adopted, as the minor cannot express his or her opinion in an unlimited manner, since the specific conditions of each minor must be taken into account, in terms of his or her age and maturity."

Federación Coordinadora de ONG's que
trabajan con la Niñez y la Adolescencia-
CODENI, of Nicaragua:
In its October 16, 2001 brief, it stated that:

In Nicaragua, enactment of the Childhood and Adoleseence Code, in 1998, has generated structural changes in treatment of adolescents who have broken the law. Nevertheless, these changes have not been substantial, due to lack of allocation of a specific budget for comprehensive application of the code.

In connection with this sector of the population, it is convenient to use the terminology "children and adolescents," to highlight their status as social subjects and as legal persons, a product of their juridical personality, and to leave behind the "irregular situation" policy that considered them objects rather than subjects of rights and that uses the term "minors" in a derogatory manner.

Immunity of children from prosecution should allow them to be identified and to provide treatment that is different from that for an alleged offender, since the "act committed [answers to] a particular situation and not necessarily [to] a premeditated or learned action as argued by the "irregular situation" doctrine that considers the child an object rather than a subject of rights."

The law must consider, when establishing the causes of a criminal act, the "biopsychosocial" study of the individual implemented in Nicaragua which shows that "almost 100% [of...] the criminal acts derive from

individual implemented in Nicaragua which shows that "almost 100% [of...] the criminal acts derive from circumstances outside their control or from specific situations of the [s]ystem itself," since the children who are inclined or prone to fall into situations of risk or illegality are the poor, the sons and daughters of prostitutes and criminals, among others.

There are principles that relate to due process, such as culpability, humane treatment, jurisdictionality, presence of both parties and inviolability of defense, that must be applied to children:

a) Principle of Culpability: publicity generated from the moment the crime was committed, not providing attention to the perpetrator and not providing specialized treatment by experts in the matter, causes "anticipatory culpability of children". The State is also under the obligation to have experts in childhood and adolescence in the Judiciary, the Public Attorneys' Office and the Legal Aid Program.

b) Principle of Humane treatment: the typology of crimes applied to adolescents must be different from that set forth in regular legislation; corrective measures must seek re-socialization of the perpetrator, rather than mere incarceration, as "it has been proven that said measure does not cause positive effects."

The law must also clearly define the conduct and consider the judicial proceedings as a means for "special protection" rather than an inquiry.

c) Principle of Jurisdictionality: the law must differentiate the sphere and role of each actor responsible. It is necessary to implement socio-educational measures that enable re-socialization of the child. The administrative authorities will oversee compliance with said measures.

d) Principle of the presence of both parties: the right to be heard relates to recognition of juridical personality, "insofar as both are not observed from the same direction, it will be difficult for an adult, inexperienced person to establish praetical differences in the terminology."

e) Principle of inviolability of defense: Defense of children is not generally entrusted to specialists in childhood and adolescence. This does not contribute to respect for the rights of children. The role of the State and the family is fundamental, not as spectators nor as those who punish the individual, but "as alternatives to overcome the problem." The State is under the obligation to have psychosocial specialists to provide attention to the children and to correlate this action with the family.

Fundación Rafael Preciado
Hernández, A.C, de Mexico: In its oral and written comments:

The starting point for development of this subject is the 1989 United Nations Convention on the Rights of the Child, as the international instrument that initiated the doctrine of comprehensive protection that defines children as fully legal persons rather than as objects of protection. The requested interpretation of Articles 8, 19 and 25 of the American Convention on Human Rights should fully include the model presented and adopted in the Convention on the Rights of the Child.

Certain relevant guidelines for the proposed interpretation are highlighted:

a. Prohibition of separating children and adolescents from their family or community milieu due to purely material issues.

The current model for protection of children is based on joint responsibility of the State and the parents (or those responsible for the children). In accordance with the principle of solidarity, the former must not place children under its guardianship, denying them the exercise of their rights, especially the right to liberty, due to lack of minimal conditions for support or as a consequence of their special personal, social or cultural situation, and the parents must provide at least adequate living conditions. In other words, both the State and the family are jointly responsible for providing and ensuring the child minimum conditions for subsistence. This means that legislation developed in accordance with the principle of protection and which criminalizes poverty, stripping the management of legal conflicts of the most disadvantaged sectors of the population from the right to fair trial, must be reconsidered so as to adjust it to the current model and reality.

b. Separation of the administrative and jurisdictional spheres of action.

Jurisdictional matters pertaining to the rights of children and adolescents, whether under criminal, civil or family law, in light of the Convention, should be conducted by judges with full and specific capacity to settle juridical conflicts in the technical, impartial and independent manner inherent to their position, and limited by individual guarantees.

The Convention on the Rights of the Child, which is the main international instrument that has replaced the former protective laws, establishes the complementary nature of special protection mechanisms for children, which is not autonomous but rather based on general juridical protection (Article 41, Convention on the Rights of the Child) for which it also distinguishes clearly between assistential and penal matters.

From this standpoint, it states that all proceedings regarding children must respect the following principles:

1. Jurisdictionality: this involves respect for certain minimum characteristics of jurisdiction, such as intervention of the competent court previously established by law, as well as independence and impartiality of the body responsible for reaching the relevant decision.

2. Inviolability of defense: this requires the presence of the technical defense counsel in decisions affecting the child and in any proceedings in which he or she intervenes.

3. Lawfulness of the proceedings: all proceedings that involve the presence of a child or decisions that affect him or her must be previously determined by law, to avoid application of discretionary criteria and to ensure fair and equitable development of the individuals, thus ensuring that decisions are not based on the personal conditions of the child.

4. Presence of both parties: this involves the possibility of knowing the facts and the evidence submitted in the proceedings, as well as to face them with the respective legal assistance.

5. Impugnation: this presupposes the existence of a higher body before which the decision adopted can be appealed.

6. Public nature of the proceedings: this has two expressions; on the one hand, the possibility of having access to all procedural items to ensure adequate defense; and on the other hand, protection of the identity of the children to avoid their stigmatization.

c. Children as fully legal persons.

Article 3 of the American Convention on Human Rights recognizes the juridical personality of all persons and this, of course, includes children. Nevertheless, the former protective model only saw children as objects of protection and not as legal persons. Therefore, they did not enjoy recognition of their rights. Currently, the preamble of the Convention on the Rights of the Child and the principles of the United Nations Charter clearly state that children are legal persons, under conditions of equality and based on the inherent dignity of all human beings.

According to the comprehensive protection model that has been adopted, children have the right to participate in proceedings where decisions are reached that affect them, not only within the household but also regarding actions taking place before the competent authorities.

In light of these criteria, it is deemed relevant to urge the member countries of the OAS to adopt, in their domestic legislation, the guidelines set forth by international law regarding protection and wardship of children, so as to recognize them as persons entitled to rights and having obligations. This includes the right to due process.

In the case of Mexico, the protective model was clearly adopted. Legislation considers children to be immune from prosecution and legally disqualified, and they are thus treated in a similar manner to mentally disabled persons, denying them access to due process followed in jurisdictional decisions regarding adults.

According to Mexican legislation, children are subject to a non-jurisdictional process that takes place without the judicial guarantee of due process. That process involves a "treatment" consisting of deprivation of liberty, decided with no guarantees whatsoever, and which rather than contributing to protection of children brings with it a series of systematic violations of the rights and guarantees of children and adolescents.

Mexican legislation must adopt the protection model recognized by international instruments.

United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (ILANUD):

In its written and oral arguments, ILANUD made the following remarks:

With respect to the first question raised by the Commission, regarding separation of youths from their families for reasons of education and support, the Institute determined that Articles 8 and 25 of the Convention constitute limits on States' good judgment and discretion to issue measures of protection pursuant to the provisions of Article 19 of that same instrument. "Separation of youths from their parents and/or families and without due process, because it is deemed that the families cannot offer conditions to provide them with education and support, breaches Article 2 of the Convention on the Rights of the Child, as well as principles established in International Law and Human Rights; the principle of equality and the right to non-

discrimination."

With respect to the measure regarding suppression of liberty of minors, because it is deemed that they have been abandoned or are at risk or prone to illegal situations, the Institute stated "that the guarantees set forth in Articles 8 and 25 of the American Convention [...] constitute a limitation of the decisions of States Party on such special measures. The practice of deciding suppression of liberty taking into account special circumstances of the minors breaches the Right to Humane Treatment (Article 5) and the Right to Personal Liberty (Article7), both of the American Convention [...], as well as principles of International Law and Human Rights, such as the pro libertatis principle, and the pro homine principle. It would also clearly breach the principle of equality and non-discrimination."

With respect to admissions of guilt by minors in criminal matters without due process guarantees, the Institute stated "that the rights to fair trial and to judicial protection set forth in Articles 8 and 25 of the Convention, constitute limits and minimum rights that the States Parties must respect when they receive admissions of guilt or statements from any person, and especially from minors. To accept these special measures in a discretionary and unrestricted manner constitutes a violation of the principle of specialized justice for minors, set forth in Article 5(5) of the American Convention," as well as of due process.

Regarding the administrative proceedings where fundamental rights are established without the right to defense, the Institute pointed out that "this practice violates the right to fair trial set forth in Articles 8 and 25 of the American Convention, for which reason they do constitute limitations of the capacity and discretion of the States Party." It also deemed that said practices breach the right to legal representation set forth in Article 40, subparagraph 2, item ii of the Convention on the Rights of the Child. This right involves respect for all guarantees encompassed by the right to fair trial, such as the rights to be informed of the charges, to presumption of innocence, and to appeal, among others.

Finally, with respect to the question raised by the Inter-American Commission regarding establishment of rights and liberties in administrative or judicial proceedings without the right to be heard personally, as well as non-consideration of the opinion of the minor,

ii. the Institute argued that this would violate the provisions of Articles 8 and 25 of the American Convention, as these norms constitute limits to the good judgment and discretion of the States Parties "as minimum rights, which must be respected for all citizens and especially for children and adolescents." Furthermore, this situation would breach the provisions of Article 40 of the Convention on the Rights of the Child, "as well as internationally accepted and recognized legal principles such as: the principle of the best interests of the child, recognition of minors as legal persons, the principle of comprehensive protection, the principle of specialized jurisdiction, the principle of comprehensive training and resettlement into the family and society."

Since the Convention on the Rights of the Child was adopted, most Latin American legal systems began to change from the protective theory, usually applied in judiciary or administrative proceedings, depending on each State, to that of comprehensive protection set forth in the aforementioned international instrument. To this end, a legislative technique was used which could be called "[a]ll-encompassing codes, called childhood codes that regulate all types of situations both of omission of rights and of violations of criminal law."

Center for Justice and International Law:
In its brief and in its oral comments the Center made the following statements:

Convention on the Rights of the Child:

The main normative reaction to the system of the "irregular situation" was the adoption of the Convention on the Rights of the Child in 1989, which involved a change of paradigm to recognize minors as subjects of rights and to establish the principle of the "best interests of the child" as a "form for resolution of conflicts among rights, and/or as a guide to evaluate laws, practices and policies pertaining to children," as well as principles such as respect for the opinion of the child, the principle of survival and development, and the principle of non-discrimination. The Convention on the Rights of the Child also legally codified the "doctrine of comprehensive protection," which delimited the role of the Judge to that of solving juridical conflicts, strengthened procedural guarantees, and determined obligations of the State to establish "comprehensive policies that respect the rights and guarantees protected" by the aforementioned Convention.

This impetus given to the doctrine of comprehensive protection has led to a number of modifications to legislation within the region; nevertheless, "practices in administration of justice and State policies have not yet adapted to the precepts of the Convention [on the Rights of the Child]." Likewise, in some countries there is a "less and less inclusive situation (socially and politically)" for minors and grave or systematic violations of human rights demonstrate non-fulfillment of the States' international obligations.

Current legislative situation:

Some countries in the region have developed new legislation to provide special protection to minors. However, lack of legislative reform directed toward "strengthening basic social policies" constitutes an obstacle to effective enjoyment of the rights recognized in the Convention on the Rights of the Child. Furthermore, there are countries that have not begun the process of adjusting their legislation, or where this process must be enhanced to "attain an effective adjustment of the law to precepts of the" Convention on the Rights of the Child, especially with respect to guarantees.

Furthermore, even in those countries where new legislation has been adopted, there are a number of deficiencies that must be corrected, such as creation of the necessary facilities to apply measures that involve internment under decent conditions, and moving legislation away from the old system based on the doctrine of the "irregular situation" that perceived children as objects rather than subjects of rights. Thus, the comprehensive protection doctrine has faced many obstacles of various types, such as:

- Economic obstacles: lack of budgetary allocations to adequately protect the rights of children;
- Political obstacles: social spending is not a priority for governments, and when it occurs its "execution is incoherent for lack of adequate planning;"
- Ideological obstacles: there is a need to promote greater sensitivity and commitment to the new requirements of children, especially in face of a "widespread authoritarian and repressive culture;"
- Institutional obstacles: there is a lack of training for juridical and social operators in this field, as they "do not understand the scope of their competence nor do they manage to fully separate this function from that of sanctioning" the juvenile offender.
- Obstacles regarding information: it is necessary to provide training to attorneys, due to their "special

- Obstacles regarding information: it is necessary to provide training to attorneys, due to their "special participation in terms of control and demands" vis-à-vis State institutions in charge of implementing protection measures;
- Legislative obstacles: progress in this field has been slow and formal in nature; and
- Obstacles in terms of training: despite attainments, there is not yet "a critical mass of professionals who are able to generate opinion" on this matter.

Current problems of children:

Millions of children in the region live in poverty and marginality, "the victims of an immense and unforgivable oblivion" and "the products of major structural flaws," related to domestic and international policies. The following problems stand out:

a. Children in situations of armed conflict:

This type of conflicts have been associated with violations of human rights and of International Humanitarian Law to the detriment of children and adolescents in the region, with consequences for them that are even more intense and traumatic than for adults. Those conflicts also generate greater poverty as more resources are channeled toward those ends; furthermore, malnutrition increases due to low production of food, and obstacles hindering access to services increase too. In addition, children often face displacement and separation from their families, which deprives them of a safe environment.

In this regard, the existence of the Optional Protocol to the Convention on the Rights of the Child is important, as it refers to participation of children in armed conflicts as a means to complement the minimum obligations of the States, set forth in the Convention on the Rights of the Child with respect to children in armed conflicts such as, among other things, the minimum age for recruitment is raised from 15 to 18.

Likewise, even though many States recognize the existence of soldier children recruited by the armed forces and undertake to issue orders to avoid new recruitment, generally there are no provisions to facilitate demobilization of children currently recruited, which impedes their access to education, to family re-unification, or to food and shelter necessary for their resettlement in society. Furthermore, in connection with internal displacement of minors, "not giving the situation a legal framework, in the complete manner it requires, leaves children unprotected due to the lack of a specific legal remedy to address that situation," to the detriment of the "right to not be displaced as a corollary of freedom of Movement and Residence."

b. Refuge and Nationality:

To define the scope of the measures of protection set forth in Article 19 of the American Convention regarding refugee children or asylum-seeking children, it is essential to take into account the provisions and principles set forth in the Convention on the Rights of the Child and the 1951 Convention relating to the Status of Refugees. Therefore, protection measures must be considered in the course of determination of refugee status and in treatment of refugee and asylum-seeking children, especially when they have been separated from their parents or guardians.

International human rights obligations require that the rights set forth in the various treaties be ensured for all

people, whatever their age. Therefore, age-based discrimination can only be accepted in certain circumstances, pursuant to the case law of the Court itself and when measures adopted are proportional. Furthermore, in the case of children, the States must adopt special measures to protect them, based on the principle of the best interests of the child.

The right to fair trial set forth in Article 8 of the American Convention, which covers all administrative or judicial proceedings where rights are determined, must be respected during the process of deciding on refugee status, as this mechanism permits determination of whether a person fulfills the requirements to enjoy the right to asylum and protection against refoulement. Likewise, the right to simple and effective remedy that protects against acts that breach fundamental rights, set forth in Article 25 of the American Convention, must be applied, with no discrimination, to all persons subject to the jurisdiction of the State, including all individuals who are not nationals of that State. Specifically, the following guarantees must be respected in the process of determining refugee status:

- the right to a hearing for the child to file his or her request for asylum and to freely express his or her opinion, within a reasonable term and before a competent, impartial and independent authority. This in turn presupposes protection against refoulement and return at the border. Likewise, to ensure the greatest possible participation by the child, the procedure must be adequately explained to him or her, together with decisions reached and their possible consequences; also, whenever it is appropriate, the State should guarantee that the child receives assistance from a legal representative who is prepared for this function;
- adoption of special measures that allow the asylum request of a child to be studied in a more flexible manner, taking into account that children generally experience persecution in a different manner from adults; these measures might include granting of the benefit of the doubt when analyzing the request, less rigid standards of evidence, and a more expedite procedure; and
- an assessment of the degree of mental development and maturity of the child by a specialist with the required training and experience; if the child is not sufficiently mature, more objective factors must be considered when analyzing his or her request, such as conditions in the country of origin and situation of his or her next of kin.

Likewise, protection of the family, as a basic social unit, is also set forth in international human rights treaties. Therefore, any State decision that affects the unity of the family must be adopted in accordance with the right to fair trial set forth in the American Convention. To respect unity of the family, the State must not only abstain from acts that involve separation of the members of the family, but must also take steps to keep the family united or to reunite them, if that were the case.

In this regard, there must be a presumption that remaining with his or her family, or rejoining it in case they have been separated, will be in the best interests of the child. However, there are circumstances in which said separation is more favorable to the child. Before reaching this decision, all parts involved must be heard. The State is also under the obligation not only to abstain from measures that might lead to separation of families, but also to take steps that will allow the family to remain united, or for its members to reunite if they have been separated.

Detention of asylum-seekers is also undesirable due to its negative consequences for their possibilities of participating in the asylum request proceedings and because it can be a traumatic experience. In this regard, the Executive Committee of the United Nations High Commissioner for Refugees (UNHCR) has stated that

persons who request asylum and who have been admitted to determine refugee status in a country "should not be sanctioned or exposed to unfavorable treatment solely based on their presence in that country being deemed illegal." Thus, detainment of said persons –if necessary- must be for a brief period and must be exceptional in nature, and other options should be preferred. In addition, the specific situation of each person should be studied before ordering his or her detainment.

Therefore, this Committee has identified four hypothetical situations in which detainment of an individual might be considered "neeessary":

i. to verify his or her identity;
ii. to establish the grounds on which the request for refugee status or asylum is based;
iii. to deal with eases in which those requesting refuge or asylum have destroyed their identification documents or have used fraudulent documentation to confuse the authorities; or
iv. to protect national security or public order.

When minors are involved, these criteria should be even more restrictive and, therefore, as a rule, children should not be detained and, instead, they should reeeive lodging and adequate supervision by State authorities in eharge of the protection of children. If there are no other alternatives, detention must be an ultima ratio measure and one adopted for the shortest possible period; likewise, children should have at least the minimum procedural guarantees granted to adults.

On the other hand, children whose parents request asylum or receive refuge find themselves in an especially vulnerable situation with respect to restrictive migration control policies in the region, as "families are increasingly marginalized and vulnerable to abuse." Children are also liable to forced repatriation without minimum guarantees and safe conditions.

Likewise, existence of children without a nationality places them in an unprotected situation internationally, as they do not receive the benefits and rights enjoyed by citizens, and if the State also denies them their birth certificates when they are born in the country of refuge, this places them at "permanent risk of being arbitrarily expelled and therefore of being separated from their families," which very often leads to "ehildren's loss of many other rights through the loss of this first one."

c. Cases where life and health are endangered:
When children suffer abuse, "this not only eauses psychologieal, physical and moral damage to them, but also exposes them to sexually transmitted diseases, whieh worsens the danger to their lives." Unfortunately, these facts often remain within the household environment and in other eases the State does not act, even though it has the authority to exercise appropriate mechanisms to protect them. Furthermore, mechanisms to punish the perpetrators are often ineffective, thus denying aceess to justiee and obstructing any idea of protecting children.

d. Cases of especially vulnerable children and adolescents:

When States do not provide adequate protection to children who are in a special situation due to any physical or mental disability, this places those children in a state of defenselessness, which worsens when they are subject to an internment system that does not have adequate resources for this purpose.

subject to an internment system that does not have adequate resources for this purpose.

e. Cases of wardship or guardianship (adoption):

The problem of illegal adoptions, together with child pornography and prostitution, generates great concern internationally. This problem arises primarily when "there are legislative flaws that place no obstacle to this type of crimes." Especially in connection with adoption, judicial intervention should be ensured to control its implementation, because it is important that it be "an act geared toward the well-being of the child" and lack of control over it can lead to abuse and illegal actions.

f. Children and adolescents who do not have access to education:

All children have the right to education as a universally recognized right. However, there are millions of primary school-age children who cannot attend school, and they are therefore in a situation of denial of the right to education, in turn linked to violations of civil and political rights such as illegal work, detainment in prisons, and ethnic, religious, or other forms of discrimination, worsened in cases of children in especially difficult situations such as children who are members of ethnic minorities, orphans, refugees, or homosexuals.

Likewise, violence to maintain discipline in classrooms and to punish children with low academic performance are factors that, aside from the direct consequences they may cause, hinder access to education, which the States must undertake to remove.

Development of Article 19 of the American Convention:

Based on Article 19 of the American Convention, the child has the right to protection measures by the States, which must be granted without any discrimination. Implementation of this provision should take into account those of other international instruments, pursuant to the interpretive criterion of Article 29 of the American Convention that enshrines "the principle of applicability of the provision most favorable to the individual," as well as the provisions and principles of the Convention on the Rights of the Child, especially expressed in the principle of the "best interests of the child."

Special protection measures that must be granted to children "surpass the exclusive control of the State" and Article 19 of the American Convention requires of States the existence of "a comprehensive policy for protection of children" and adoption of all measures required to ensure full enjoyment of their rights.

Substantive and procedural guarantees pertaining to special protection enshrined in Article 19 of the American Convention:

Due process guarantees and judicial protection are fully applicable "when solving disputes that involve children and adolescents, as well as regarding proceedings or procedures to establish their rights or their situation."

A. Substantive guarantees:

The purpose of Articles 8 and 25 of the American Convention is to "ensure effective protection of rights, surrounding it with indispensable procedural and substantive safeguards" for realization of the rights of

surrounding it with indispensable procedural and substantive safeguards" for realization of the rights of children. Three of these stand out:

i. Principle of culpability (nulla poena sine culpa):

This principle, recognized in various international treaties, consists of the "need for culpability to exist for there to be punishment." As it is currently conceived, the principle of presumption of innocence is considered a "probatory rule or trial rule" and a "rule for treatment of the accused."

With respect to the practices that the Commission proposes in its request, it is necessary to establish that guilt is closely associated to chargeability, so a person lacking in psychological or physical faculties, whether due to lack of sufficient maturity or because he or she has severe physical alterations, cannot be declared guilty and, therefore, cannot be criminally responsible for his or her acts, even if they are defined as crimes and are against the law. Thus, immunity from prosecution is "a limitation of criminal responsibility based on intellective and volitional capacity," as well as on other significant factors that must be taken into account to establish immunity from prosecution.

A judicial decision on chargeability must not involve any type of discrimination nor stigmatization against those who are immune from prosecution, as in the case of children, such as their being considered inferior or incapable, but rather that "they are simply persons in situations of inequality." Therefore, establishment of their "immunity from prosecution" must derive from "a socio-political and political-criminological decision, that reflects the obligation of the State to consider their special condition in society," so they must respond for their actions, but in a different way than adults. The principle of equality must then be applied in the sense that "those who are unequal must be treated differently, to make them equal."

With respect to children, recognition of their special needs should be taken into account when they are granted entitlement to their rights, as well as when responsibilities are demanded of them. Currently, "what is sought is not to extend immunity from prosecution to adolescents, but rather [...] to establish their criminal responsibility," so their acts, while not being deemed crimes, will have legal consequences, consistent with their condition as persons, their dignity, their rights, and the special characteristics of each child.

Therefore, it is deemed that children under 18 but older than 12 or 14 "should not be considered criminally chargeable, but criminally responsible," taking into account that, as a minor, he or she is a person who is immune from prosecution and "has faced obstacles to participate on an equal basis in society and to satisfy his or her needs," and therefore the State must take into account these circumstances and foster conditions that facilitate their integration into society.

Principle of lawfulness (nullum crimen, nulla poena sine lege):

Understood as a procedural guarantee, this principle seeks to ensure that "all proceedings take place in accordance with the law," as well as to establish a framework for action by the authorities in charge of deciding matters pertaining to minors.

This principle has been developed in case law of the Court and is found in international instruments, and it establishes the impossibility of "punishing an act without a law having previously sanctioned it as a crime." It

also establishes the obligation to recognize immunity of minors from prosecution as regards their criminal responsibility, both to set the limits where this cause of immunity from prosecution begins and ends, and also regarding "the time within which the re-socializing treatment of the juvenile offender must be imposed."

Sometimes the principle of lawfulness is "confronted by reality," as there is legislation with provisions that abridge rights of children, "based exclusively on their personal or circumstantial conditions."

Even though the Constitutions of the countries of the region forbid arbitrary deprivation of liberty, the authorities often breach this guarantee with regard to minors, as they do not have a court order to detain them, they do not bring the child before a competent judicial authority within 24 hours, and because of the very conditions of detainment, all of which threaten the minor with subsequent violations.

iii. Principle of humane treatment:
The purpose of this principle is to forbid abuse by the authorities while a child is institutionalized or an offender is serving a sentence. It has three main consequences: to explicitly forbid torture or cruel, inhuman or degrading treatment; to state the aim of re-education and social resettlement of the children to whom these measures are applied; and to forbid application of the death penalty to persons who were under 18 at the time of the facts. Therefore, a measure that deprives liberty "can in no case involve the loss of some of the rights that are compatible with it, and even those rights that are necessary for adequate re-socialization must be recognized."

Furthermore, many detention centers do not have appropriate infrastructure, nor human or professional resources able to develop the educational and work programs that will enable the re-education and social resettlement sought by these measures.

B. Procedural guarantees:

These are all guarantees that must be respected because they are necessary in any judicial situation where a controversy regarding a right must be decided in an equitable manner. Thus, procedural guarantees must be recognized not only in proceedings where criminal responsibilities are decided, but also "in all judicial or administrative processes where a there is a direct or indirect discussion of a fundamental right" of the children.

i. Principle of jurisdictionality:

Administration of justice must be entrusted to a competent, independent and impartial judge, pursuant to Article 8 of the American Convention. Likewise, when deciding about controversies or situations that involve children and adolescents, efforts must be made to preserve specialization by the bodies entrusted with this task. Furthermore, in criminal matters, the authorities must be judicial, except when there is a "transfer of proceedings" to administrative jurisdiction, in cases in which this is better for the parties involved, especially the child. The authorities in charge of solving conflicts that involve minors must also receive training, as a fundamental requirement for their functions.

ii. Presence of both parties:

It is crucial to establish the parties involved in the proceedings, as well as to guarantee the rights protected by

law. For this, it is necessary to "grant equal opportunities to the parties to argue and defend their claims" and to provide "due balance among the parties to the proceedings." Efforts must also be made for "the proceedings to include an actor, plaintiff or claimant party who is clearly distinct from the judicial function in charge of reaching a decision."

Adequate legal advice and participation of parents or guardians during the proceedings enables protection required by the child due to his or her special condition.

iii. Principle of inviolability of defense:

This principle means that every person must effectively enjoy the right to adequately prepare his or her defense, which requires being informed of the charges and of the evidence against him or her, as well as the right to suitable legal representation throughout the proceedings, which "cannot be substituted by parents, psychologists, social assistants." Furthermore, this right involves not submitting the detainee to tortures to obtain an admission that he or she committed the criminal act.

iv. Principle of the public nature of the proceedings:

In accordance with this principle, all parties to the proceedings must be informed of and have access to the procedural actions as "a means to control the development of the proceedings and to avoid placing any of them in a position of defenselessness." Likewise, when minors are involved, publicity must be limited to benefit their dignity or privacy, as well as in situations where debate of the case may have negative consequences or lead to stigmatization.

v. Principle of appeal or review:

All persons, including children, have the right to enjoy the possibility of review of a decision to determine whether the law was adequately applied and to assess the facts and evidence, in all proceedings where decisions are reached regarding some of their fundamental rights. Also, "this right is always expanded with the possibility of resorting to expedite remedies (habeas corpus or similar actions) against decisions that involve deprivation of liberty or prolonging it."

Conclusions

During the last decade, a new doctrinal scenario developed, based on international human rights law, called the "doctrine of comprehensive protection." It was founded on the recognition of children as legal persons, which has made it possible to leave the "theory of the irregular situation" behind. In this regard, "the Convention on the Rights of the Child, [has constituted] the foundation and cornerstone for the new doctrine." With respect to Article 19 of the American Convention, the Inter-American Court "has given life to the substantive content of that provision, incorporating –for its interpretation and application- the body of provisions and of doctrine that have enabled an expansion of standards regarding this matter." This phenomenon has been developed by the concept of the "best interests of the child." All of this has made possible "substantial progress in protection of the human rights of children and adolescents, ensuring them in a better and more complete manner exercise of their rights and guarantees."

Effective recognition of the rights of children requires a major social and cultural movement, more than an "appropriate legislative framework", where the various agents play a fundamental role: civil society, regarding education and fostering children's rights at all levels; non-governmental organizations, by denouncing, defending and demanding children's rights; States by "ensuring fulfillment of protection measures inferred from Article 19 of the American Convention [...] in light of the best interests of the child, as well as the other ratified treaties on this matter;" the bodies of the inter-American system, with respect to the challenge of expanding recognition and demanding compliance by the States parties to the American Convention.

Regarding the practices identified by the Inter-American Commission, they conclude that "in each and every one of them, due process guarantees and effective judicial protection must be applied," which necessarily affects the discretion of the State to decide on matters where the fundamental rights of minors are discussed.

Comisión Colombiana de Juristas:

In its August 2, 2002 brief, the Colombian Commission of Jurists stated that:

To be able to realize the aspiration to a new set of international provisions for the protection of children's rights, it is imperative to modify certain legislation in the region, that was enacted to address problems of children but especially those of children who broke criminal laws. To attain that objective, it is relevant to point out that it is not sufficient to establish a specialized criminal jurisdiction for children, which seeks to put an end to the "irregular situation" system that views children as objects rather than subjects of rights. This only deepens the presence of irregularities, since it is quite the contrary of the model of comprehensive protection that must be adopted and is, therefore, not consistent with the rights of juvenile offenders.

Therefore, children must be exempted from any application of criminal law, even if it is considered to be special in nature. The State must seek to fully guarantee children's rights to prevent children from entering criminal life. It must also ensure full exercise of those rights and the possibility of receiving a complete education in accordance with human dignity and human rights principles, especially those of tolerance, liberty, equality, and solidarity.

In this regard, it is important to highlight that "for prevention of juvenile crime, policies that seek to prevent crimes being committed by children must be set within the framework of a social policy, the overall aim of which should be to promote children's well-being." The States must strive to provide sufficient conditions for decent sustenance of the family, as children need the means for their complete physical, mental, and social development.

Furthermore, all efforts must be made to avoid separation of children from their family environment, as this should be a measure of last resort that, in any case, must be adopted with due respect for jurisdictional guarantees and must anyhow be in accordance with human dignity and therefore "in no case should it involve a reduction of rights, especially the right to liberty."

With respect to observance of criteria set forth regarding legal capacity of persons being established as a limit and a criterion with respect to children, it should be stated that most legislation deems that given their physical and mental development, it is only at the age of 18 that they are sufficiently mature for adult attitudes and, therefore, all those below that age are to be considered children or adolescents. This involves applying all

therefore, all those below that age are to be considered children or adolescents. This involves applying all guarantees and rights set forth for them, realizing that from this standpoint, all persons under 18 are unable to adequately decide, which involves greater attention by the State and the family to provide them with guidance, support, and care.

On the other hand, it is necessary to highlight that any decision by the State regarding juvenile offenders has as its main and almost exclusive objective education of the child or adolescent, whose guidance must be set within the principles of protection and satisfaction of the children's needs. These criteria, per se, make it necessary to set aside any application of criminal law, even if the latter is special, to children because its purpose is not education of nor care for the perpetrator, but rather punishment for incurring in the crimes defined by law.

In light of the above, it concludes that:

1. the American Convention on Human Rights must be interpreted in such a way that it reaffirms the obligation of the State to protect children and guarantee their rights;
2. ensuring the necessary conditions for support of children is the best way to prevent crimes being committed by children and youths;
3. juvenile offenders must receive treatment in accordance with the respective guarantees, primarily seeking their education and completely outside the framework of criminal law. Every effort must be made to avoid deprivation of liberty, which should only be a measure of last resort;
4. systems to address children's needs must include educational programs for parents and teachers, and those in charge of assistance programs for children must be trained in the area of children's human rights; and
5. States must undertake to make every effort to prevent violations of the rights of children, and to investigate and punish whoever breaches those rights, as well as to restore the rights breached.

III
COMPETENCE

16. This request for an advisory opinion was filed before the Court by the Commission, exercising the authority granted by Article 64(1) of the Convention, which states that:

[t]he member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.

17. The aforementioned authority has been exercised in this case fulfilling the respective requirements as set forth in the Rules of Procedure: precise statement of the questions on which the opinion of the Court is being sought, identification of the provisions to be interpreted, and the name and address of the Delegate, and submission of the considerations giving rise to the request (Article 59 of the Rules of Procedure), as well as identification of the international instruments other than the American Convention on which an interpretation is also requested (Article 60(1)).

18. The Commission asked the Court to "interpret whether Articles 8 and 25 of the American Convention on Human Rights constitute limits to the good judment and discretion of the States to issue special measures of protection in accordance with Article 19 of the Convention," and for this it proposed five hypothetical practices for the Court to decide on their compatibility with the American Convention, as follows:

a) separation of young persons from their parents and/or family, on the basis of a ruling by a decision-making organ, made without due process, that their families are not in a position to afford their education or maintenance;

b) deprivation of liberty of minors by internment in guardianship or custodial institutions on the basis of a determination that they have been abandoned or are prone to fall into situations of risk or illegality, motives which should not be considered of a criminal nature, but, rather, as the result of personal or circumstantial vicissitudes;

c) the acceptance of confessions by minors in criminal matters without due guarantees;

d) judicial or administrative proceedings to determine fundamental rights of the minor without legal representation of the minor; and

e) determination of rights and liberties in judicial and administrative proceedings without guarantees for the right of the minor to be personally heard; and failure to take into account the opinion and preferences of the minor in such determination.

The Court was also asked to issue "valid general criteria" regarding these matters.

19. Fulfillment of the requirements set forth in the Rules of Procedure regarding submission of a request for an advisory opinion does not mean that the Court is under the obligation to respond to it. In this regard, the Court must take into account considerations that transcend merely formal aspects and that are reflected in the generic limits that the Court has recognized in exercising its advisory function. Said considerations are addressed in the following paragraphs.

20. The Commission requested a juridical interpretation of certain precepts of the American Convention, and subsequently expanded its proposal and requested the interpretation of other treaties, mainly the Convention on the Rights of the Child, insofar as these treaties might contribute to specify the scope of the American Convention. For this, the Court must first of all decide whether it is invested with the authority to interpret, by means of an advisory opinion, international treaties other than the American Convention , when their provisions contribute to specify the meaning and scope of provisions contained in the latter.

21. The Court has set certain guidelines for interpretation of international provisions that do not appear in the American Convention. For this, it has resorted to the general provisions set forth in the Vienna Convention on the Law of Treaties, especially the principle of good faith to ensure agreement of a norm with the object and purpose of the Convention. This Court has also established that interpretation must take into account "the changes over time and present-day conditions," and that the interpretation of other international instruments cannot be used to limit the enjoyment and exercise of a right; also, it must contribute to the most favorable application of the provision to be interpreted.

22. Likewise, this Court established that it could "interpret any treaty as long as it is directly related to the protection of human rights in a Member State of the inter-American system," even if said instrument did not issue from the same regional protection system, and that

[n]o good reason exists to hold, in advance and in the abstract, that the Court lacks the power to receive a request for, or to issue, an advisory opinion about a human rights treaty applicable to an American State merely because non-American States are also parties to the treaty or because the treaty has not been adopted within the framework or under the auspices of the inter-American system.

23. The Court has also had the opportunity to refer specifically to the Convention on the Rights of the Child, to which the Commission refers in the instant request for an advisory opinion, through the analysis of Articles 8, 19 and 25 of the American Convention. In the "Street Children" Case (Villagrán Morales et al), in which Article 19 of the American Convention was applied, the Court resorted to Article 1 of the Convention on the Rights of the Child as an instrument to define the scope of the concept of "child."

24. In that case, the Court highlighted the existenee of a "very comprehensive international corpus juris for the protection of the child" (whieh the Convention on the Rights of the Child and the American Convention are part of), which should be used as a source of law by the Court to establish "the content and scope" of the obligations undertaken by the State through Article 19 of the American Convention, specifically with respect to identification of the "measures of proteetion" to which the aforementioned precept refers.

25. Children constitute a group to whom the international community has paid much attention. The first international instrument regarding them was the 1924 Geneva Declaration, adopted by the International Association for the Protection of Children. This Declaration recognized that humanity must give children the best of itself, as a duty that is above all considerations of raee, nationality, or creed.

26. At least 80 international instruments adopted during the 20th century are applieable to children in various degrees. Among them, the following stand out: the Deelaration on the Rights of the Child, adopted by the General Assembly of the United Nations (1959), the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules, 1985), the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules, 1990) and the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines, 1990). This same circle of ehild protection ineludes Agreement 138 and Recommendation 146 of the International Labor Organization and the International Covenant on Civil and Political Rights.

27. As regards the inter-American system for the protection of human rights, it is necessary to take into consideration Principle 8 of the American Declaration of the Rights and Duties of Man (1948) and Article 19 of the American Convention, as well as Articles 13, 15 and 16 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Soeial and Cultural Rights ("Protocol of San Salvador").

28. With respect to the aforementioned Article 19 of the Ameriean Convention, it is worth highlighting that when it was drafted there was a concern for ensuring due protection of children, by means of State

mechanisms directed toward this end. Today, this precept requires a dynamic interpretation that responds to the new circumstances on which it will be projected and one that addresses the needs of the child as a true legal person, and not just as an object of protection.

29. The Convention on the Rights of the Child has been ratified by almost all the member States of the Organization of American States. The large number of ratifications shows a broad international consensus (opinio iuris comunis) in favor of the principles and institutions set forth in that instrument, which reflects current development of this matter. It should be highlighted that the various States of the hemisphere have adopted provisions in their legislation, both constitutional and regular, regarding the matter at hand; the Committee on the Rights of the Child has repeatedly referred to these provisions.

30. If this Court resorted to the Convention on the Rights of the Child to establish what is meant by child in the framework of a contentious case, all the more so can it resort to said Convention and to other international instruments on this matter when it exercises is advisory function, "relating not only to the interpretation of the Convention but also to 'other treaties concerning the protection of human rights in the American states.'"

31. Following its practice regarding advisory opinions, the Court must establish whether issuing an advisory opinion might "have the effect of altering or weakening the system established by the Convention in a manner detrimental to the individual human being."

32. The Court can use several parameters when it conducts this examination. One of them, which is consistent with most international case law on this subject matter, is that it might be inconvenient for there to be a premature determination on a theme or issue that might subsequently be brought before the Court in the context of a contentious case. However, this Court has stated that the existence of a controversy regarding interpretation of a provision is not, per se, an impediment to exercise its advisory function.

33. When it exercises its advisory function, the Court is not called upon to decide on matters of fact, but rather to elucidate the meaning, purpose and reason of international human rights provisions. The Court carries out its advisory function within this framework. The Court has asserted the distinction between its advisory and contentious jurisdiction several times, by stating that

[t]he advisory jurisdiction of the Court differs from its contentious jurisdiction in that there are no "parties" involved in the advisory proceedings nor is there any dispute to be settled. The sole purpose of the advisory function is "the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states." The fact that the Court's advisory jurisdiction may be invoked by all the Member States of the OAS and its main organs defines the distinction between its advisory and contentious jurisdictions.

[...] The Court therefore observes that the exercise of the advisory function assigned to it by the American Convention is multilateral rather than litigious in nature, a fact faithfully reflected in the Rules of Procedure of the Court, Article 62(1) of which establishes that a request for an advisory opinion shall be transmitted to all the "Member States", which may submit their comments on the request and participate in the public hearing on the matter. Furthermore, while an advisory opinion of the Court does not have the binding character of a judgment in a contentious case, it does have undeniable legal effects. Hence, it is evident that the State or organ requesting an advisory opinion of the Court is not the only one with a legitimate interest in the outcome

organ requesting an advisory opinion of the Court is not the only one with a legitimate interest in the outcome of the procedure.

34. As it affirms its competence regarding this matter, the Court recalls the broad scope of its advisory function, unique in contemporary international law, which enables it "to perform a service for all of the members of the inter-American system and is designed to assist them in fulfilling their international human rights obligations" and to

assist states and organs to comply with and to apply human rights treaties without subjecting them to the formalism and the sanctions associated with the contentious judicial process.

35. The Court deems that pointing out a few examples serves the purpose of referring to a specific context and of illustrating the various interpretations that may exist regarding the juridical issue that is the subject matter of the instant Advisory Opinion being discussed, without this involving a juridical statement by the Court on the situation posed in said examples. The latter also allow the Court to point out that its Advisory Opinion is not mere academic speculation and that its interest is justified due to the benefit it may bring to international protection of human rights. In addressing the issue, the Court is acting in its role as a human rights tribunal, guided by the international instruments that govern its advisory jurisdiction, and it conducts a strictly juridical analysis of the questions posed to it.

36. Therefore the Court deems that it must examine the matters posed in the request that is now analyzed and it must issue the respective Advisory Opinion.

IV
STRUCTURE OF THE OPINION

37. It is inherent to the authority of the Court for it to have the authority to structure its pronouncements in the manner it deems most adequate for the interests of justice and for an advisory opinion. For this, the Court takes into account the basic issues that underlie the questions raised in the request for an advisory opinion and analyzes them to reach general conclusions that, in turn, may apply to the specific points mentioned in the request itself and to other related themes. In this instance, the Court has decided to address, first of all, the more substantive conceptual themes that will allow demarcation of the analysis and conclusions regarding specific, especially procedural matters submitted to it for consideration.

V
DEFINITION OF CHILD

38. Article 19 of the American Convention, which orders special measures of protection in favor of children, does not define this concept. Article 1 of the Convention on the Rights of the Child states that a "child [is] every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."

39. In the Beijing Rules, in the Tokyo Rules and in the Riyadh Guidelines, the terms "child" and "juvenile" are used to refer to the individuals to whom their provisions are directed. According to the Beijing Rules, a "juvenile is a child or young person who, under the respective legal systems, may be dealt with for an offence

in a manner which is different from an adult." The Tokyo Rules do not state any exceptions to the age limit of 18 years.

40. At this time, the Court will not address the implications of the various expressions used to refer to the members of this population group under the age of 18. Some of the positions expressed by participants in the proceedings in connection with this Opinion noted the difference between a child and a minor, from certain perspectives. For the aims sought by this Advisory Opinion, the difference established between those over and under 18 will suffice.

41. Adulthood brings with it the possibility of fully exercising rights, also known as the capacity to act. This means that a person can exercise his or her subjective rights personally and directly, as well as fully undertake legal obligations and conduct other personal or patrimonial acts. Children do not have this capacity, or lack this capacity to a large extent. Those who are legally disqualified are subject to parental authority, or in its absence, to that of guardians or representatives. But they are all subjects of rights, entitled to inalienable and inherent rights of the human person.

42. Finally, taking into account international norms and the criterion upheld by the Court in other cases, "child" refers to any person who has not yet turned 18 years of age.

VI
EQUALITY

43. As both Mexico and Costa Rica, as well as the Inter-American Institute of Children, ILANUD and CEJIL noted, it is necessary to specify the meaning and scope of the principle of equality with respect to the matter of children. Previously, this Court has stated that Article 1(1) of the American Convention places the States under the obligation to respect and guarantee full and free exercise of the rights and liberties recognized therein, with no discrimination. Any treatment that can be considered discriminatory with respect to the rights protected by the Convention is, per se, incompatible with it.

44. In a more specific sense, Article 24 of the Convention protects the principle of equality before the law. Thus, the general prohibition of discrimination set forth in Article 1(1) "extends to the domestic law of the States Parties, permitting the conclusion that in these provisions the States Parties, by acceding to the Convention, have undertaken to maintain their laws free of discriminatory regulations."

45. In an Advisory Opinion, the Court noted that

[t]he notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified. It is impermissible to subject human beings to differences in treatment that are inconsistent with their unique and congenerous character.

46. Now, when the Court examined the implications of differentiated treatment given to the beneficiaries of certain provisions, it established that "not all differences in treatment are in themselves offensive to human

dignity." In this same sense, the European Court of Human Rights, based on "the principles that can be inferred from the juridical practice of a large number of democratic States," warned that a distinction is only discriminatory when it "lacks objective and reasonable justification." There are certain factual inequalities that may be legitimately translated into inequalities of juridical treatment, without this being contrary to justice. Furthermore, said distinctions may be an instrument for the protection of those who must be protected, taking into consideration the situation of greater or lesser weakness or helplessness in which they find themselves.

47. This Court also determined that:

[a]ccordingly, no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things. It follows that there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind. (infra 97).

48. The Inter-American Court itself has established that "it cannot be deemed discrimination on the grounds of age or social status for the law to impose limits on the legal capacity of minors or mentally incompetent persons who lack the capacity to protect their interests."

49. At this point, it is appropriate to recall that Article 2 of the Convention on the Rights of the Child provides:

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

50. Likewise, the general principles of the Beijing Rules establish that

[they] shall be applied to juvenile offenders impartially, without distinction of any kind, for example as to race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status.

51. In its General Comment 17 on the International Covenant on Civil and Political Rights, the Human Rights Committee pointed out that Article 24(1) of that instrument recognizes the right of every child, with no discrimination, to the protection measures required by his or her condition as a child, both on the part of his or her family and on the part of society and the State. Applying this provision involves adopting special measures for protection of children in addition to those that the States must adopt, pursuant to Article 2, to ensure that all persons enjoy the rights set forth in the Covenant. The Committee pointed out that the rights set forth in Article 24 are not the only ones applicable to children: "as individuals, children benefit from all of the civil

rights enunciated in the Covenant."

52. The Committee also stated that

[t]he Covenant requires that children should be protected against discrimination on any grounds such as race, colour, sex, language, religion, national or social origin, property or birth. In this connection, the Committee notes that, whereas non-discrimination in the enjoyment of the rights provided for in the Covenant also stems, in the case of children, from article 2 and their equality before the law from article 26, the non-discrimination clause contained in article 24 relates specifically to the measures of protection referred to in that provision.

53. The ultimate objective of protection of children in international instruments is the harmonious development of their personality and the enjoyment of their recognized rights. It is the responsibility of the State to specify the measures it will adopt to foster this development within its own sphere of competence and to support the family in performing its natural function of providing protection to the children who are members of the family.

54. As was pointed out during the discussions on the Convention on the Rights of the Child, it is important to highlight that children have the same rights as all human beings –minors or adults-, and also special rights derived from their condition, and these are accompanied by specific duties of the family, society, and the State.

55. It can be concluded that, due to the conditions in which children find themselves, differentiated treatment granted to adults and to minors is not discriminatory per se, in the sense forbidden by the Convention. Instead, it serves the purpose of allowing full exercise of the children's recognized rights. It is understood that, in light of Articles 1(1) and 24 of the Convention, the States cannot establish distinctions that lack an objective and reasonable justification and that do not have as their only objective, ultimately, exercise of the rights set forth in the Convention.

VII
BEST INTERESTS OF THE CHILD

56. This regulating principle regarding children's rights is based on the very dignity of the human being, on the characteristics of children themselves, and on the need to foster their development, making full use of their potential, as well as on the nature and scope of the Convention on the Rights of the Child.

57. In this regard, principle 2 of the Declaration on the Rights of the Child (1959) sets forth:

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration. (Not underlined in the original text)

58. The aforementioned principle is reiterated and developed in Article 3 of the Convention on the Rights of the Child, which states:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts

of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. (Not underlined in the original text)

[...]

59. This matter is linked to those discussed in previous paragraphs, if we take into account that the Convention on the Rights of the Child refers to the best interests of the child (Articles 3, 9, 18, 20, 21, 37 and 40) as a reference point to ensure effective realization of all rights contained in that instrument. Their observance will allow the subject to fully develop his or her potential. Actions of the State and of soeiety regarding protection of children and promotion and preservation of their rights should follow this criterion.

60. By the same token, it should be noted that the preamble of the Convention on the Rights of the Child establishes that children require "special care," and Article 19 of the American Convention states that they must receive "speeial measures of protection." In both cases, the need to adopt these measures or care originates from the specific situation of children, taking into aecount their weakness, immaturity or inexperience.

61. In conclusion, it is necessary to weigh not only the requirement of special measures, but also the specific characteristics of the situation of the child.

VIII
DUTIES OF THE FAMILY, SOCIETY, AND THE STATE

The family as a foeal point for protection

62. Adoption of special measures to protcet children is a responsibility both of the State and of the family, community, and society to which they belong. In this regard, Article 16 of the San Salvador Protocol states that:

[e]very child, whatever his parentage, has the right to the protection that his status as a minor requires from his family, society and the State. Every child has the right to grow under the protection and responsibility of his parents; save in exceptional, judicially-recognized cireumstances, a child of young age ought not to be separated from his mother. Every child has the right to free and compulsory education, at least in the elementary phase, and to continue his training at higher levels of the educational system.

63. By the same token, Article 3 of the Convention on the Rights of the Child has established that:

[...]

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, partieularly in the arcas of safety, health, in the number and suitability of their staff, as well as competent supervision.

64. In addition to the above, it is necessary to faithfully comply with the obligations set forth in Article 4 of the

64. In addition to the above, is necessary to faithfully comply with the obligations set forth in Article 4 of the Convention on the Rights of the Child, which states that

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

65. To effectively protect children, all State, social or household decisions that limit the exercise of any right must take into account the best interests of the child and rigorously respect provisions that govern this matter.

66. In principle, the family should provide the best protection of children against abuse, abandonment and exploitation. And the State is under the obligation not only to decide and directly implement measures to protect children, but also to favor, in the broadest manner, development and strengthening of the family nucleus. In this regard, "[r]ecognition of the family as a natural and fundamental component of society," with the right to "protection by society and the State," is a fundamental principle of International Human Rights Law, enshrined in Articles 16(3) of the Universal Declaration, VI of the American Declaration, 23(1) of the International Covenant on Civil and Political Rights and 17(1) of the American Convention.

67. The Riyadh Guidelines have stated that "the family is the central unit responsible for the primary socialization of children, governmental and social efforts to preserve the integrity of the family, including the extended family, should be pursued. The society has a responsibility to assist the family in providing care and protection and in ensuring the physical and mental well-being of children [...]" (twelfth paragraph). The State must also safeguard stability of the household, facilitating, through its policies, provision of adequate services for the families, ensuring conditions that enable attainment of a decent life (infra 86).

68. Article 4 of the Declaration on Social Progress and Development (1969), proclaimed by the General Assembly of the United Nations in resolution 2542 (XXIV), of December 11, 1969, declared:

The family as a basic unit of society and the natural environment for the growth and well-being of all its members, particularly children and youth, should be assisted and protected so that it may fully assume its responsibilities within the community. Parents have the exclusive right to determine freely and responsibly the number and spacing of their children.

69. The Human Rights Committee of the United Nations referred to entitlement to the rights protected by Articles 17 and 23 of the International Covenant on Civil and Political Rights. It is important to take into account the scope of the concept of family to base the rights and powers we are referring to. The European Court of Human Rights has repeatedly stated that the concept of family life "is not confined solely to marriage-based relationships and may encompass other de facto "family" ties where the parties are living together outside of marriage."

70. The Inter-American Court has addressed this point from the perspective of the next of kin of the victim of a human rights violation. In this regard, the Court deems that the term "next of kin" must be understood in a broad sense that encompasses al persons linked by close kinship.

Exceptional separation of the child from his or her family

71. The child has the right to live with his or her family, which is responsible for satisfying his or her material, emotional, and psychological needs. Every person's right to receive protection against arbitrary or illegal interference with his or her family is implicitly a part of the right to protection of the family and the child, and it is also explicitly recognized by Articles 12(1) of the Universal Declaration of Human Rights, V of the American Declaration of the Rights and Duties of Man, 17 of the International Covenant on Civil and Political Rights, 11(2) of the American Convention on Human Rights, and 8 of the European Human Rights Convention. These provisions are especially significant when separation of a child from his or her family is being analyzed.

72. The European Court has established that mutual enjoyment of harmonious relations between parents and children is a fundamental component of family life; and that even when the parents are separated, harmonious family relations must be ensured. Measures that impede this enjoyment are an interference with the right protected by Article 8 of the Convention. The Court itself has pointed out that the essential content of this precept is protection of the individual in face of arbitrary action by public authorities. One of the most grave interferences is that which leads to division of a family.

73. Any decision pertaining to separation of a child from his or her family must be justified by the best interests of the child. In this regard, Riyadh Guideline 14 set forth that:

[w]here a stable and settled family environment is lacking and when community efforts to assist parents in this regard have failed and the extended family cannot fulfill this role, alternative placements, including foster care and adoption, should be considered. Such placements should replicate, to the extent possible, a stable and settled family environment, while, at the same time, establishing a sense of permanency for children, thus avoiding problems associated with "foster drift".

74. The European Court itself has shown that in certain cases the authorities have very broad powers to decide what is in the best interest of the child. However, one must not lose sight of existing limitations in several areas, such as access by the parents to the minor. Some of these measures endanger family relations. There must be a fair balance between the interests of the individual and those of the community, as well as between those of the minor and of his or her parents. Recognition of the authority of the family does not mean that the family can arbitrarily control the child, in a manner that would entail damage to the minor's health and development. These and other associated concerns determine the content of various precepts of the Convention on the Rights of the Child (Articles 5, 9, 19 and 20, inter alia).

75. This Court highlights the travaux préparatoires of the Convention on the Rights of the Child, which considered the need for separations of children from their family nucleus to be duly justified and preferably temporary, and for the child to be returned to his or her parents as soon as circumstances allow. The Beijing Rules (17, 18 and 46) made a similar statement.

76. Lack of material resources cannot be the only basis for a judicial or administrative decision that involves separation of the child from his or her family, and the resulting deprivation of other rights protected by the Convention.

77. In conclusion, the child must remain in his or her household, unless there are determining reasons, based on the child's best interests, to decide to separate him or her from the family. In any case, separation must be exceptional and, preferably, temporary.

Institutions and staff

78. Effective and timely protection of the interests of the child and the family must be provided through intervention by duly qualified institutions, with appropriate staff, adequate facilities, suitable means and proven experience in this type of tasks. In brief, it is not enough for there to be jurisdictional or administrative bodies involved; they must have all the necessary elements to safeguard the best interests of the child. In this regard, the third paragraph of Article 3 of the Convention on the Rights of the Child stipulates that:

[...]

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

79. This must permeate the activity of all persons intervening in the proceedings, who must discharge their respective duties taking into account both the nature of these, in general, and the bests interests of the child vis-à-vis the family, society, and the State itself, specifically. Decisions on protection and fair trial do not suffice if the legal operators in the proceedings lack sufficient training on what the best interests of the child involve and, therefore, on effective protection of his or her rights.

Living conditions and education of the child

80. Regarding conditions for care of children, the right to life that is enshrined in Article 4 of the American Convention does not only involve the prohibitions set forth in that provision, but also the obligation to provide the measures required for life to develop under decent conditions. The concept of a decent life, developed by this Court, relates to the norm set forth in the Convention on the Rights of the Child, Article 23(1) of which states the following, with reference to children who suffer some type of disability:

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

81. Full exercise of economic, social, and cultural rights of children has been associated with the possibilities of the State that is under the obligation (Article 4 of the Convention on the Rights of the Child), which must make its best effort, in a constant and deliberate manner, to ensure access of children to those rights, and their enjoyment of such rights, avoiding regressions and unjustifiable delays, and allocating as many available resources as possible to this compliance. The International Conference on Population and Development (Cairo, 1994) highlighted that

[a]ll States and families should give highest possible priority to children. The child has the right to standards of living adequate for its well-being and the right to the highest attainable standards of health, and the right to

education. [...] (principle 11)

82. Likewise, the II World Conference on Human Rights (Vienna, 1993) stated specifically that

[n]ational and international mechanisms and programmes should be strengthened for the defence and protection of children, in particular, the girl-child, abandoned children, street children, economically and sexually exploited children, including through child pornography, child prostitution or sale of organs, children victims of diseases including acquired immunodeficiency syndrome, refugee and displaced children, children in detention, children in armed conflict, as well as children victims of famine and drought and other emergencies.
83. In this regard, the International Conference on Population and Development also highlighted that

[e]veryone has the right to education, which shall be directed to the full development of human resources, and human dignity and potential, with particular attention to women and the girl-child. Education should be designed to strengthen respect for human rights and fundamental freedoms, including those relating to population and development.

84. It should be highlighted that the right to education, which contributes to the possibility of enjoying a dignified life and to prevent unfavorable situations for the minor and for society itself, stands out among the special measures of protection for children and among the rights recognized for them in Article 19 of the American Convention.

85. Principle 7 of the Declaration on the Rights of the Child (1959) established:

The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgment, and his sense of moral and soeial responsibility, and to become a useful member of society.

[...]

The child shall have full opportunity for play and recreation, which should be directed to the same purposes as education; society and the public authorities shall endeavour to promote the enjoyment of this right.

86. In brief, education and care for the health of children require various measures of protection and are the key pillars to ensure enjoyment of a decent life by the children, who in view of their immaturity and vulnerability often lack adequate means to effectively defend their rights.

Positive obligations to provide protection

87. This Court has repeatedly established, through analysis of the general provision set forth in Article 1(1) of the American Convention, that the State is under the obligation to respect the rights and liberties recognized therein and to organize public authorities to ensure persons under its jurisdiction free and full exercise of human rights. According to legal standards regarding international responsibility of the State that are applicable to International Human Rights Law, actions or omissions by any public authority, of any branch of government, are imputable to the State which incurs responsibility under the terms set forth in the American

government, are imputable to the State which incurs responsibility under the terms set forth in the American Convention. This general obligation requires the States Parties to guarantee the exercise and enjoyment of rights by individuals with respect to the power of the State, and also with respect to actions by private third parties. By the same token, and for the purposes of this Advisory Opinion, the States Party to the American Convention are under the obligation, pursuant to Articles 19 (Rights of the Child) and 17 (Rights of the Family), in combination with Article 1(1) of this Convention, to adopt all positive measures required to ensure protection of children against mistreatment, whether in their relations with public authorities, or in relations among individuals or with non-governmental entities.

88. Likewise, according to the provisions set forth in the Convention on the Rights of the Child, children's rights require that the State not only abstain from unduly interfering in the child's private or family relations, but also that, according to the circumstances, it take positive steps to ensure exercise and full enjoyment of those rights. This requires, among others, economic, social and cultural measures. In its first general comment, the Committee on the Rights of the Child specifically emphasized the major importance of the right to education. Accordingly, it is mainly through education that the vulnerability of children is gradually overcome. The State, given its responsibility for the common weal, must likewise safeguard the prevailing role of the family in protection of the child; and it must also provide assistance to the family by public authorities, by adopting measures that promote family unity.

89. It should be highlighted that the Committee on the Rights of the Child paid special attention to violence against children both within the family and at school. It pointed out that "the Convention on the Rights of the Child sets high standards for protection of children against violence, particularly in Articles 19 and 28, as well as in Articles 29, 34, 37, and 40, and others, [...] taking into account the general principles contained in Articles 2, 3 and 12."

90. The European Court, referring to Articles 19 and 37 of the Convention on the Rights of the Child, has recognized the right of the child to be protected against interference by actors other than the State, such as mistreatment by one of the parents; it has also recognized that if children are not cared for by their parents and their basic social needs are not satisfied, the State has the duty to intervene to protect them.

91. In conclusion, the State has the duty to adopt positive measures to fully ensure effective exercise of the rights of the child.

IX
JUDICIAL OR AMINISTRATIVE PROCEEDINGS INVOLVING CHILDREN

Due process and guarantees

92. As stated above (supra 87), States have the obligation to recognize and respect rights and liberties of the human person, as well as to protect and ensure their exercise through the respective guarantees (Article 1(1)), which are suitable means for them to be effective under all circumstances; both the corpus iuris of rights and liberties and their guarantees are inseparable concepts of the systems of values and principles distinctive of a democratic society. In such a society, "the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law form a triad. Each component thereof defines itself, complements and depends on the others for its meaning."

depends on the others for its meaning."

93. These fundamental values include safeguarding children, both because they are human beings with their inherent dignity, and due to their special situation. Given their immaturity and vulnerability, they require protection to ensure exercise of their rights within the family, in society and with respect to the State.

94. These considerations must be reflected in regulation of judicial or administrative proceedings where decisions are reached regarding children's rights and, when appropriate, those of the persons under whose custody or guardianship they find themselves.

95. The guarantees set forth in Articles 8 and 25 of the Convention are equally recognized for all persons, and must be correlated with the specific rights established in Article 19, in such a way that they are reflected in any administrative or judicial proceedings where the rights of a child are discussed.

96. It is evident that a child participates in proceedings under different conditions from those of an adult. To argue otherwise would disregard reality and omit adoption of special measures for protection of children, to their grave detriment. Therefore, it is indispensable to recognize and respect differences in treatment which correspond to different situations among those participating in proceedings.

97. In this regard, it should be recalled that the Court pointed out, in the Advisory Opinion on the Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, when it addressed this matter from a general perspective, that

[t]o accomplish its objectives, the judicial process must recognize and correct any real disadvantages that those brought before the bar might have, thus observing the principle of equality before the law and the courts and the corollary principle prohibiting discrimination. The presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defense of one's interests. Absent those countervailing measures, widely recognized in various stages of the proceeding, one could hardly say that those who have the disadvantages enjoy a true opportunity for justice and the benefit of the due process of law equal to those who do not have those disadvantages. (supra 47).

98. Finally, while procedural rights and their corollary guarantees apply to all persons, in the case of children exercise of those rights requires, due to the special conditions of minors, that certain specific measures be adopted for them to effectively enjoy those rights and guarantees.

Participation of the child

99. The hypothetical situations proposed by the Inter-American Commission refer directly to participation of the child in proceedings where his or her own rights are discussed and where the decision has a significant bearing on his or her future life. Article 12 of the Convention on the Rights of the Child contains adequate provisions regarding this point, with the aim of ensuring that intervention of the child is adjusted to his or her conditions and is not detrimental to his or her genuine interests:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express

those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

100. From this same perspective, and specifically with respect to certain judicial proceedings, General Observation 13 on Article 14 of the United Nations Covenant on Civil and Political Rights, pertaining to equality among all persons in terms of the right to be heard publicly by a competent eourt, pointed out that this provision applies both to regular and to special courts, and established that "minors must enjoy at least the same guarantees and protection granted to adults in Article 14."
101. This Court deems it appropriate to provide some specification regarding this issue. As stated above, the group defined as children includes al persons under 18 (supra 42). Evidently, there is great diversity in terms of physical and intellectual development, of experience and of the information known by those who are included in that group. The decision-making ability of a 3-year-old child is not the same as that of a 16-year-old adolescent. For this reason, the degree of participation of a child in the proceedings must be reasonably adjusted, so as to attain effective proteetion of his or her best interests, which are the ultimate objective of International Human Rights Law in this regard.

102. Finally, those responsible for application of the law, whether in the administrative or judiciary sphere, must take into aecount the specific conditions of the minor and his or her best interests to decide on the child's participation, as appropriate, in establishing his or her rights. This consideration will seek as much access as possible by the minor to examination of his or her own case.

ADMINISTRATIVE PROCESS

103. Protection measures adopted by administrative authorities must be strictly in aceordance with the law and must seek eontinuation of the child's ties with his or her family group, if this is possible and reasonable (supra 71); in case a separation is necessary, it should be for the least possible time possible (supra 77); those who participate in decision-making processes must have the neeessary personal and professional competence to identify advisable measures from the standpoint of the child's interests (supra 78 and 79); the objective of measures adopted must be to re-educate and re-socialize the minor, when this is appropriate; and measures that involve deprivation of liberty must bc exceptional. All this enables adequate development of due process, reduces and adequately limits its discretion, in accordanee with criteria of relevance and rationality.

JUDICIAL PROCEEDINGS
Chargeability, criminal conduet and state of risk

104. To examine this issue, it is useful to identify certain concepts that are often used in this regard –with better or worse judgment-, such as those of chargeability, criminal conduct, and state of risk.

105. From a criminal perspective –associated with conduct that is defined and punishable as a crime, and with the consequent sanctions-, chargeability refers to a person's capacity for culpability. If the person does not have this capacity, it is not possible to file charges in a lawsuit as in the case of a person who is chargeable.

have this capacity, it is not possible to file charges in a lawsuit as in the case of a person who is chargeable. Chargeability is not an option when the person is unable to understand the nature of his or her action or omission and/or to behave in accordance with that understanding. It is generally accepted that children under a certain age lack that capacity. This is a generic legal assessment, one that does not examine the specific conditions of the minors on a case by case basis, but rather excludes them completely from the sphere of criminal justice.

106. Provision 4 of the Beijing Rules, which is not binding, stated that criminal chargeability "shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity" of the child.

107. The Convention on the Rights of the Child does not refer explicitly to repressive measures for this type of situations, except in Article 40(3) subparagraph a), which establishes the obligation of the States Party to set a minimum age up to which it is presumed that the child cannot infringe penal or criminal laws.

108. This leads to consider the hypothesis that minors –children, in the sense defined by the respective Convention- incur in unlawful conduct. State action (prosecuting, punitive measures, or those geared toward re-adaptation) is justified, both in the case of adults and in that of minors of a certain age, when the former or the latter carry out acts that criminal laws consider punishable. Therefore, it is necessary for the conduct that leads to State intervention to be defined as a crime. Thus, the rule of law is ensured in this delicate area of relations between the person and the State. This Court has stated that the principle of penal legality "means a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that are either not punishable offences or are punishable but not with imprisonment." This guarantee, set forth in Article 9 of the American Convention, must be granted to children.

109. One obvious consequence of the relevance of dealing in a differentiated manner with matters that pertain to children, and specifically those pertaining to an unlawful behavior, is the establishment of specialized jurisdictional bodies to hear cases involving conduct defined as crimes and attributable to them. What was stated above regarding the age required for a person to be considered a child, according to the predominant international criteria, applies to this important matter. Therefore, children under 18 who are accused of conduct defined as crimes by penal law must be subject, for the case to be heard and appropriate measures to be taken, only to specific jurisdictional bodies different from those for adults. Thus, the Convention on the Rights of the Child addresses the "establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law" (Article 40(3)).

110. It is unacceptable to include in this hypothesis the situation of minors who have not incurred in conduct defined by law as a crime, but who are at risk or endangered, due to destitution, abandonment, extreme poverty or disease, and even less so those others who simply behave differently from how the majority does, those who differ from the generally accepted patterns of behavior, who are involved in conflicts regarding adaptation to the family, school, or social milieu, generally, or who alienate themselves from the customs and values of their society. The concept of crime committed by children or juvenile crime can only be applied to those who fall under the first aforementioned situation, that is, those who incur in conduct legally defined as a crime, not to those who are in the other situations.

111. In this regard, Riyadh Guideline 56 states that "legislation should be enacted to ensure that any conduct not considered an offence or not penalized if committed by an adult is not considered an offence and not

not considered an offence or not penalized if committed by an adult is not considered an offence and not penalized if committed by a young person."

112. Finally, it is appropriate to point out that there are children exposed to grave risk or harm who cannot fend for themselves, solve the problems that they suffer or adequately channel their own lives, whether because they absolutely lack a favorable family environment, supportive of their development, or because they have insufficient education, suffer health problems or have deviant behavior that requires careful and timely intervention (supra 88 and 91) by well-prepared institutions and qualified staff to solve those problems or allay their consequences.

113. Obviously, these children are not immediately deprived of rights and withdrawn from relations with their parents or guardians and from their authority. They do not pass into the "dominion" of the authorities, in such a manner that the latter, disregarding legal procedures and guarantees that preserve the rights and interests of the minor, take over responsibility for the case and full authority over the former. Under all circumstances, the substantive and procedural rights of the child remain safeguarded. Any action that affects them must be perfectly justified according to the law, it must be reasonable and relevant in substantive and formal terms, it must address the best interests of the child and abide by procedures and guarantees that at all times enable verification of its suitability and legitimacy.

114. Neither do grave circumstances, such as those described above, immediately exclude the authority of the parents nor relieve them of the primary responsibilities that naturally fall to them, and which can only be modified or suspended, if that were the case, as the outcome of a proceeding in which rules applicable to infringement of rights are respected.

Due process

115. Observance of the right to fair trial is mandatory in all proceedings where the personal liberty of an individual is at stake. The principles and acts of due legal process are an irreducible and strict set that may be expanded in light of new progress in human rights Law. As this Court established in its Advisory Opinion on The Right to Information on Consular Assistance within the Framework of the Guarantees of the Due Process of Law:

the judicial process is a means to ensure, insofar as possible, an equitable resolution of a difference. The body of procedures, of diverse character and generally grouped under the heading of the due process, is all calculated to serve that end. To protect the individual and see justice done, the historical development of the judicial process has introduced new procedural rights. An example of the evolutive nature of judicial process are the rights not to incriminate oneself and to have an attorney present when one speaks. These two rights are already part of the laws and jurisprudence of the more advanced legal systems. And so, the body of judicial guarantees given in Article 14 of the International Covenant on Civil and Political Rights has evolved gradually. It is a body of judicial guarantees to which others of the same character, conferred by various instruments of International Law, can and should be added.

116. As regards the subject matter we are now addressing, the rules of due process have been set forth, mainly but not exclusively, in the Convention on the Rights of the Child, the Beijing Rules, the Tokyo Rules, and the Riyadh Guidelines, which safeguard the rights of children subject to various actions by the State

and the Riyadh Guidelines, which safeguard the rights of children subject to various actions by the State, society, or the family.

117. The rules of due process and the right to fair trial must be applied not only to judicial proceedings, but also to any other proceedings conducted by the State, or under its supervision (supra 103).

118. At an international level, it is important to note that the States Party to the Convention on the Rights of the Child have undertaken the obligation to adopt a number of measures to safeguard due legal process and judicial protection, following similar parameters to those set forth in the American Convention on Human Rights. These provisions are Articles 37 and 40.

119. For the purposes of this Advisory Opinion, it is pertinent to state certain considerations regarding the various material and procedural principles, the application of which is actualized in proceedings pertaining to minors, and which must be associated with the points examined above to set the complete framework regarding this matter. In this regard, it is also appropriate to consider the possibility and convenience of all procedural forms followed in those courts to have features of their own, in accordance with the characteristics and needs of the proceedings that take place there, bearing in mind the principle set forth in Convention on the Rights of the Child, that at this level can be reflected both in court intervention, as regards the form of procedural acts, and in the use of alternative means of solving controversies, mentioned below (infra 135 and 136): "Whenever appropriate and desirable, [measures will be adopted to deal with children who are accused of or recognized as having infringed the penal law], without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected." (Article 40(3)b of the Convention on the Rights of the Child).

a) Competent, Independent and Impartial Court previously established by Law

120. Guaranteeing rights involves the existence of suitable legal means to define and protect them, with intervention by a competent, independent, and impartial judicial body, which must strictly adhere to the law, where the scope of the regulated authority of discretionary powers will be set in accordance with criteria of opportunity, legitimacy, and rationality. In this regard, Beijing Rule No. 6 regulates the authority of judges to determine the rights of children:

6.1 In view of the varying special needs of juveniles as well as the variety of measures available, appropriate scope for discretion shall be allowed at all stages of proceedings and at the different levels of juvenile justice administration, including investigation, prosecution, adjudication and the follow-up of dispositions.

6.2 Efforts shall be made, however, to ensure sufficient accountability at all stages and levels in the exercise of any such discretion.

6.3 Those who exercise discretion shall be specially qualified or trained to exercise it judiciously and in accordance with their functions and mandates. .

b) Right to appeal and effective remedy

121. The aforementioned procedural guarantee is complemented by the possibility of actions of the lower court being reviewed by a higher one. This right has been reflected in Article 8(2)(h) of the American

Convention and in Article 40(b) subparagraph v) of the Convention on the Rights of the Child, which states:

v) If [the child is] considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law[...].

122. Article 25 of the American Convention provides that each person must have access to prompt and simple recourse. Amparo and habeas corpus are set within this framework, and they cannot be suspended, even in emergency situations. .

123. The Beijing Rules also established the following parameters:

7.1 Basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings.

c) Presumption of innocence

124. Article 8(2)(g) of the American Convention applies to this matter, when it states that

[...]

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

[...]

g. the right not to be compelled to be a witness against himself or to plead guilty; and

[...]

125. The aforementioned provision must be read in combination with Article 40(2)(b) of the Convention on the Rights of the Child, which states that

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

[...]

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

i) To be presumed innocent until proven guilty according to law;

126. Likewise, Rule 17 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty

states that

Juveniles who are detained under arrest or awaiting trial ("untried") are presumed innocent and shall be treated as such. Detention before trial shall be avoided to the extent possible and limited to exceptional circumstances. Therefore, all efforts shall be made to apply alternative measures. When preventive detention is nevertheless used, juvenile courts and investigative bodies shall give the highest priority to the most expeditious processing of such cases to ensure the shortest possible duration of detention. Untried detainees should be separated from convicted juveniles.

127. This Court has establish that said principle "demands that a person cannot be convicted unless there is clear evidence of his criminal liability. If the evidence presented is incomplete or insufficient, he must be acquitted, not convicted."

128. Within the proceedings there are acts that are –or have been considered- especially far-reaching for the definition of certain juridical consequences that affect the sphere of rights and responsibilities of the parties. This category includes admission of guilt, understood as the recognition by the accused of the facts attributed to him or her, which does not necessarily mean that this recognition encompasses all issues that might be associated with those facts or their effects. It has also been understood that confession might involve an act of disposing of the goods or rights regarding which there is a controversy.

129. In this regard, and with respect to minors, it is relevant to point out that any statement by a minor, if it were indispensable, must be subject to the procedural protection measures that apply to minors, including the possibility of remaining silent, the assistance of legal counsel, and the statement being made before the authority legally empowered to receive it.

130. Furthermore, it is necessary to take into account that due to his or her age or other circumstances, the child may not be able to critically judge or to reproduce the facts on which he or she is rendering testimony and the consequences of his or her statement, and in this case the judge can and must be especially careful when assessing the statement. Evidently, the latter cannot be granted efficacy for purposes of the decision when it is made by persons who, precisely because they not have the civil capacity to act, and cannot make their will of their patrimony nor exercise their rights on their own (supra 41).

131. All the above would apply to a procedure in which the minor is involved and is to render testimony. As regards specifically penal proceedings –the request for this Advisory Opinion referred to "criminal matters"- it should be taken into account that minors are excluded from participating as accused parties in this type of trials. Therefore, there should be no possibility of their rendering testimony that might correspond to the evidentiary category of an admission of guilt.

d) Presence of both parties

132. All proceedings require certain elements for there to be the greatest possible balance among the parties for due defense of their interests and rights. This involves, among other things, application of the principle of the presence of both parties in the actions. This principle is addressed in the provisions of various instruments that require intervention of the child, whether personally or through representatives in the procedural acts, providing evidence and examining it, stating arguments, among others.

providing evidence and examining it, stating arguments, among others.

133. In this regard, the European Court has stated that:

The right to contradict in a proceeding for the purposes of Article 6(1), as has been interpreted by case law, "in principle means the opportunity of the parties in a civil or criminal trial to hear and analyze alleged evidence or observations included in the file [...], with the aim of influeneing the deeision of the Court."

e) Principle of the public nature of the proceedings

134. When the proceedings address issues pertaining to minors, whieh affect their lives, it is appropriate to set certain limits to the broad principle of the public nature of the proceedings that applies to other cases. not regarding access by the parties to evidence and decisions, but rather regarding public observation of the proeedural acts. These limits take into account the best interests of the child, insofar as they protect him or her from opinions, judgments or stigmatization that may have a substantial bearing on his or her future life. In this regard, referring to Article 40(2)(b) of the Convention on the Rights of the Child, the European Court has pointed out that "the privacy of children aceused of erimes must be fully respected in all stages of the proceedings." Likewise, the Council of Europe ordered the States Parties to review and change legislation with the aim of ensuring respect for the privacy of the child. In a similar manner, Beijing Rule 8.1 establishes that the privacy of minors must be respected at all stages of the proceedings.

Alternative justiee

135. International standards seek to exclude or reduce "judicialization" of social problems that affect children, which can and must be resolved, in many cases, through various types of measures, pursuant to Article 19 of the American Convention, but without altering or diminishing the rights of individual persons. In this regard, alternative means to solve controversies are fully admissible, insofar as they allow equitable decisions to be reached without detriment to individuals' rights. Therefore, it is necessary to regulate use of alternative means in an especially careful manner in those cases where the interests of minors are at stake.

136. In this regard, Article 40 of the Convention on the Rights of the Child reads:

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, aecused of, or recognized as having infringed the penal law, and, in particular:

[...]

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judieial proceedings, providing that human rights and legal safeguards are fully respected.

X
OPINION

137. For the foregoing reasons,

THE COURT,

by six votes to one

DECIDES

That it is competent to render the instant Advisory Opinion and that the request by the Inter-American Commission on Human Rights is admissible.

DECLARES

That for the purposes of this Advisory Opinion, a "child" or "minor" is any person who has not yet turned 18, unless he or she has attained majority, by legal mandate, before that age, under the terms set forth in paragraph 42.

AND IS OF THE OPINION

1. That pursuant to contemporary provisions set forth in International Human Rights Law, including Article 19 of the American Convention on Human Rights, children are subjects entitled to rights, not only objects of protection.

2. That the phrase "best interests of the child", set forth in Article 3 of the Convention on the Rights of the Child, entails that children's development and full enjoyment of their rights must be considered the guiding principles to establish and apply provisions pertaining to all aspects of children's lives.

3. That the principle of equality reflected in Article 24 of the American Convention on Human Rights does not impede adopting specific regulations and measures regarding children, who require different treatment due to their special conditions. This treatment should be geared toward protection of children's rights and interests.

4. That the family is the primary context for children's development and exercise of their rights. Therefore, the State must support and strengthen the family through the various measures it requires to best fulfill its natural function in this field.

5. That children's remaining within their household should be maintained and fostered, unless there are decisive reasons to separate them from their families, based on their best interests. Separation should be exceptional and, preferably, temporary.

6. That to care for children, the State must resort to institutions with adequate staff, appropriate facilities, suitable means, and proven experience in such tasks.

7. That respect for life, regarding children, encompasses not only prohibitions, including that of arbitrarily depriving a person of this right, as set forth in Article 4 of the American Convention on Human Rights, but also the obligation to adopt the measures required for children's existence to develop under decent conditions.

8. That true and full protection of children entails their broad enjoyment of all their rights, including their economic, social, and cultural rights, embodied in various international instruments. The States Parties to international human rights treaties have the obligation to take positive steps to ensure protection of all rights of children.

9. That the States Party to the American Convention have the duty, pursuant to Articles 19 and 17, in combination with Article 1(1) of that Convention, to take positive steps to ensure protection of children against mistreatment, whether in their relations with public officials, or in relations among individuals or with non-State entities.

10. That in judicial or administrative procedures where decisions are adopted on the rights of children, the principles and rules of due legal process must be respected. This includes rules regarding competent, independent, and impartial courts previously established by law, courts of review, presumption of innocence, the presence of both parties to an action, the right to a hearing and to defense, taking into account the particularities derived from the specific situation of children and those that are reasonably projected, among other matters, on personal intervention in said proceedings and protective measures indispensable during such proceedings.

11. That children under 18 to whom criminal conduct is imputed must be subject to different courts than those for adults. Characteristics of State intervention in the case of minors who are offenders must be reflected in the composition and functioning of these courts, as well as in the nature of the measures they can adopt.

12. That behavior giving rise to State intervention in the cases to which the previous paragraph refers must be described in criminal law. Other cases, such as abandonment, destitution, risk or disease, must be dealt with in a different manner from procedures applicable to those who commit criminal offenses. Nevertheless, principles and provisions pertaining to due legal process must also be respected in such cases, both regarding minors and with respect to those who have rights in connection with them, derived from family statute, also taking into account the specific conditions of the children.

13. That it is possible to resort to alternative paths to solve controversies regarding children, but it is necessary to regulate application of such alternative measures in an especially careful manner to ensure that they do not alter or diminish their rights.

Judge Jackman dissents, and informs the Court of his Dissenting Opinion. Judges Cançado Trindade and Garcia Ramírez inform the Court of their Concurring opinions, which are attached to the instant Advisory Opinion.

Done in Spanish and English, the Spanish text being authentic, at the seat of the Court in San José, Costa Rica, on August 28, 2002.

Antônio A. Cançado Trindade
President

Alirio Abreu-Burelli Máximo Pacheco-Gómez

Hernán Salgado-Pesantes Oliver Jackman

Sergio Gareía-Ramírez Carlos Vicente de Roux-Rengifo

Manuel E. Ventura-Robles
Secretary

So ordered,

Antônio A. Cançado Trindade
President

Manuel E. Ventura-Robles
Secretary

DISSENTING OPINION OF JUDGE JACKMAN

I have, regretfully, found myself unable to join the majority of the Court in its decision to respond favourably to the "Request for an Advisory Opinion" dated March 30th 2001, by the Inter-American Commission on Human Rights ("the Commission") because, in my view, the Request does not fulfill the criteria for admissibility set out in Artiele 64 of the Convention, as eonsistently interpreted by this Court from the moment of its very first advisory opinion.

In its communication requesting the issuing of an advisory opinion, the Commission states the "objective" of the request in the following terms.

"The Commission deems it necessary to interpret whether Articles 8 and 25 of the American Convention on Human Rights include limits to the good judgment and discretion of the States to issue special measures of protection in accordance with Article 19 thereof and requires (sic) the Court to express general and valid guidelines in conformance to the framework of the Convention."

The Commission then indicates the five "special measures of protection" on which it desires the Court to pronounce (cf. para 4 of this Opinion):

a. without guarantees for t separation of young persons (minors) from their parents and/or family, on the basis of a ruling by a decision-making organ, made without due process, that their families are not in a position to afford their education or maintenance;
b. deprivation of liberty of minors by internment in guardianship or custodial institutions on the basis of a determination that they have been abandoned or are prone to fall into situations of risk or illegality, motives ("causales") which should not be considered of a criminal nature, but, rather, as the result of personal or circumstantial vicissitudes;
c. the acceptance of confessions by minors in criminal matters without due guarantees:
d. judicial or administrative proceedings to determine fundamental rights of the minor without legal representation of the minor; and

e. determination of rights and liberties in judicial and administrative proceedings he right of the minor to be personally heard; and failure to take into account the opinion and preferenees of the minor in such determination.*

With the greatest respect to the Inter-American Commission on Human Rights, the so-called "objective" of the requested advisory opinion is, in my view, vague almost to the point of meaninglessness, a vagueness that is fatally compounded by the "requirement" that the Court should express "general and valid guidelines".

Repeatedly in its examination of the scope of the "broad ambit" (el amplio alcance) of its consultative function, (cf para. 34 of the present Opinion) the Court has insisted that the fundamental purpose of that function is to render a service to member-states and organs of the Inter-American system in order to assist them "in fulfilling and applying treaties that deal with human rights, without submitting them to the formalities and the system of sanctions of the contentious process".

It should not be forgotten that in the exercise of its vocation to "throw light on the meaning, object and purpose of the international norms on human rights [and], above all, to provide advice and assistance to the Member States and organs of the OAS in order to enable them to fully and effectively comply with their international obligations in that regard" "the Court is a judicial institution of the inter-American system" (OC-1/82: para 19) (my emphasis). As such, the Court should resist invitations to indulge in "purely academic speculation, without a foreseeable application to concrete situations justifying the need for an advisory opinion" (cf. OC-9/87, para 16).

I would suggest that a request to provide "general and valid guidelines" to cover a series of hypotheses that reveal neither public urgency nor juridical complexity is, precisely, an invitation to engage in "purely academic speculation" of a kind which assuredly "would weaken the system established by the Convention and would distort the advisory jurisdiction of the Court." (cf. OC-1/82, para 25).

For these reasons I have declined to participate in the deliberations on this Opinion, and herewith record my vote against it in its entirety.

Oliver Jackman
Judge

Manuel E. Ventura-Robles
Secretary

CONCURRING OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. I vote in favour of the adoption, by the Inter-American Court of Human Rights, of the present Advisory Opinion n. 17 on the Juridical Condition and Human Rights of the Child, which constitutes, in my view, a new contribution of its recent case-law to the evolution of the International Law of Human Rights. The consultation formulated by the Inter-American Commission of Human Rights fits perfectly, in my view, into the wide jurisdictional basis of the advisory function of the Inter-American Court (Article 64 of the American Convention on Human Rights), already clearly explained and established by this latter in its Advisory Opinion n. 15 on the Reports of the Inter-American Commission of Human Rights (of 14.11.1997). The Court, thus,

n. 15 on the Reports of the Inter-American Commission of Human Rights (of 14.11.1997) . The Court, thus, has the competenee to interpret the relevant provisions (object of the present consultation) of the American Convention on Human Rights and of other treaties which bind the States of the region, besides the responsability and the duty - as determined by the American Convention - to exert its advisory function, the operation of which is a matter of international ordre public.

I. Prolegomena: Brief Conceptual Precisions.

2. The preamble of the United Nations Convention on the Rights of the Child of 1989 warns that "in all countries in the world there are children living in exceptionallly difficult conditions", standing therefore in need of "special consideration". Children abandoned in the streets, children overtaken by delinquency, child labour, enforced prostitution of children, traffic of children for sale of organs, children engaged in armed conflicts, children who are refugees, displaced and stateless persons, are aspects of the day-to-day contemporary tragedy of a world apparently without future.

3. I do not see how to avoid this sombre prognostic that, a world which does not take care of its children, which destroys the enchantment of their infancy within them, which puts a premature end to their childhood, and which subjects them to all sorts of deprivations and humiliations, effectively has no future. A tribunal of human rights cannot avoid taking account of this tragedy, with all the more reason when expressly requested to pronounce on aspects of the human rights of the child and of his juridical condition, in the exereise of its advisory function, endowed with a wide jurisdictional basis.

4. We all live in time. The passing of time affects our juridical condition. The passing of time should strengthen the bonds of solidarity which link the living to their dead, bringing them closer together . The passing of time should strengthen the ties of solidarity which unite all human beings, young and old, who experience a greater or lesser degree of vulnerability in different moments along their existence. Nevertheless, not always prevails this perception of the implacable effects of the passing of time, which consumes us all.

5. In a general way, it is at the beginning and the end of the existential time that one experiences greater vulnerability, in face of the proximity of the unknown (birth and early infaney, old age and death). Every social milieu ought, thus, to be attentive to the human condition. The social milieu which does not take care of its children has no future. The social milieu which does not take eare of its elderly people has no past. And to count only on the eseaping present is no more than a mere illusion.

6. In its resolutory point n. 1, the present Advisory Opinion n. 17 of the Inter-American Court provides that, "in conformity with the contemporary norms of the International Law of Human Rights, in which is found Article 19 of the American Convention on Human Rights, the children are subjects of rights and not only object of protection" . In fact, the subjects of law are the children , and not infancy or childhood. The subjects of law are the elderly persons, and not old age. The subjeets of law are the persons with disabilities , and not disability itself. The subjects of law are the stateless persons, and not statelessness. And so forth. The limitations of legal capacity nothing subtract from legal personality. The titulaire of rights is the human being, of flesh and bone and soul, and not the existential condition in which he finds himself temporarily.

7. From the standpoint of the conceptual universe of the International Law of Human Rights, - in the framework of which are found, in my view, the human rights of the child, - the titulaires of rights are the

framework of which are found, in my view, the human rights of the child, - the titulaires of rights are the children, and not the infancy or childhood. An individual can have specific rights in virtue of the condition of vulnerability in which he finds himself (e.g., the children, the elderly persons, the persons with disabilities, the stateless persons, among others), but he remains always the titulaire of rights, as human person, and not the collectivity or the social group to whieh he belongs by his existencial condition (e.g., the infancy or ehildhood, the old age, the disability, the statelessness, among others).

8. It is certain that the juridical personality and capacity keep a close relationship, but at the conceptual level they are distinguished from each other. It may oecur that an individual may have juridical personality without enjoying, as a result of his existential condition, full capacity to aet. Thus, in the present context, one understands by personality the aptitude to be titulaire of rights and duties, and by capacity the aptitude to exercise them by himself (eapacity of exercise). Capacity is, thus, elosely linked to personality; nevertheless, if by any situation or circumstance an individual does not enjoy full juridical capacity, this does not mean that thereby he is no longer subject of right. It is the case of the ehildren.

9. Given the transcendental importance of thc matter dealt with in the present Advisory Opinion n. 17 of the Inter-American Court of Human Rights on the Juridical Condition and Human Rights of the Child, I feel obliged to leave on the records my thoughts on the matter, centred in six central aspects, which I consider of the greatest relevant in our days, and which conform a theme which has consumed me years of study and meditation, namely: first, the crystallization of the international juridical personality of the human being; seeond, the juridical personality of the human being as a response to a need of the international community; third, the advent of the child as a true subject of rights at international level; fourth, the subjective right, human rights and the new dimension of the international juridical personality of the human being; fifth, the implications and projections of the juridical personality of the child at international level; and sixth, the human rights of the child and the obligations of their protection erga omnes. Let us pass on to a succinet exam of each one of these aspects.

II. The Crystallization of the International Juridical Personality of the Human Being.

10. The crystallization of the international juridical personality of the human being eonstitutes, in my understanding , the most precious legacy of the legal science of the XXth century, which requires greater attention on the part of contemporary juridical doctrine. In this respect, International Law experiences today, at the beginning of the XXIst century, in a way a return to the origins, in the sense in whieh it was originally eoneeived as a true jus gentium, the droit des gens. Already in the XVIth and XVIIth centuries, the writings of the so-called founding fathers of International Law (especially those of F. Vitoria, F. Suárez and H. Grotius, besides those of A. Gentili and S. Pufendorf) sustained the ideal of the civitas maxima gentium, constituted by human beings organized socially in States and eoextensive with humanity itself.

11. Regrettably, the thoughts and vision of the so-called founding fathers of International Law (set forth notably in the writings of the Spanish theologians and in the Grotian writings), which conceived it as a truly universal system , came to be surpassed by the emergency of legal positivism, which personified the State, endowing it with a "will of its own", reducing the rights of the human beings to those that the State "conceded" to them. The consent of the will of the

States (according to the voluntarist positivism) became the predominant criterion in International Law, denying jus standi to the individuals, to the human beings .

12. This rendered difficult the understanding of the international community, and undermined International Law itself, reducing it to a strictly inter-State law, no more above but rather among sovereign States . In fact, when the international legal order moved away from the universal vision of the so-called "founding fathers" of the law of nations (droit des gens / derecho de gentes) (cf. supra), successive atrocities were committed against the human kind. The disastrous consequences of this distortion are widely known.

13. Already by the end of the twenties, there emerged the first doctrinal reactions against this reactionary position . And by the mid-XXth century the more lucid jusinternacionalist doctrine moved away definitively from the Hegelian and neo-Hegelian formulation of the State as the final depositary of the freedom and responsibility of the individuals who composed it, and that in it [in the State] integrated themselves entirely . Against the doctrinal current of traditional positivism , which came to sustain that only the States were subjects of International Law , there emerged an opposing trend , sustaining, a contrario sensu, that, ultimately, only the individuals, addressees of all juridical norms, were subjects of International Law. It must never be forgotten that, ultimately, the State exists for the human beings who compose it, and not vice-versa.

14. Meanwhile, there persisted the old polemics, sterile and pointless, between monists and dualists, erected upon false premises, which, not surprisingly, failed to contribute to the doctrinal endeavours in favour of the emancipation of the human being vis-à-vis his own State. In fact, what both the dualists and the monists did, in this particular, was to "personify" the State as subject of International Law . The monists discarded all anthropomorfism, affirming the international subjectivity of the State by an analysis of the juridical person ; and the dualists did not contain themselves in their excesses of characterization of the States as sole subjects of International Law .

15. With the recognition of the legal personality of the human being at international level, International Law came to appear as a corpus juris of emancipation. There is no "neutrality" in Law; every Law is finalist, and the ultimate addressees of legal norms, both national and international, are the human beings. In the mid-XXth century, the juridical experience itself contradicted categorically the unfounded theory that the individuals were simple objects of the international juridical order, and destructed other prejudices of State positivism . The legal doctrine of the time it made clear the recognition of the expansion of the protection of the individuals in the international legal order , as true subjects of law (of the law of nations) .

16. In the ponderation of René Cassin, writing in 1950, for example, "all human creatures" are subjects of law, as members of the "universal society", it being "inconceivable" that the State comes to deny them this condition . Human rights were conceived as inherent to every human being, independently from any circumstances in which he finds himself. By then, already, the individual came to be seen as subject jure suo of international law, such as the more lucid doctrine sustained, since that of the so-called founding fathers of the law of nations (droit des gens) .

17. Also in the American continent, even before the adoption of the American and Universal Declarations of Human Rights of 1948, doctrinal manifestations flourished in favour of the international juridical personality of the individuals, such as those which are found, for example, in the writings of Alejandro Álvarez and Hildebrando Accioly. In fact, successive studies of the international instruments of international protection

Hildebrando Accioly . In fact, successive studies of the international instruments of international protection came to emphasize precisely the historical importance of the recognition of the international juridical personality of the individuals .

18. The whole new corpus juris of the International Law of Human Rights has been constructed on the basis of the imperatives of proteetion and the superior interests of the human being, irrespectively of his link of nationality or of his political statute, or any other situation or circumstance. Hence the importance assumed, in this new law of protection, by the legal personality of the individual, as subject of both domestic and international law . Nowadays one recognizes the responsibility of the State for all its acts - both jure gestionis and jure imperii - and all its omissions, what brings to the fore the legal personality of the individuals and their direct access to international jurisdiction to vindicate their rights (including against their own State) .
19. The State, created by the human beings themselves, and composed by them, exists for them, for the realization of their common good. For this recognition the considerable evolution in the last five decades of the International Law of Human Rights has contributed decisively, at international level, to which one may likewise add that of the International Humanitarian Law; also this latter considers the persons protected not as simple object of the established regulation, but rather as true subject of International Law . Ultimately, all Law exists for the human being, and the law of nations is no exception to that, guaranteeing to the individual his rights and the respect for his personality .

20. The "eternal return" or "rebirth" of jusnaturalism has been reckoned by the jusinternationalists themselves , much contributing to the assertion and the consolidation of the primacy, in the order of values , of the State obligations as to human rights, and of the recognition of their necessary compliance vis-à-vis the international community as a whole . This latter, witnessing the moralization of Law itself, assumes the vindication of common superior interests . One has gradually turned to conceive a truly universal legal system.

III. The Juridical Personality of the Human Being as a Response to a Need of the International Community.

21. Thus, International Law itself, in recognizing rights inherent to every human being, has disauthorized the archaic positivist dogma which, in an authoritarian way, intended to reduce such rights to those "conceded" by the State. The recognition of the individual as subject of both domestic law and international law, represents a true juridical revolution, - to which we have the duty to contribute in the search for the prevalence of superior values, - which comes at last to give an ethical content to the norms of both public domestic law and international law. This transformation, proper of our time, corresponds, in its turn, to the recognition of the necessity that all States are made answerable for the way they treat all human beings who are under their jurisdiction, so as to avoid new violations of human rights.

22. This rendering of accounts would simply not have been possible without the crystallization of the right of individual petition, amidst the recognition of the objective character of the positive obligations of protection and the acceptance of the collective guarantee of the compliance with them. This is the real meaning of the historical rescue of the individual as subject of the International Law of Human Rights. It is for this reason that, in my Concurring Opinion in the case of Castillo Petruzzi and Others versus Peru (Preliminary Objections, Judgment of 04.09.1998), urged by the circumstances of the cas d'espèce, I saw it fit to examine the evolution and crystallization of the right of international individual petition, which I qualified as a fundamental clause (cláusula pétrea) of the human rights treaties which provide for it . And I added:

-"The right of individual petition shelters, in fact, the last hope of those who did not find justice at national level. I would not refrain myself nor hesitate to add, - allowing myself the metaphor, - that the right of individual petition is undoubtedly the most luminous star in the universe of human rights".

23. In fact, the recognition of the juridical personality of the individuals fulfils a true necessity of the international community, which today seeks to guide itself by common superior values. As it can be inferred, e.g., from the historical case of the "Street Children" (case Villagrán Morales and Others versus Guatemala) before this Court (1999-2001), the international juridical subjectivity of the individuals is nowadays an irreversible reality, and the violation of their fundamental rights, emanated directly from the international legal order, brings about juridical consequences.

24. In its Judgment as to the merits (of 19.11.1999) in the aforementioned case of the "Street Children", the Court significantly warned that

"In the light of Article 19 of the American Convention, the Court wishes to record the particular gravity of the fact that a State Party to this Convention can be charged with having applied or tolerated in its territory a systematic practice of violence against at-risk children. When States thus violate the rights of at-risk children, such as `street children', this makes them victims of a double aggression. First, such States do not prevent them from living in misery, thus depriving them of the minimum conditions for a dignified life and preventing them from the `full and harmonious development of their personality', even though every child has the right to harbour a project of life that should be tended and encouraged by the public authorities so that it may be developed for his personal benefit and that of the society to which he belongs. Second, they violate their physical, mental and moral integrity, and even their lives".

25. The human being emerges, at last, even in the most adverse conditions, as ultimate subject of Law, domestic as well as international. The case of the "Street Children", decided by the Inter-American Court, in which those marginalized and forgotten by the world succeeded to resort to an international tribunal to vindicate their rights as human beings, is truly paradigmatic, and gives a clear and unequivocal testimony that the International Law of Human Rights has achieved its maturity.

26. The doctrinal trend which still insists in denying to the individuals the condition of subjects of International Law is based on a rigid definition of these latter, requiring from them not only to possess rights and obligations emanated from International Law, but also to participate in the process of creation of its norms and of the compliance with them. It so occurs that this rigid definition does not sustain itself, not even at the level of domestic law, in which it is not required - it has never been - from all individuals to participate in the creation and application of the legal norms in order to be subjects (*titulaires*) of rights, and to be bound by the duties, emanated from such norms.

27. Besides unsustainable, that conception appears contaminated by an ominous ideological dogmatism, which had as the main consequence to alienate the individual from the international legal order. It is surprising - if not astonishing, - besides regrettable, to see that conception repeated mechanically and ad nauseam by a part of doctrine, apparently trying to make believe that the intermediary of the State, between the individuals and the international legal order, would be something inevitable and permanent. Nothing could be more

fallacious. In the brief historical period in which that Statist conception prevailed, in the light - or, more precisely, in the darkness - of legal positivism, successive atrocities were committed against the human being, in a scale without precedents.

28. It results quite clear today that there is nothing intrinsic to International Law that impedes or renders it impossible to non-State actors to enjoy international legal personality. No one in sane conscience would today dare to deny that the individuals effectively possess rights and obligations which emananate directly from International Law, with which they find themselves, therefore, in direct contact. And it is perfectly possible to conceptualize - even with greater precision - as subject of International Law any person or entity, titulaire of rights and obligations, which emanate directly from norms of International Law. It is the case of the individuals, who thus have strengthened this direct contact - without intermediaries - with the international legal order .

29. The truth is that the international subjectivity of the human being (whether a child, an elderly person, a person with disability, a stateless person, or any other) erupted with all vigour in the legal science of the XXth century, as a reaction of the universal juridical conscience against the successive atrocities committed against the human kind. An eloquent testimony of the erosion of the purely inter-State dimension of the international legal order is found in the historical and pioneering Advisory Opinion n. 16 of the Inter-American Court, on the Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law (of 01.10.1999) , which has served as orientation to other international tribunals and has inspired the evolution in statu nascendi of the international case-law on the matter.

30. In that Advisory Opinion, the Inter-American Court lucidly pointed out that the rights set forth in Article 36.1 of the Vienna Convention on Consular Relations of 1963

"have the characteristic that their titulaire is the individual. In effect, this provision is unequivocal in stating that the rights to consular information and notification are 'accorded' to the interested person. In this respect, Article 36 is a notable exception to the essentially Statist nature of the rights and obligations set forth elsewhere in the Vienna Convention on Consular Relations; as interpreted by this Court in the present Advisory Opinion, it represents a notable advance in respect of the traditional conceptions of International Law on the matter" .

31. In this way, the Inter-American Court reconized, in the light of the impact of the corpus juris of the International Law of Human Rights in the international legal order itself, the crystallization of a true individual subjective right to information on consular assistance, of which is titulaire every human being deprived of his freedom in another country; furthermore, it broke away from the traditional purely inter-State outlook of the matter, giving support to numerous migrant workers and individuals victimized by poverty, deprived of freedom abroad. The present Advisory Opinion n. 17 of the Inter-American Court, on the Juridical Condition and Human Rights of the Child, fits into the same line of assertion of the juridical emancipation of the human being, in stressing the consolidation of the juridical personality of the children, as true subject of law and not simple object of protection.

32. The juridical category of the international legal personality has not shown itself insensible to the necessities of the international community, among which appears with prominence that of providing protection to the human beings who compose it, in particular those who find themselves in a situation of special vulnerability, as

human beings who compose it, in particular those who find themselves in a situation of special vulnerability, as do the children. In fact, doetrine and international case-law on the matter sustain that the subjects of law themselves in a legal system are endowed with attributes that fulfil the needs of the international community .

33. Hence, - as Paul de Visscher points out perspicaciously, - mientras que "the concept of juridical person is unitary as coneept", given the fundamental unity of the human person who "finds in herself the ultimate justification of her own rights", the juridical eapacity, on it turn, reveals a variety and multiplicity of scopes . But such varieties of the extent of the juridical capacity, - including its limitations in relation to, e.g., the children, the elderly persons, the persons with mental disability, the stateless persons, among others, - in nothing affect the juridical personality of all human beings, juridical expression of the dignity inherent to them.

34. Thus, in sum, every human person is endowed with juridical personality, which imposes limits to State power. The juridical capaeity varies in virtue of the juridical condition of each one to undertake certain acts. Yet, although such capacity of exercise varies, all individuals are endowed with juridical personality. Human rights reinforce the universal attribute of the human person, given that to all human beings correspond likewise the juridical personality and the proteetion of the Law, independently of her existential or juridical condition.

IV. The Advent of the Child as a True Subject of Rights at International Level

35. On the basis of all this notable development is found the principle of the respeet for the dignity of the human person, independently of her existential condition. In virtue of this principle, every human being, irrespectively of the situation and the circumstances in which he finds himself, has the right to dignity . This fundamental principle is invoked in the preambles of the United Nations Convention on the Rights of the Child of 1989 as well as of the Declaration of the Rights of the Child of 1959. It appears likewise in the preamble of the Additional Protocol to the Ameriean Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador, of 1988), among other treaties and international instruments of human rights.

36. It is also found, - and it could not be otherwise, - in the present Advisory Opinion of the Inter-American Court, when this latter places, in the scale of the fundamental values, "the safeguard of the children, both by their condition of human beings and the dignity inherent to them, as by the special situation in which they find themselves. As a result of their immaturity and vulnerability, they require a protection that guarantees the exereise of their rights within the society and with regard to the State" (par. 93).

37. It is certain, as the Court points out in the present Advisory Opinion on the Juridical Condition and Human Rights of the Child, that only along the XXth eentury the eorpus juris of the rights of the child was articulated, in the framework of the International Law of Human Rights (pars. 26-27), conceived the child as a true subject of law. This occurred with the impact notably of the aforementioned Declaration (1959) and Convention (1989) on the Rights of the Child, as well as the Minimum Rules of the United Nations for the Administration of the Justice of Minors (Beijing, 1985), and on the Measures Not in Deprivation of Freedom (Tokyo, 1990), and the United Nations Guidelines for the Prevention of Juvenile Delinqueney (Ryad, 1990), - besides the general treaties of human rights.

38. That is, the rights of the child at last detached themselves from the patria potestas (from Roman law) and from the conception of the indissoluble character of marriage (from canon law). In the law of family itself, -

from the conception of the indissoluble character of marriage (from canon law). In the law of family itself, - enriched by the recognition, in the XXth century, of the rights of the child, at international level, - the foundation of parental authority becomes the "superior interest of the child", whose statute or juridical condition acquires at last an autonomy of its own .

39. It is surprising that, in face of this notable development of the contemporary legal science, there still existes a doctrinal trend which insists in the view that the Convention on the Rights of the Child limits itself to ereate State obligations. This posture seems to me unconvincing and juridically unfounded, as such obligations exist precisely in virtue of the human rights of the child set forth in that Convention of the United Nations and other international instruments of protection of human rights.

40. Moreover, that trend of thought fails to appreciate precisely the great achievement of contemporary legal science in the present domain of proteetion, namely, the recognition of the child as subject of law. This is, in my view, the Leitmotiv which permeates the present Advisory Opinion on the Juridical Condition and Human Rights of the Child as a whole. In fact, the Inter-Amerlean Court of Human Rights does not hesitate to affirm that all human beings, irrespectively of their existential eondition, arc subjects of inalienable rights, which are inherent to them (par. 41), and to stress the imperative to fulfil the needs of the child "as a true subject of law and not only as object of protection" (par. 28).

41. The ehild comes does to be treated as a true subjeet of right, being in this way recognized his own personality, distinct even from those of his parents . Thus, the Inter-American Court sustains, in the present Advisory Opinion, the preservation of the substantive and procedural rights of the child in all and any circumstances (par. 113). The Kantian conception of the human person as an end in herself comprises naturally the children, all the human beings independently of the limitations of their juridical capaeity (of exereise).

42. All this extraordinary development of the jusinternationalist doctrine in this respect, along the XXth century, finds its roots, - as it so happens, - in some refleetions of the past, in the juridical as well as philosophical thinking . This is inevitable, as it reflects the process of maturing and refinement of the human spirit itself, which renders possible the advances in the human condition itself.

43. Thus, as to the juridieal domain, I limit myself to rescue a passage of a magisterial course delivered by Paul Guggenheim at the Hague Academy of International Law in 1958. On the occasion, that jurist pertinently recalled that, already in the XVIIth century, Hugo Grotius, who so much had contributed to the autonomy of the jus gentium (detaching it from scholastic thinking), sustained that the rules pertaining to the capacity of trhe children in civil matters belonged to the droit des gens itself .

44. As to philosophical thinking, in his Treatise on Education (better known as the Émile, 1762), Jean-Jacques Rousseau appears as a preeursor of the modern conceptualization of the rights of the child, in warning, with great sensitiveness, that one ought to respect infancy, to let "nature work", that wishes the children to be children (with their own way of seeing, thinking and feeling) before being adults . Human intelligence, - Rousseau kept on warning, - has its limits, cannot learn everything, and the existential time is brief. At the beginning "we do not know to live, soon we will be able to"; reason and judgment "come slowly", while "prejudices overwhelm" . One, thus, ought not to lose sight of the passing of time, ought to have it always in mind, and one ought to know to respect the ages of the human existence.

always in mind, and one ought to know to respect the ages of the human existence.

VI. The Subjective Right, Human Rights and the New Dimension of the International Juridical Personality of the Human Being.

45. There is no way to dissociate the reeognition of the international juridical personality of the individual from the dignity itself of the human person. In a wider dimension, the human person appears as the being who brings within himself his supreme end, and who achieves it throughout his life, under his own responsibility. In fact, it is the human person, essentially endowed with dignity, who articulates, expresses and introduces the "ought to be" ("deber ser") of the values in the world of the reality in which he lives, and only is he capable of this, as bearer of such ethical values. The juridical personality, in its turn, manifests itself as a juridical category in the world of Law, as a unitary expression of the aptitude of the human person to be titulaire of rights and duties at the level of the regulated behaviour and human relations .

46. It may be recalled, in the present context, that the eonception of individual subjective right already has a wide historical projection, originated in particular in the jusnaturalist thinking in the XVIIth and XVIIIth centuries, and systematized in the juridical doctrine along the XIXth century. Nevertheless, in the XIXth century and the beginning of the XXth eentury, that conception remained in the framework of domestic public law, emanated from public power, and under the influence of legal positivism . The subjective right was conceived as the prerrogative of the individual such as defined by the legal order at issue (the objective law) .

47. Notwithstanding, there is no way to deny that the crystallization of the concept of individual subjective right, and its systematization, achieved at least an advance towards a better understanding of the individual as a titulaire of rights. And they rendered possible, with the emergence of human rights at international level, the gradual overcoming of positive law. In the mid-XXth eentury, the impossibility became elear of the evolution of Law itself without the individual subjective right, expression of a de true "human right" .

48. As I saw it fit to sustain in my Concurring Opinion in the historical Advisory Opinion n. 16 of this Court on the Right to Information on Consular Assistance in the Farnework of the Guarantees of the Due Process of Law (of 01.10.1999), we nowadays witness

"the process of humanization of international law, which today encompasses also this aspect of consular relations. In the confluence of these latter with human rights, the subjective individual right to information on consular assistance, of which are titulaires all human beings who are in the need to exercise it, has crystallized: such individual right, inserted into the conceptual universe of human rights, is nowadays supported by conventional international law as well as by customary international law" (par. 35).

49. The emergence of universal human rights, as from the proclamation of the Universal Declaration of 1948, came to expand considerably the horizon of contemporary legal doctrine, disclosig the insufficiencies of the traditional conceptualization of the subjective right. The pressing needs of protection of the human being have much fostered this development. Universal human rights, superior to, and preceding, the State and any form of politico-social organization, and inherent to the human being, affirmed themselves as oposable to the public power itself.

50. The international juridical personality of the human being crystallized itself as a limit to the discretion of State power. Human rights freed the conception of the subjective right from the chains of legal positivism. If, on the one hand, the legal category of the international juridical personality of the human being contributed to instrumentalize the vindication of the rights of the human person, emanated from International Law, - on the other hand the corpus juris of the universal human rights conferred upon the juridical personality of the individual a much wider dimension, no longer conditioned by the law emanated from the public power of the State.

VII. Implications and Projections of the Juridical Personality of the Child at International Level.

51. The convergence of points of view, expressed in the course of the present advisory procedure, both in written form and in the oral pleadings before the Inter-American Court during the public hearing of 21 June 2002, in support of the position of the children as true subjects of law and not and not as simple objeet of protection, cannot pass unnoticed. In this same sense manifested themselves, e.g., the two intervening States, Mexico and Costa Rica, as well as the Inter-American Commission on Human Rights, besides specialized organisms such as the Inter-American Institute of the Child, the Latin-American United Nations Institute for the Prevention of Delict and the Treatment of the Delinquent (ILANUD), besides non-governmental organizations, such as the Centre for Justice and International Law (CEJIL) and the Foundation Rafael Preciado Hernández (of Mexico). This convergence of points of view as to the juridical condition of the children as titulaires of rights established in the International Law of Human Rights highly significant, as such recognition, besides reflecting a true change of paradigm, represents, ultimately, the opinio juris comunis in our days on the matter.

52. But it is not sufficient to affirm that the child is subject of right, it is important that he knows about it, including for the development of his responsibility. Hence the transcendental relevanee of education in general , and of human rights education in particular, duly recognized in the present Advisory Opinion (pars. 84-85 and 88). It is not difficult to reckon the precocious manifestations of some great vocations, at times very early in life. Every child has effectively the right to create and develop his own project of life . In my view, the acquisition of knowledge is a form - perhaps the most effective one - of human emancipation, and indispensable for the safeguard of the rights inherent to every human being .

53. The corpus juris of the human rights of the child has conformed itself as a response of the human eonscience to its needs of protection. The faet that the children do not enjoy full legal capacity to act , and that they therefore have to exercise their rights by means of other persons, does not deprive them of their juridical eondition of subjets or right. No one would dare to deny the imperative of the ohservance, as from the dawn of life, of the rights of the ehild, e.g., the freedoms of eonscienee, thought and expression. Special relevance has been attributed to the respect for the points of view of the child, set forth in Article 12 of the United Nations Convention on the Rights of the Child, which, in its turn, has fostered a holistic and integral vision of human rights .

54. Besides the wide scope of this duty, as formulated in Article 12 of the Convention of 1989, - eomprising the right of the child to be heard (directly or by means of a legal representative) in judicial or administrative proceedings in which he participates, and to have his points of view taken into aeeount, - in practice the Committee on the Rights of the Child (of the United Nations) has attributed capital importance to it, reflected

in its general guidelines for the elaboration of the initial and periodic (State) reports . In circumstances of commission of a delict, the approach of that corpus juris of the rights of the child in relation to the minor who commits the infraction ends up by being that of a guarantee, oriented towards the development of the responsibility of this latter ; in no circumstance, - as it can be inferred from the present Advisory Opinion, - is the child deprived of his legal personality, with all the juridical consequences ensuing therefrom.

55. In the light of the previous considerations, it is undeniable that the international juridical subjectivity of the human being has been affirmed and expanded in the last decades (cf. supra), and that the child (as titulaire of rights) is no exception to that. In the face of the limitations of the juridical capacity of the child (to exercise his rights for himself), a legal representative is recognized to him. But independently of such limitations, the juridical personality of the child, - as of every human being, - projects itself at international level. As it is not possible to conceive rights - emanated directly from International Law - without the prerrogative of vindicating them, the whole evolution of the matter ha oriented itself towards the crystallization of the right of the individual - including the child - to resort directly to the international jurisdictions .

56. The experience of the application of the European Convention on Human Rights provides examples of concrete cases in which children have effectively made use of the right of international individual petition under the Convention. Thus, for example, the petitioners in the case X and Y versus The Netherlands (1985) before the European Court of Human Rights were a girl child (of 16 years of age) and her father (cf. infra). More recently, in the cases Tanrikulu versus Turkey (1999) , Akdeniz and Others versus Turkey (2001) , and Oneryildiz versus Turkey (2002) , adults and children appeared as petitioners jointly, in denunciations of violations of the right to life . In the case A versus United Kingdom (1998) , a 9-year old child acted as petitioner (cf. infra).

57. In this way, a child, event though not endowed with juridical capacity in the national legal system at issue, can, nevertheless, make use of the right of individual petition to the international instances of protection of his rights. But once interposed the petition, he must, of course, count on a legal representative , if he is legally incapable. There is no reason why such representation be conditioned by provisions of any domestic law. As I saw it fit to point out in my aforementioned Concurring Opinion in the case Castillo Petruzzi and Others versus Peru (Preliminary Objections, 1998) before the Inter-American Court, the conditions for the exercise of the right of internacional individual petition do not necessarily coincide with the criteria of domestic law pertaining to locus standi, and there is a whole jurisprudence constante in clear support of the autonomy of the right of individual petition at international level vis-à-vis concepts and provisions of domestic law (pars. 21-22).

VIII. The Human Rights of the Child and the Obligations of Their Protection Erga Omnes.

58. The preceding considerations lead me to my last line of thoughts, pertaining to the resolutory point n. 9 of the present Advisory Opinion of the Inter-American Court on the Juridical Condition and Human Rights of the Child, which provides that

"The States Parties to the American Convention have the duty, in accordance with Articles 19 and 17, in relation to Article 1.1 of it, to take all positive measures which secure the protection to the children against ill-treatment, either with regard to public authorities, or in inter-individual relations or with non-State entities".

59. In this respect, in its Judgment in the aforementioned case of the "Street Children" (Villagrán Morales and Others versus Guatemala, of 19.11.1999), in which "a context of much violence against the children and youth who lived in the streets" was established (pars. 167 and 79), the Inter-American Court pointed out

"the particular gravity of the instant case since the victims were youths, three of them children, and because the conduct of the State not only violated the express provision of Article 4 of the American Convention, but also numerous international instruments, widely accepted by the international community, which devolve to the State the duty to adopt special measures of protection and assistance for the children under its jurisdiction".

60. The advances, in the present context, at the juridical level (cf. supra), cannot make us forget the current deterioration of basic social policies everywhere, aggravating the economic-social problems which so much affect children, and which transform the necessity to secure the right to create and develop their project of life an undeniable question of justice. The recurring, and aggravated, problems, which nowadays affect the children (added to the tragedy of refugee, displaced and stateless children, and of the children involved in armed conflicts), warn that we remain far from their "integral protection". Nevertheless, one ought to persevere in the endeavours in favour of the prevalence of the general principle of the "superior interest of the child", - enshrined into Article 3 of the United Nations Convention on the Rights of the Child, and evoked in the present Advisory Opinion (pars. 56-61), - from which emanates their dignity as human beings.

61. In the aforementioned case X and Y versus The Netherlands (1985) before the European Court of Human Rights, concerning sexual abuse to the detriment of a 16-year old girl child with mental disability, - with traumatic consequences for the direct victim, aggravating her mental disturbances, - the European Court pointed out that the concept of "private life" (under Article 8 of the European Convention) encompassed the physical and moral integrity of the person (including her sexual life). In the case, - added the Court, - "fundamental values and essential aspects of private life" were at issue, and required the adoption of positive measures on the part of the State so as to secure the respect for private life also in the sphere of inter-individual relations. The Court concluded that the respondent State had violated Article 8 of the Convention, as the pertinent provisions of the Dutch Penal Code did not secure to the victim a "practical and effective protection".

62. That is, the Court concluded that the Netherlands had violated Article 8 of the Convention for not providing the legal protection against abuses (to the detriment of a girl child) in the private or inter-individual relations. We are here before the State duty to take positive measures of protection of the of the children, among the other individuals, not only vis-à-vis the public authorities, but also in relation with other individuals and non-State actors. This is a clear example of obligations of protection of the children (and all those in need of protection) truly erga omnes.

63. In two other reeent cases, A versus United Kingdom (1998) and Z and Others versus United Kingdom (2001), the European Court affirmed the obligation of the respondent State to take positive measures to protect the children against ill-treatment, including that inflicted by other other individuals (pars. 22 and 73, respectively). It is precisely in this private ambit that abuses are often committed against children, in face of the omission of public power, - what thus requires a protection of the human rights of the child erga omnes, that is, including in the inter-individual relations (Drittwirkung).

64. This is a context in which, definitively, the obligations of protection erga omnes assume special relevance. The foundation for the exercise of such protection is found in the American Convention on Human Rights itself. The general obligation which is set forth in its Article 1.1 to respect and to ensure respect for the protected rights - including the rights of the child, as stipulated in Article 19 - requires from the State the adoption of positive measures of protection (including for preserving the preponderant role of the family, foreseen in Article 17 of the Convention, in the protection of the child - par. 88), applicable erga omnes. In this way, Article 19 of the Convention comes to be endowed with a wider dimension, protecting the children also in the inter-individual relations.

65. The present Advisory Opinion of the Inter-American Court on the Juridical Condition and Human Rights of the Child gives a notable contribution to the jurisprudential construction of the erga omnes obligations of protection of the rights of the human person in every and any circumstances. The Advisory Opinion affirms categorically the general duty of the States Parties to the American Convention, as guarantors of the common good, to organize public power so as to guarantee to all persons under their respective jurisdictions the free and full exercise of the conventionally protected rights, - an obligation which is suseeptible to being required not only in relation to the State power but also in relation to "actions of private third parties" (par. 87).

66. At a moment in which the sources of violations of the rights of the human person are regrettably diversified, the understanding of the Court could not be otherwise. This is the interpretation which imposes itself, in eonformity with the letter and the spirit of the American Convention, and capable of contributing to the fulfilment of its object and purpose. Just as the Court sustained in its recent Resolution of Provisional Measures of Protection (of 18.06.2002) to the benefit of the members of the Community of Peace of San José of Apartadó (Colombia), and of the persons who render services to this latter, in the present Advisory Opinion n. 17 the Court again stresses, correctly, that the protection of the rights of the human person applies erga omnes.

67. This is an imperative of international ordre public, whieh implies the recognition that human rights constitute the basic foundation, themselves, of the legal order. And the values, which are always underlying it. - besides being perfectly identifiable , - see to it to give them concrete expression. It is not to pass unnoticed, for example, that already the preamble of the Universal Declaration of Human Rights of 1948 invoked the "consciencie of mankind". And, one dccade later, the preamble of the Declaration on the Rights of the Child of 1959 warned with all propriety that "mankind owes to the child the best it has to give".

68. In sum, in the domain of the International Law of Human Rights, moved by considerations of international ordre public, we are before common and superior values, truly fundamental and irreducible, seized by human conscience. This latter is always present, it has accompanied and fostered the whole evolution of the jus gentium, of which - I firmly believe - is the material source par excellence.

69. In concluding this Concurring Opinion, I allow myself to return to my starting-point. We all live in time. Each one lives in his time, which ought to be respected by the others. It is important that each one lives in his time, in harmony with the time of the others. The child lives in the minute, the adolescent lives in the day, and the adult, already "impregnated of history" , lives in the epoch; those who already departed, live in the memory of those who remain and in eternity. Each one lives in his time, but all human beings are equal in rights.

70. From the perspective of an international tribunal of human rights like the Inter-American Court, one ought to affirm the human rights of the children (and not the so-called "rights of the childhood or infancy"), as from their juridical condition of true subjects of law, endowed with international legal personality; one has, moreover, to develop all the potentialities of their legal capacity. I have always sustained that the International Law of Human Rights will achieve its plenitude the day when is definitively consolidated the recognition not only of the personality, but also of the international legal capacity of the human person, as subject of inalienable rights, in all and any circumstances. In the jus gentium of our days, the importance of the consolidation of the international legal personality and capacity of the individual, irrespectively of his existential time, is much greater than what one may prima facie assume.

71. In fact, as the Law ineluctably recognizes juridical personality to every human being (whether he is a child, an elderly person, a person with disability, a stateless person, or any other), irrespectively of his existential condition or of his juridical capacity to exercise his rights for himself (capacity of exercise), - we may, thus, visualize a true right to the Law (derecho al Derecho), that is, the right to a legal order (at domestic as well as international levels) which effectively protects the rights inherent to the human person . The recognition and consolidation of the position of the human being as full subject of the International Law of Human Rights constitutes, in our days, an unequivocal and eloquent manifestation of the advances of the current process of humanization of International Law itself (jus gentium), to which we have the duty to contribute, as the Inter-American Court of Human Rights has done in the present Advisory Opinion n. 17 on the Juridical Condition and Human Rights of the Child.

Antônio Augusto Cançado Trindade
Judge

Manuel E. Ventura-Robles
Secretary

CONCURRING OPINION OF JUDGE SERGIO GARCÍA RAMÍREZ
ON ADVISORY OPINION OC-17, REGARDING THE "LEGAL STATUS AND HUMAN RIGHTS OF CHILDREN," OF AUGUST 28, 2002.

1. The request for an Advisory Opinion received and considered by the Court --OC-17/2002, on the "Legal status and human rights of children"—to which this Concurring Opinion is attached, reflects among other matters a concern with identifying and adequately defining the limits of the power of the State to act with respect to children under certain extremely important assumptions. These must be carefully delimited: a) conduct, by action or omission, that has been legally defined as criminal, in other words, that is a criminal offense; and b) a situation which involves no legally defined crime and where there is a need for such an action for the real or alleged benefit of the minor. This viewpoint, which I do not necessarily share but which nevertheless expresses those assumptions, would lead us to refer to "juvenile offenders" or to "criminal children or youths", in the former case, and to "minors in irregular situations" or "at risk", in the latter. Needless to say, these terms today have a strong "unfavorable connotation", or at least one that is controversial. The great debate begins –or ends- with the very use of those expressions.

2. It is worth pointing out that the borderline between those two hypotheses must be subordinated to the nature of the facts or the respective situations of each one, from the standpoint of the rights recognized and protected by the juridical order –in mi opinion, from the level of the national Constitution itself- and the gravity of the detriment caused to them or the danger they face. In a democratic soeiety, the legislative authority must carefully observe the limits of each hypothesis, in accordance with its nature, and consequently establish the appropriate regulation. It is not aeceptable for a conduct to be placed within one of the aforementioned categories solely by the free discretion of the legislative body, without taking into account Constitutional decisions and principles that govern legislators' tasks when they "select" the conduets that must be eonsidered criminal, as well as the respective juridical consequences.

3. In this Vote, as in Advisory Opinion OC-17 itself, the terms "child" and "minor" are used in their most rigorous sense (para. 39), and at the same time in that which is farthest from any disqualifying, biased or pejorative intention. Language is a system of codes. I must define the scope of those I now use, adhering to the way the Court has used them in this Advisory Opinion, to place them above or beyond –according to each one's preference- a debate that casts more shadows than light. The word "minor", widely used at a national level, refers to a person who has not yet reached the age at which full –or broad- exercise of his or her rights has been established there, together with the respective duties and responsibilities. As a rule, this borderline coincides with the ability to enjoy civil rights, or many of them (a possibility that arises in the past: sinee birth, or even before that), and the ability to exereise them (a possibility that unfolds toward the future, where the borderline is crossed toward an autonomous exercise of rights by the person entitled to them). The meaning of the word "child", in turn, has in principle been more biological or biopsychological than juridical, and this meaning, that is in line with popular usage of the term, contrasts with adolescent, youth, adult, or elderly persons.

4. The eoncept of a "ehild" coincides with that of a "minor" when the former and the latter are juridicized, so to speak, and they concur under the same consequences of Law. The United Nations Convention on the Rights of the Child, often invoked in the instant Advisory Opinion, considers children to be persons under 18, "unless under the law applicable to the ehild, majority is attained earlier" (Article 1) (para. 42). This grants a precise legal meaning to the term child, and as such it places this concept –and this subject- as a reference point to assign multiple juridical consequences. Needless to say, the word child herc encompasses adolescents, because it thus arises from this widely ratified Convention, and it also includes girls, according to the rules of our language. The Inter-American Court itself declares the scope of the terms "child" and "minor" for purposes of the Advisory Opinion. Allow me, then, to avoid eonstant use of the exuberant expression: boy-child, girl-child, and adolescent (which could be expanded if we also establish a distinction between male and female adolescents).

5. Neither the statement by the Court in this regard nor the Whereas paragraphs nor the speeific opinions in the last part of OC-17 differentiate in any way that would allow a distinetion to be established on the basis of or in connection with good judgment or the so called presumption regarding capability (or incapability) of actual malice. Sueh distinctions would, in turn, create new sub-sets within the larger group of children. It is, then, understood that the age of 18 is a precisc borderline between two ages that involve two distinctive situations in the ambit of this Opinion: one, regarding those who find themselves outside the subjective validity of normal criminal rules, and the other pertaining to those who are subject to them.

6. When the Advisory Opinion refers to a speeific treatment of children or minors, and distinguishes it from that given to adults or persons who have attained majority, in my opinion this entails the assumption that the system applieable to adults cannot be transferred or applied to minors (para. 109). This, of course, does not hinder: a) the existence of principles and rules applieable, by their very nature, to both groups (human rights, guarantees), whatever modalities are reasonable or, even, necessary in each case, and b) the existence, in the ambit of minors, of differences derived from the diverse development among individuals under 18: there is, in effect, a major difference between those who are 8 or 10 years old and those who are 16 or 17. There are also differences –which I do not intend to examine now- in the other group, that of adults, for various reasons; the most obvious example is that of those who have lost their faculty of reasoning.

7. Clearly, the points I mentioned in paragraph 1, supra, would also be of interest if we were dealing with an adult or a "person who has attained majority", and in fact they have determined some of the more protracted, intense, and significant developments associated with democracy, the Rule of Law, liberties, human rights, and guarantees. These themes –with their respeetive values- come to the forefront when the public authorities face "criminal" individuals, on the one hand, or "marginal or destitute" individuals on the other. In this confrontation, as longstanding as it is dramatic, the most relevant individual rights –to life, liberty, humane treatment, patrimony- are at stake, and the most impressive, though not necessarily justified or persuasive, arguments are put forward to legitimize the actions of the State, as well as their characteristics and objectives, whether aeknowledged or unspeakable.

8. Nevertheless, the point becomes more complex when in addition to its sensitivity due to the subject matter –irregularity, extravagance, marginality, dangerousness, crime-, members of an especially vulnerable human group are involved, often lacking the personal abilities to adequately face eertain problems, due to lack of experience, immaturity, weakness, lack of information or of training; or when they do not meet the requirements of the law to freely manage their own interests and exercise their rights in an autonomous manner (para. 10). Such is the situation of children or minors, who on the one hand generally and in a relative manner –as different faetors generate diverse situations- lack those personal requirements, and on the other hand exercise of their rights is restricted or halted, ope legis. It is natural that in this "mine-strewn terrain" abuse may appear and thrive, often shrouded by paternal discourse or one of redemption, which can hide the severest authoritarianism.

9. In the criminal system of the remote past, adults and minors were subject to similar if not identical rules, eased in the case of the latter by benevolence issuing from a humane attitude or based on the lack of or diminished judgment (subject to demonstration, because malitia supplet aetatem). The various ages of the individual could also establish different degrees of subjection to criminal justiee and its distinctive consequences. Extreme minority –up to seven or nine years of age, for example- could lead to complete exelusion from access to criminal justice, though not to all State justice. For older but still not juvenile ehildren, the consequences of criminal eonduct or intervention of criminal justice were moderated in accordance with the level of good judgment that the individual could exercise to appreciate and govern his or her own conduct. Finally, attaining another, juvenile age –between 16 and 21- made the individual fully responsible for his or her conduct, and therefore subject to criminal prosecution and convietion. In actual "penal life", things did not always happen as was sought by legislation or good sense: there are abundant stories –both forensic or criminological and literary- about the indistinct incarceration of children, adolescents, youths and adults in the

same detention centers.

10. In a period somewhat longer than the last century, the idea of setting a clear-cut boundary between minors and adults took root; the former would be subject to semi-paternal action or jurisdiction by the State, while the latter –legally qualified according to criminal Law- would be subject to regular criminal justice. It was then said that criminal chargeability would begin at the threshold age, and that under that age there would be absolute immunity from prosecution, established by law. This certainty was reflected in a centenarian expression: "L'enfant est sorti du Droit pénal".

11. I will not expand at this time on the relevance or irrelevance of referring in this regard, as is often done, to "immunity from prosecution,", or of using other concepts that can better explain the distinction between adults and minors for purposes of criminal Law. If it is considered, as accredited doctrine and many criminal laws do, that chargeability is the capacity to understand the lawfulness of one's own conduct and to behave in accordance with that understanding, it follows that chargeability is not a group theme, but rather an individual one; in effect, one is or is not chargeable depending on that capacity, which one does or does not personally have. Assignment of chargeability or immunity from prosecution ope legis to a broad human group, by virtue of the age they all have, and not each one's capacity, is a useful fiction which answers to the needs and expectations of a certain policy apropos of youth's protection and development, but not of the specific reality –the only one that exists- of each one's case.

12. In any case, the delimitation, which was supposed to be uniform, has never been so: different boundaries prevailed in various countries, and there also were or are different boundaries within a single country under a federal system. The situation is quite diverse even among countries that have common juridical values, as in the case of Europe: the age for criminal responsibility is seven years in Cyprus, Ireland, Switzerland, and Liechtenstein; eight in Scotland; thirteen in France; fourteen in Germany, Austria, Italy, and several East European States; fifteen in the Scandinavian countries; sixteen in Portugal, Poland, and Andorra, and eighteen in Spain, Belgium, and Luxembourg.

13. Distribution of the population between these two major sectors, for purposes of responsibility for unlawful conduct, involved the establishment or development of different jurisdictions --lato sensu--, differentiated juridical orders as well as procedures and institutions for each one. In the case of adults, this development coincided with the apogee of the principle of criminal and procedural legality, which gave rise to a more or less demanding system of guarantees. In the case of minors, instead, removal from criminal justice led to the establishment of "paternalistic or protective" jurisdictions based on the idea that the State relieves parents or guardians of custody or guardianship, and undertakes their functions with their usual scope and characteristics. In the Anglo-Saxon tradition, the roots of this idea are found in the parens patria system, which connects with the principle of the king as father of the realm.

14. Evolution and adaptation of this way of addressing the issue of juvenile offenders is related to the idea of the "social State," broadly empowered to undertake economic, social, educational, or cultural tasks. That same tendency to intervene and take over functions, which previously were the sole responsibility of other instances –with arguments worthy of consideration and in relation to pressing realities-, to a certain extent encouraged the State to move into the ambit of parenthood and guardianship. If parents or guardians can decide on the development of their children with considerable liberty, even adopting measures of authority that

would not be applicable to adults outside judicial proceedings, the "parent or guardian State" might do the same, setting aside, to this end, the formalities and guarantees of regular Law: from legality in definition of conducts that give rise to intervention and the nature and duration of the respective measures, to the procedures to reach decisions and implement them.

15. National legislation and case law, supported by a doctrine that seemed innovative at the time, strengthened the paternalistic position of public authorities in various countries. In the United States, these ideas took root after an 1838 Pennsylvania Supreme Court order: Ex parte crouse. In Mexico, almost a hundred years later, a well-known judgment by the Supreme Court of Justice, rendered in the amparo case brought by Ezequiel Castañeda against acts of the Minors' Court and the respective law, stated the traditional criterion: in that case, the State did not act "as an authority, but rather performing a social mission and substituting the private citizens entrusted by the law and by the juridical tradition of Western civilization to carry out an educational and corrective action with respect to minors." This defined the path that would be followed regarding this matter, in a more or less peaceful manner, for many years. Taking into account the parental and protective role undertaken, which juridically explained and justified the actions of the State, as well as the purpose given to its intervention in these affairs, which roughly coincided with the intention to correct or recover that prevailed in the case of adults, this way of acting and the line of thought that backed it, were given a name which has survived until our times: "protective."

16. The protective approach, understood as stated in the paragraphs above, was at the time an interesting step forward from the previously prevailing system. It sought to, and effectively did, remove minors from the spaces where justice was applied to adult offenders. Since it was understood that children do not commit crimes and therefore cannot be classified nor treated as criminals, but rather as "sui generis" offenders, it sought to exclude them from the world of regular criminals. It also noted the enormous weight that the judicial apparatus can apply on minors, and assumed that it was preferable to establish procedures and organize bodies that did not have the "profile and clamor" of regular justice, the results of which had not, precisely, been satisfactory in the case of minors.

17. Handing children over to this method to solve their "behavior problems," understood as "problems with the law," brought with it various difficult questions that led to its being questioned increasingly and gave rise to proposals to substitute it with a different system. First of all, the extraordinary flexibility of the protective concept regarding conduct that could determine State intervention brought into the same framework for attention, action and decision-making, acts that were legally defined as crimes and others that were not. This included certain domestic conflicts which should be solved by the parents and were transferred, due to their incompetence or for their convenience, to correctional bodies of the State. This confusion brought to the same courts and institutions those who had committed legally-defined grave crimes and those who had incurred in more or less slight "errors of conduct", that should have been addressed from a different perspective. This gave rise to questioning of the protective approach: "the protective pretext can hide very grave injuries of all sorts (to the right to legal representation, to freedom of movement, to custody, to the family). Juvenile law, understood as "protective law," has been rightly questioned several years ago and no one can forget that, historically, the worst aberrations have been committed with protective pretexts: against heretics, against infidels, etc."

18. Likewise, when the State took over the authority of parents and guardians, it not only took control of and

captured minors, but it also violently deprived adults of certain rights under family statute. Furthermore, the intention to exclude the legal definition and form of the regular trial, together with the idea that the State is not in conflict with the child, but rather the best guarantor of his or her well-being –proceedings that were not contentious and therefore had no procedural parties-, led to minimizing participation of the minor and of those legally responsible for him or her in the proeedural acts, setting aside certain acts that in regular Law are part of "due legal process," and suppression of the system of guarantees that contributes to eontrol of aetions by the State to moderate its strength and its discretion for the sake of legality, which must ultimately benefit justice.

19. These and other problems gave rise, as I mentioned before, to a strong reaction that demanded a return – or evolution, if one prefers to state it thus- toward different legal methods, that involve a significant sum of guarantees: first of all, substantive and proeedural legality that ean be verified and eontrolled. Erosion of the former system began from various angles. A very significant one was jurisprudence: just as it had strongly exalted the parens patria doctrine, it would demolish the solutions linked to that doctrine and establish a new guarantee-based system. In the United States, a famous Supreme Court order of May 15, 1967, In re Gault, effected a turn in the direetion that would subsequently prevail, reinstating eertain essential rights of minors: to be informed of the charges, to have legal counsel, to examine witnesses, to not incriminate themselves, to have access to the file, and to appeal. The reaction gave rise to a different system, one that is usually referred to by the expressive name of a "guarantee-based" system. This name denotes the reinstatement of guarantees – essentially, the minors' rights, as well as those of their parents- in the system applied to juvenile offenders.

20. Actually, increasing eriminal waves –and among them crime by children or youths in "youthful societies," such as the Latin American ones-, which lead to equally growing and understandable demands by public opinion, have triggered legal and institutional changes that seem to define one of the most important and significant current positions of society and the State. These disturbing ehanges include a reduction in the age of access to criminal justice, with the resulting growth of the universe of those potentially subject to criminal justice: with eaeh reduetion of that age, millions of persons enter that universe, having been children or adults the day before and having become adults by legislative agreement. Transformation of procedures with respect to minors has obviously brought with it the application of legal definitions that are typical of criminal proceedings, together with the penal customs or culture that are inherent to them.

21. Currently there is in many eountries, as was clearly seen in the course of the proeeedings (briefs and statements at the June 21, 2002 public hearing) (para. 15) leading to the Advisory Opinion to which this Opinion is attached, a strong debate between schools of thought, trends or concepts: on the one hand, the proteetive system, associated with the doctrine of the "irregular situation" –which "means nothing else, it has been stated, than legitimizing indiscriminate judicial action regarding those children and adolescents who are in difficult situations"- and on the other hand, the guarantee-based system, linked to what has been ealled the doctrine of "comprehensive protection" –which "refers to a series of international juridical instruments that express a fundamental qualitative leap in social consideration of childhood;" there is thus a movement from the "minor as an object of eompassion-repression, to children and adolescents as full subjeets of rights." There has been an acute polarization between these two schools of thought, and their encounter –or confrontation- poses a fundamental dilemma of sorts, which can sometimes generate "fundamentalisms" with their charaeteristic styles. This dilemma is posed in very simple terms: either the protective system or the guarantee-

based system.

22. If one takes into account that the protective approach has as its emblem that of treating the minor in accordance with his or her specific conditions and providing the protection that he or she requires (hence the term "protection"), and that the guarantee-based approach is substantially concerned with recognition of minors' rights and legal responsibilities, identification of minors as subjects, rather than objects of the proceedings, and control of acts of the authorities by means of the relevant system of guarantees, it is possible to note that there is no essential or radical opposition between one and the other intent. Neither do the basic goals of the protective project contradict those of the guarantee-based project, nor do those of the latter contradict those of the former, if both of them are considered in their essential aspects, as I do in this Opinion and as has been done, in my view, in the Advisory Opinion, which does not adhere to any specific doctrine.

23. How can we, in effect, deny that a child is in a different situation from that of an adult, and that diverse situations may rationally require diverse approaches? Or that the child requires, because of these characteristic conditions, special, different and more intense and meticulous protection than an adult, if there is any for the latter? And how can we deny, on the other hand, that the child –above all, a human being- is entitled to irreducible rights, some of which are generic while others are specific? And that he or she is not and cannot be seen as an object of the proceedings, subject to the discretion or whim of the authorities, but rather as a subject of the proceedings, since he or she has true and respectable rights, both substantive and procedural? And that in his or her case, as in any other, procedures must abide by clear and legitimate rules and be subject to control through a system of guarantees?

24. If that is true, then probably the time has come to leave behind the false dilemma and recognize the true dilemmas that are present in this field. Those of us who at one time addressed these issues –rightly or mistakenly, and now seeking to overcome mistakes or, better, to move forward by revising concepts that are no longer justified-, have had to correct our earliest assertions and reach new conclusions. Real contradictions –and therefore dilemmas, antinomies, true conflicts- must be expressed in other terms. The protective and guarantee-based approaches are not opposed to each other. The real opposition is between protective and punitive approaches, at one level of consideration, and between the approach based on guarantees and arbitrarity, at the other level. Ultimately, where there seems to be contradiction a synthesis, a meeting-ground or consensus may arise dialectically. This would take up the substantive aspects of each doctrine; their intimate raison d'être, and would restore the original meaning of the word "protection" –as one speaks of protection of the Law or protection of human rights-, which has led some writers of treatises to identify it with juvenile offenders' Law, which under the sign of protection, in its original and pure meaning, would constitute a protective Law, not a Law that takes away fundamental rights.

25. On the one hand, this synthesis would retain the intention of protecting the child, as a person with specific needs for protection, who should be looked after with measures of this type, rather than with the characteristic solutions of the criminal system for adults. This initial articulation of the synthesis has been reflected, extensively, in the American Convention itself, in the San Salvador Protocol, and in the Convention on the Rights of the Child, which insists on the specific conditions of minors and the respective protection measures, as well as in other instruments cited by the Advisory Opinion: Beijing Rules, Riyadh Guidelines, and Tokyo Rules (paras. 106-111). And on the other hand, the synthesis would include the basic demands of the guarantee-based approach: the rights and guarantees of minors. This second articulation is reflected, no less

extensively, in those same international instruments, which express the current situation in this regard. In brief, the child will be treated in a specific manner, according to his or her own conditions, and will not be deprived –since he or she is a subjeet of rights, not just an objeet of protection- of the rights and guarantees inherent to human beings and to their speeific conditions. Rather than suggesting that minors be included in the system for adults, or that their guarantees be diminished, on the one hand specificity is reinforced, and on the other hand lawfulness.

26. For this reason, in my view, the Advisory Opinion of the Inter-American Court avoids "subscribing" to one or another of the lines of thought involved, and prefers to analyze the issues raised before it –conveniently grouped, as the decision itself states, under broad eoncepts that can be applied to the specific hypotheses- and to state the respeetive opinions. In this manner, the Court, taking into aceount the inherent objectives of an opinion with these charaeteristics, fosters the development of domestic Law in accordance with the principles reflected in and applied by international law.

27. In the procedural system for minors, both when the procedure involves offenders who have broken the criminal law and when the procedure has been triggered by situations that are different in nature, it is necessary to respeet the principles of fair trial in a demoeratic soeiety, governed by legality and legitimaey of the aets of the authorities. This involves equality between the parties, the right to be heard and to legal eounsel, the possibility of submitting evidence and arguments, the presence of both parties, eontrol over lawfulness, the right to appeal, etc. However, it is not possible to disregard the fact that minors have a speeial situation in the proceedings, as they do in life and in all social relations. Neither inferior nor superior: different, thus also requiring different attention. It must be underlined, as I did above –and the Advisory Opinion is emphatic in this regard- that all international instruments pertaining to the rights of the ehild or minor reeognize without a doubt the "difference" between them and adults and the relevanee, therefore, of adopting "speeial" measures with respect to ehildren. The very idea of "speeiality" reeognizes and reaffirms the existing difference –a de faeto inequality, which the Law does not disregard- and the diverse juridical solutions that it is appropriate to eontribute given this panorama of diversity.

28. It is well known that in the social process –not publie, not private- equality among the parties is sought by ways other than the simple, solemn and ineffective proclamation that all men are equal before the law. It is necessary to introduce compensation factors to attain, insofar as possible, that leveling. This has been explicitly stated by the Inter-American Court itself in its ease law, cited in this Advisory Opinion. (paras. 47 and 97). Proceedings involving minors in a major, rather than an incidental, manner to solve eontroversies and define their obligations and rights, coincide to a large extent with proceedings that are social in nature, origin, or orientation, and are distinet from those typically public, private, or criminal. The former require the "material" defense provided by the law and by judicial proceedings: specialized assistance, measures to correct material and procedural inequality, correction of deficiencies of the complaint, official aid to gather evidence offered by the parties, establishment of historieal truth, etc.

29. An extreme form of the proceedings regarding juvenile offenders excluded parents and guardians from them. Said exclusion in this ambit –dominated by what a distinguished procedural specialist called a proceeding of a "protective-inquisitorial nature" - reflected the idea that there was no true controversy in trials of minors, because the interests of the minor and those of society coincided. Both sought the welfare of the child. In current terms one would say: the best interests of the minor. If such was the theory, things did not

function that way in concrete regulations and in practice, and in any case the rights of the parents regarding their children were at stake, as well as their own rights, those of the family and other rights. It is therefore necessary to accept that the minor cannot be foreign to his or her own trial, a witness and not a protagonist of his or her case, and that the parents –or guardians- also have their own rights to assert and for this reason they must participate in the trial, each with an advisor, promoter or defense counsel undertaking their defense fully and effectively.

30. This procedural claim should, on the other hand, note certain facts. In one case, the child is not qualified – let us consider, espeeially, the youngest children- to conduct a personal aetion such as that an experienced or at least a mature adult could conduct (para. 101). This characteristic of the child should be refleeted in his or her participation in the trial and in the significance of the acts he or she carries out –the statements, among other acts, whose requirements in terms of admissibility and efficacy are usually set forth in procedural law itself-; can be ignored neither by the law nor by the courts, using as a pretext equality among all participants in the proceedings, as this would ultimately cause the greatest harm to the legal interests of the child. And in another case it is possible –especially given the characteristics of the conflicts decided here- that there is a eontradiction of interests and even of positions between the parents and the minor. This is not always the appropriate terrain for legal representation, which in principle corresponds to those who exercise custody or guardianship, to be exercised to its fullest natural extent.

31. The above reflections regarding these and other similar hypotheses should not be construed as impediments for the State to act effectively and diligently –and invariably with due respect for lawfulness- in urgent situations that require immediate attention. Grave danger faced by a person –and, obviously, not only a minor- requires that the risk be addressed in a prompt and expedite manner. It would be absurd for a fire only to be turned out when there is a court order authorizing intervention in the private property on fire, or to protect an abandoned child, at risk of injury or death, only after a judicial process culminating with a written order by the competent authority.

32. The State has duties of immediate protection –set forth in legislation, in addition to reason and justice- which it cannot disregard. In these hypotheses, the nature and function of the State as a "natural and necessary guarantor" of the goods of its eitizens comes forth with all its strength, when all other entities called upon to ensure their safety –the family, for example- are not able to ensure it or may, even, be a clear risk factor. This emergency action, which allows for no delay, is based on the same considerations that authorize adoption of preventive or preeautionary measures inspired by a reasonable appearance of urgent need, which suggests the existence of rights and duties, and by periculum in mora. Of course, the precautionary measure does not prejudge the merits, nor does it defer or suppress the respective trial or proceeding.

33. I believe it necessary to highlight –and I am pleased that OC-17/2002 has done so- a major issue for reflection on this matter, which is part of the background to understand where solutions to many of the problems –not all, obviously- that affect us in this regard are to be found. If one looks at the reality of minors taken before administrative or judicial authorities and then subject to protection measures in view of criminal offenses or other situations, one will note, in the vast majority of cases, that they lack integrated households, means of subsistence, true access to education and to healthcare, adequate recreation; in brief, they neither have nor ever had reasonable expectations and conditions for a decent life (para. 86). Generally it is they – and not those better off- who end up at police headquarters, with various charges, or who suffer violation of

some of their most essential rights: life itself, as has been seen in the judicial experience of the Inter-American Court.

34. In these cases, which apply to an enormous number of children, not only are civil rights violated, including those pertaining to offenses or conduct that give rise to intervention by the abovementioned authorities, but also economic, social, and cultural rights. The "progressiveness" of the latter has not yet enabled coverage of millions and millions of human beings who, in their childhood, are far from having the necessities of life satisfied as those declarations and provisions –pending fulfillment- formally promise. The Court has referred to this in the Villagrán Morales Case, cited in the instant Advisory Opinion (para. 80), when it puts forth concepts that will provide new paths for jurisprudence and it establishes that the right of children to life involves not only respect for prohibitions regarding deprivation of life, set forth in Article 4 of the American Convention, but also providing suitable living conditions to promote the development of minors.

35. In this regard, the unified idea of human rights becomes relevant: all of them significant, enforceable, mutually complementary and conditioned. It is good for proceedings to be organized in such a way that the children have all the means required by due legal process for assistance and defense, and it is also good for children not to be removed from the family milieu –if they have one- without justification, but none of this amounts to a release from the obligation to construct circumstances that allow minors to adequately develop their existence, throughout the horizon of each human life, and not only in situations –that should be exceptional- in which certain minors face "problems with the law." They are all, simultaneously, the protective shield of the human being: they are mutually enforced, conditioned, and perfected, and it is therefore necessary to pay equal attention to all of them. We could not say that human dignity is safe where there is, perhaps, care for civil and political rights –or only some of them, among the most visible ones- and attention is not paid to other rights.

36. In my view, OC-17 rightly addresses this matter from a dual perspective. On the one hand it underlines the obligation of the States, which –as regards the Americas- was set forth in the Bogotá Charter pursuant to the Buenos Aires Protocol, to adopt measures that will enable people's various necessities of life to be satisfied; and on the other hand it recognizes that true rights are involved, the enforceability of which, as such, begins to gain ground. In effect, it would not suffice to attribute duties to the States if the rights of individuals are not in turn recognized: the characteristic bilateralism of the juridical system thus takes shape. In this regard, there has been a conceptual evolution similar to that prevailing in the domestic system: if Constitutions have a normative nature, as is now proclaimed –they are, in this sense, genuine "supreme law," "law of laws"-, this is also the nature of treaties, and as such they ascribe true obligations and authentic rights. The latter include, as regards the theme I address here, the economic, social, and cultural rights of children.

Sergio García-Ramírez
Judge

Manuel E. Ventura-Robles
Secretary

PENAL CODE

With the participation of John Rason SPENCER QC
Professor of Law, University of Cambridge
Fellow of Selwyn College

ARTICLE 111-1
Criminal offences are categorised as according to their seriousness as felonies, misdemeanours or petty offences.

ARTICLE 111-2
Statute defines felonies and misdemeanours and determines the penalties applicable to their perpetrators.
Regulations define petty offences and determine the penalties applicable to those who commit them, within the limits and according to the distinctions established by law.

ARTICLE 111-3
No one may be punished for a felony or for a misdemeanour whose ingredients are not defined by statute, nor for a petty offence whose ingredients are not defined by a regulation.
No one may be punished by a penalty which is not provided for by the statute, if the offence is a felony or a misdemeanour, or by a regulation, if the offence is a petty offence.

ARTICLE 111-4
Criminal legislation is to be construed strictly.

ARTICLE 111-5
Criminal courts have jurisdiction to interpret administrative decisions of a regulatory or individual nature, and to appreciate their legality where the solution to the criminal case they are handling depends upon such examination.

ARTICLE 112-1
Conduct is punishable only where it constituted a criminal offence at the time when it took place.
Only those penalties legally applicable at the same date may be imposed.
However, new provisions are applicable to offences committed before their coming into force and which have not led to a res judicata conviction, when they are less severe than the previous provisions.

ARTICLE 112-2
The following are immediately applicable to the repression of offences committed before their coming into force:
1° laws governing jurisdiction and judicial organisation, provided no first instance judgment on the issue has been pronounced;
2° laws determining the modes of prosecution and procedural formalities;
3° laws governing the execution and enforcement of penalties; however, where they would result in making the penalties imposed by the sentence harsher, such laws will only be applicable to offences committed after their coming into force;
4° where the limitation period has not expired, laws governing the limitation of the public prosecution and the limitation of penalties.

ARTICLE 112-3
Laws governing the type and availability of means of review, as well as time-limits within which they are to be instituted and the legal capacity of parsons allowed to apply are applicable to remedies sought against decisions passed after their coming into force. Remedies are covered by rules as to formalities which are in force at the time they are sought.

ARTICLE 112-4

The immediate application of a new law shall not affect the validity of procedural steps carried out in accordance with any previous law.

However, the penalty ceases to be enforceable where it was imposed for a matter which, in consequence of any law enacted after the judgment was passed, no longer amounts to a criminal offence.

CHAPTER III

OF THE TERRITORIAL APPLICABILITY OF A CRIMINAL LAW Articles 113-2 to 113-1

ARTICLE 113-1

For the application of the present Chapter, the territory of the Republic shall include the territorial waters and air space which are attached to it.

SECTION I

OFFENCES COMMITTED OR DEEMED TO HAVE BEEN COMMITTED WITHIN THE TERRITORY OF THE FRENCH REPUBLIC Articles 113-2 to 113-5

ARTICLE 113-2

French Criminal law is applicable to all offences committed within the territory of the French Republic.

An offence is deemed to have been committed within the territory of the French Republic where one of its constituent elements was committed within that territory.

ARTICLE 113-3

French Criminal law is applicable to offences committed on board ships flying the French flag, or committed against such ships, wherever they may be. It is the only applicable law in relation to offences committed on board ships of the national navy, or against such ships, wherever they may be.

ARTICLE 113-4

French Criminal law is applicable to offences committed on board aircraft registered in France, or committed against such aircraft, wherever they may be. It is the only applicable law in relation to offences committed on board French military aircraft, or against such aircraft, wherever they may be.

ARTICLE 113-5

French criminal law is applicable to any person who, within the territory of the French Republic, is guilty as an accomplice to a felony or misdemeanour committed abroad if the felony or misdemeanour is punishable both by French law and the foreign law, and if it was established by a final decision of the foreign court.

SECTION II

OFFENCES COMMITTED OUTSIDE THE TERRITORY OF THE FRENCH REPUBLIC Articles 113-6 to 113-12

ARTICLE 113-6

French criminal law is applicable to any felony committed by a French national outside the territory of the French Republic.

It is applicable to misdemeanours committed by French nationals outside the territory of the French Republic if the conduct is punishable under the legislation of the country in which it was committed.

The present article applies even if the offender has acquired French nationality after the commission of the offence of which he is accused.

ARTICLE 113-7

French Criminal law is applicable to any felony, as well as to any misdemeanour punished by imprisonment, committed by a French or foreign national outside the territory of the French Republic, where the victim is a French national at the time the offence took place.

ARTICLE 113-8

In the cases set out under articles 113-6 and 113-7, the prosecution of misdemeanours may only be instigated at the behest of the public prosecutor. It must be preceded by a complaint made by the victim or his successor, or by an official accusation made by the authority of the country where the offence was committed.

ARTICLE 113-8-1

(Inserted by Act no. 2004-204 of 9 March 2004 article 19 Official Journal of 10 March 2004)

Without prejudice to the application of articles 113-6 to 113-8, French Criminal law is also applicable to any felony or misdemeanour subject to a penalty of at least five years' imprisonment committed outside the territory of the French Republic by an alien whose extradition to the requesting State has been refused by the French authorities either because the offence for which the extradition has been requested is subject to a penalty or to a safety measure that is contrary to French public policy, or because the person in question has been tried in the aforesaid State by a court which does not respect the basic procedural guarantees and the rights of the defence, or because the matter in question shows the characteristics of a political offence.

Prosecution for the offences set out in the first paragraph may only be initiated at the request of the public prosecutor. It must be preceded by an official accusation, transmitted by the Minister of Justice, from the authorities in

the country where the offence has been committed and which has requested the extradition.

ARTICLE 113-9

In the cases set out under articles 113-6 and 113-7 no prosecution may be initiated against a person who establishes that he was subject to a final decision abroad for the same offence and, in the event of conviction, that the sentence has been served or extinguished by limitation.

ARTICLE 113-10

(Act no. 2001-1168 of 11 December 2001 Article 17 Official Journal 12 December 2001)

French criminal law applies to felonies and misdemeanours defined as violations of the fundamental interests of the nation and punishable under title I of Book IV, to forgery and counterfeiting of State seals, of coins serving as legal tender, banknotes or public papers punishable under Articles 442-1, 442-2, 442-15, 443-1 and 444-1, and to any felony or misdemeanour against French diplomatic or consular agents or premises committed outside the territory of the French Republic.

ARTICLE 113-11

(Inserted by Act no. 92-1336 of 16 December art 340 Official Journal 23 December 1992 into force on 1 March 1994)

Subject to the provisions of article 113-9, French Criminal law is applicable to felonies and misdemeanours committed on board or against aircraft not registered in France:

1° where the perpetrator or victim is a French national;

2° where the aircraft lands in France after the commission of the felony or misdemeanour;

3° where the aircraft was leased without crew to a natural or legal person whose main place of business, or failing this, whose permanent residence is on French territory.

In the case provided for in 1° above, the nationality of the perpetrator or victim of the offence is determined in accordance with article 113-6, last paragraph, and article 113-7.

ARTICLE 113-12

(Inserted by Act no. 96-151 of 26 December 1996 art 9 Official Journal of 27 February 1996)

French Criminal law is applicable to offences committed beyond territorial waters, when international conventions and the law provide for this.

The present article is applicable in the overseas territories, New Caledonia and the territorial collectivity of Mayote.

ARTICLE 121-1

No one is criminally liable except for his own conduct.

ARTICLE 121-2

(Act no. 2000-647 of 10 July article 8 Official Journal of 11 July 2000)
(Act no. 2004-204 of 9 March 2004 article 54 Official Journal of 10 March 2004)

Legal persons, with the exception of the State, are criminally liable for the offences committed on their account by their organs or representatives, according to the distinctions set out in articles 121-4 and 121-7.

However, local public authorities and their associations incur criminal liability only for offences committed in the course of their activities which may be exercised through public service delegation conventions.

The criminal liability of legal persons does not exclude that of any natural persons who are perpetrators or accomplices to the same act, subject to the provisions of the fourth paragraph of article 121-3.

ARTICLE 121-3

(Act no. 1996-393 of 13 May 1996 Article 1 Official Journal of 14 May 1996; Act no. 2000-647 of 10 July article 1 Official Journal of 11 July 2000)

There is no felony or misdemeanour in the absence of an intent to commit it.

However, the deliberate endangering of others is a misdemeanour where the law so provides.

A misdemeanour also exists, where the law so provides, in cases of recklessness, negligence, or failure to observe an obligation of due care or precaution imposed by any statute or regulation, where it is established that the offender has failed to show normal diligence, taking into consideration where appropriate the nature of his role or functions, of his capacities and powers and of the means then available to him.

In the case as referred to in the above paragraph, natural persons who have not directly contributed to causing the damage, but who have created or contributed to create the situation which allowed the damage to happen who failed to take steps enabling it to be avoided, are criminally liable where it is shown that they have broken a duty of care or precaution laid down by statute or regulation in a manifestly deliberate manner, or have committed a specified piece of misconduct which exposed another person to a particularly serious risk of which they must have been aware.

There is no petty offence in the event of force majeura.

ARTICLE 121-4

The perpetrator of an offence is the person who:

1° commits the criminally prohibited act;
2° attempts to commit a felony or, in the cases provided for by Statute, a misdemeanour.

ARTICLE 121-5
An attempt is committed where, being demonstrated by a beginning of execution, it was suspended or failed to achieve the desired effect solely through circumstances independent of the perpetrator's will.

ARTICLE 121-6
The accomplice to the offence, in the meaning of article 121-7, is punishable as a perpetrator.

ARTICLE 121-7
The accomplice to a felony or a misdemeanour is the person who knowingly, by aiding and abetting, facilitates its preparation or commission.
Any person who, by means of a gift, promise, threat, order, or an abuse of authority or powers, provokes the commission of an offence or gives instructions to commit it, is also an accomplice.

CHAPTER II
GROUNDS FOR ABSENCE OR ATTENTUATION OF LIABILITY — Articles 122-1 to 122-8

ARTICLE 122-1
A person is not criminally liable who, when the act was committed, was suffering from a psychological or neuropsychological disorder which destroyed his discernment or his ability to control his actions.
A person who, at the time he acted, was suffering from a psychological or neuropsychological disorder which reduced his discernment or impeded his ability to control his actions, remains punishable; however, the court shall take this into account when it decides the penalty and delermines its regime.

ARTICLE 122-2
A person is not criminally liable who acted under the influence of a force or constraint which he could not resist.

ARTICLE 122-3
A person is not criminally liable who establishes that he believed he could legitimately perform the action because of a mistake of law that he was not in a position to avoid.

ARTICLE 122-4
A person is not criminally liable who performs an act prescribed or authorised by legislative or regulatory provisions.
A person is not criminally liable who performs an action commanded by a lawful authority, unless the action is manifestly unlawful.

ARTICLE 122-5
A person is not criminally liable if, confronted with an unjustified attack upon himself or upon another, he performs at that moment an action compelled by the necessity of self-defence or the defence of another person, except where the means of defence used are not proportionate to the seriousness of the attack.
A person is not criminally liable if, to interrupt the commission of a felony or a misdemeanour against property, he performs an act of defence other than wilful murder, where the act is strictly necessary for the intended objective the means used are proportionate to the gravity of the offence.

ARTICLE 122-6
A person is presumed to have acted in a state of self-defence if he performs an action
1° to repulse at night an entry to an inhabited place committed by breaking in, violence or deception;
2° to defend himself against the perpetrators of theft or pillage carried out with violence.

ARTICLE 122-7
A person is not criminally liable if confronted with a present or imminent danger to himself, another person or property, he performs an act necessary to ensure the safety of the person or property, except where the means used are disproportionate to the seriousness of the threat.

ARTICLE 122-8
(Act no. 2002-1138 of 9 September 2002 art. 11 Official Journal of 10 September 2002)
Minors able to understand what they are doing are criminally responsible for the felonies, misdemeanours or petty offences of which they have been found guilty, and are subject to measures of protection, assistance, supervision and education according to the conditions laid down by specific legislation.
This legislation also determines the educational measures that may be imposed upon minors aged between ten and eighteen years of age, as well as the penalties which may be imposed upon minors aged between thirteen and eighteen years old, taking into account the reduction in responsibility resulting from their age.

TITLE III
OF PENALTIES — Articles 131-1 to 133-1

CHAPTER I
OF THE NATURE OF PENALTIES — Articles 131-1 to 131-49

SECTION I

PENALTIES APPLICABLE TO NATURAL PERSONS — Articles 131-1 to 131-36-8

Subsection 1
Penalties for felonies — Articles 131-1 to 131-2

ARTICLE 131-1

The penalties incurred by natural persons for the commission of felonies are:
1° criminal imprisonment for life or life criminal detention;
2° criminal imprisonment or criminal detention for a maximum of thirty years;
3° criminal imprisonment or criminal detention for a maximum of twenty years;
4° criminal imprisonment or criminal detention for a maximum of fifteen years.
The minimum period for a fixed term of criminal imprisonment or criminal detention is ten years.

ARTICLE 131-2

The penalties of criminal imprisonment or criminal detention do not preclude the imposition of a fine and of one or more of the additional penalties set out under article 131-10.

Subsection 2
Of penalties for misdemeanours — Articles 131-3 to 131-9

ARTICLE 131-3

The penalties incurred by natural persons for the commission of misdemeanours are:
1° imprisonment;
2° a fine;
3° a day-fine;
4° a citizenship course;
5° community service;
6° penalties entailing a forfeiture or restriction of rights, set out under article 131-6;
7° the additional penalties set out under article 131-10.

ARTICLE 131-4

(Act no. 2003-239 of 18 March 2003 Art. 48 Official Journal of 19 March 2003)

The scale of custodial sentences is as follows:
1° A maximum of ten years;
2° A maximum of seven years;
3° A maximum of five years;
4° A maximum of three years;
5° A maximum of two years;
6° A maximum of one year;
7° A maximum of six months;
8° A maximum of two months.

ARTICLE 131-5

(Act no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)
(Act no.2004-204 of 9 March 2004 Article 173 1°Official Journal of 10 March 2004 in force 1 January 2005)

Where a misdemeanour is punishable by imprisonment, the court may order a day-fine. This requires the convicted person to pay the Treasury a sum, the total amount of which is a daily contribution determined by the judge, multiplied by a certain number of days. The amount of each day-fine is determined by taking into account the income and expenses of the accused. It may not exceed €1000. The number of day-fines is determined by taking into account the circumstances of the offence; it may not excaed three hundred and sixty.

ARTICLE 131-5-1

(Act no.2004-204 of 9 March 2004 Article 44 II Official Journal of 10 March 2004 in force 1 October 2004)

Where a misdemeanour is punished by a prison sentance, the court may, instead of imprisonment, order the convicted person to complete a citizenship course, the methods, length and content of which are fixed by a decree of the Conseil d'Etat, and the purpose of which is to remind the offender of the republican values of tolerance, respect of personal dignity upon which society is based. The court determines whether this course, the cost of which may not exceed that a fine for a petty offence of the third class, is to be carried out at the convicted person's expense.

This penalty may not be imposed on a defendant who rejects it or who is not present at the hearing.

ARTICLE 131-6

(Act no. 92-1336 of 16 December 1992 Article 341 and 373 Official Journal of 23 December 1992 in force on 1 March 1994)
(Inserted by Act no. 2003-495 of 12 June 2003 art. 6 III Official Journal of 13 June 2003)
(Act no.2004-204 of 9 March 2004 Article 44 V Official Journal of 10 March 2004 in force 1 October 2004)

Where a misdemeanour is punishable by a prison sentence, the court may impose one or more of the following penalties entailing forfeiture or restriction of rights instead of the prison term:

1° the suspension of a driving licence for a maximum period of five years. This suspension may be restricted to the driving of a vehicle outside professional activities, pursuant to conditions to be determined by a decree of the Conseil d'Etat; this limitation is, however, not possible in misdemeanour cases for which the suspension of the driving licence, incurred as an additional penalty, may not be limited to driving outside professional activities.

2° prohibition to drive certain vehicles for a period not exceeding five years;

3° the cancellation of the driving licence together with the prohibition to apply for a new licence for a period not exceeding five years;

4° confiscation of one or more vehicles belonging to the convicted person;

5° immobilisation of one or more vehicles belonging to the convicted person pursuant to conditions determined by a decree of the Conseil d'Etat for a maximum period of one year;

6° prohibition to hold or carry a weapon for which a permit is needed; such a prohibition may not be imposed for more than five years;

7° confiscation of one or more weapons belonging to the convicted person or which are freely available to him;

8° withdrawal of a hunting licence, together with a prohibition to apply for a new licence; such a prohibition may not be imposed for more than five years;

9° prohibition to draw cheques, except those allowing the withdrawal of funds by the drawer from the drawee or certified cheques, and prohibition to use payment cards, for a maximum duration of five years;

10° confiscation of the thing which was used in or was intended for the commission of the offence, or of the thing which is the product of it. However, this confiscation may not be imposed for a press misdemeanour;

11° prohibition, for a maximum period of five years, to exercise any professional or social activity where the facilities afforded by such activity have knowingly been used to prepare or commit the offence. Such a prohibition is not applicable to the holding of an electoral mandate or union stewardship, nor may it be imposed for a press misdemeanour;

12° prohibition, for a maximum period of three years, to frequent any places or categories of place determined by the court, and in which the offence was committed;

13° prohibition, for a maximum period of three years, to associate with certain convicted persons designated by the court, in particular the perpetrators of the offence or any accomplices;

14° prohibition , for a maximum period of three years, to enter into contact with certain persons specially named by the court, notably the victim of the offence .

ARTICLE 131-7

(Act no.2004-204 of 9 March 2004 Article 44 VI Official Journal of 10 March 2004 in force 1 October 2004)

For misdemeanours which are punishable only by a fine, the penalty of forfeiture or restriction of rights enumerated under article 131-6 may also be imposed instead of the fine.

ARTICLE 131-8

(Act no.2004-204 of 9 March 2004 Article 44 VII, Article 174 1° Official Journal of 10 March 2004 in force 1 January 2005)

Where a misdemeanour is punishable by imprisonment, the court may, as an alternative to imprisonment, order the convicted person to perform, for a period of forty to two hundred and ten hours, unpaid community service in the interest of a public law body or of an association accredited to set up community service.

Community service may not be imposed upon a defendant who rejects it or who is not present at the hearing. Before passing the sentence, the president of the court, must inform the defendant of his right to refuse to perform community service and record his response.

ARTICLE 131-9

(Act no.2004-204 of 9 March 2004 Article 44 VIII Official Journal of 10 March 2004 in force 1 October 2004)

Imprisonment may not be imposed cumulatively with any of the penalties entailing forfeiture or restriction of rights set out under article 131-6, nor with community service.

When imposing one or more of the penalties set out under articles 131-5-1, 131-6 or 131-8, the court may fix the maximum period of imprisonment or monetary penalty which the penalty enforcement judge may order to be wholly or completely enforced, under the conditions set out under article 712-6 of the Code of Criminal Procedure, if the convicted person fails to respect any obligations or prohibitions arising from the penalty or penalties imposed. The president of the court gives the convicted person notice of this after pronouncing his decision. The prison sentence or the fine which the court fixes may not exceed the penalties incurred for the misdemeanour for which the judgment has been pronounced, nor those provided for by article 434-41 of the present code. Where the provisions of the first paragraph are applied, the provisions of article 434-41 are thus not applicable.

A day-fine may not be imposed cumulatively with a fine.

Subsection 3
Additional penalties incurred for certain felonies or misdemeanours — Articles 131-10 to 131-11

ARTICLE 131-10

(Act no. 1998-468 of 17 June 1998 Article 5 Official Journal of 18 June 1998)

Where the law so provides, a felony or a misdemeanour may be punished by one or more additional penalties sanctioning natural persons which entail prohibition, forfeiture, incapacity or withdrawal of a right, an obligation to seek

treatment or a duty to act, the impounding or confiscation of a thing, the compulsory closure of an establishment, the posting a public notice of the decision or the dissemination the decision in the press, or its communication to the public by any means of electronic communication.

ARTICLE 131-11

Where a misdemeanour is punishable by one or more of the additional penalties enumerated under article 131-10, the court may decide to impose as a main sentence one or more of the additional penalties.

The court may fix the maximum period of imprisonment or monetary penalty which the penalty enforcement judge may order to be wholly or completely enforced, under the conditions set out under article 712-6 of the Code of Criminal Procedure, if the convicted person fails to respect any obligations or prohibitions arising from the penalty or penalties imposed under the provisions of this article. The president of the court gives the convicted person notice of this after pronouncing his decision. The prison sentence or the fine which the court fixes may not exceed the penalties incurred for the misdemeanour for which the judgment has been pronounced, nor those provided for by article 434-41 of the present code. Where the provisions of the first paragraph are applied, the provisions of article 434-41 are thus not applicable.

Subsection 4
Of penalties for petty offences — Articles 131-12 to 131-18

ARTICLE 131-12

The penalties incurred by natural persons for the commission of petty offences are:

1° a fine;

2° the penalties entailing a forfeiture or restriction or rights set out under article 131 1-14.

These penalties do not preclude the imposition of one or more of the additional penalties set out under articles 131-16 and 131-17.

ARTICLE 131-13

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force on 1 January 2002)

(Act no. 2003-495 of 12 June 2003 art. 4 I Official Journal of 13 June 2003)

Petty offences are offences which by law are punished with a fine not in excess of €3,000.

The amount of a fine is as follows:

1° a maximum of €38 for petty offences of the first class;

2° a maximum of €150 for petty offences of the second class;

3° a maximum of €450 for petty offences of the third class;

4° a maximum of €750 for petty offences of the fourth class;

5° a maximum of €1,500 for petty offences of the fifth class; an amount which may be increased to €3,000 in the case of a persistent offender where the regulation so provides, except where the law provides that repetition of a petty offence constitutes a misdemeanour.

NOTE: Law no. 2005-47, article 11: These provisions come into force on the first day of the third month following their publication. Nevertheless, cases of which the police court or the neighbourhood court were lawfully seised at that date remain within the jurisdiction of those courts.

ARTICLE 131-14

(Act no. 2003-495 of 12 June 2003 art. 5 II Official Journal of 13 June 2003)

In relation to any petty offence of the fifth class one or more of the following penalties entailing forfeiture or restriction of rights may be imposed:

1° suspension of a driving licence for a maximum duration of one year. This suspension may be restricted to the driving of a vehicle outside professional activities; but this limitation is not possible for an offence for which the suspension of the driving licence, incurred as an additional penalty, may not be limited to driving outside professional activities;

2° immobilisation of one or more vehicles belonging to the convicted person, for a maximum period of six months;

3° confiscation of one or more weapons belonging to the convicted person or freely available to him;

4° withdrawal of a hunting licence, together with a prohibition to apply for the issue of a new licence for a maximum period of one year;

5° prohibition to draw cheques, except those allowing the withdrawal of funds by the drawer from the drawee or certified cheques, and the prohibition to use payment cards, for a maximum period of five years;

6° confiscation of the thing which was used or was intended for the commission of the offence, or of the thing which is the product of the offence. However, this confiscation may not be imposed for a press misdemeanour.

ARTICLE 131-15

A fine may not be imposed together with any of the penalties entailing forfeiture or restriction of rights enumerated under article 131-14.

Penalties entailing forfeiture or restriction of rights enumerated under this article may be imposed cumulatively.

ARTICLE 131-16

(Inserted by Act no. 2003-495 of 12 June 2003 art. 5 III Official Journal of 13 June 2003)

(Act no. 2004-204 of 9 March 2004 article 44 III Official Journal of 10 March 2004, in force 1 October 2004)

Where the offender is a natural person, the regulation which sanctions a petty offence may provide for one or more of the following additional penalties:

1° suspension of a driving licence for a maximum period of three years. This suspension may be restricted to the driving of a vehicle outside professional activities unless the regulation expressly excludes this limitation;

2° prohibition to hold or carry a weapon for which a permit is needed, for a maximum period of three years;

3° confiscation of one or more weapons belonging to the convicted person or freely available to him;

4° withdrawal of a hunting licence, together with a prohibition to apply for a new licence, for a maximum period of three years;

5° confiscation of the thing which was used or intended to be used for the commission of the offence, or of the thing which is the product of the offence;

6° prohibition from driving certain types of motor vehicle, including those for which no driving licence is required, for a maximum period of three years;

7° the obligation to complete, at the offender's expense, a road safety awareness course;

8° the obligation to complete a citizenship course, at the offender's expense, if appropriate.

ARTICLE 131-17

A regulation which sanctions a petty offence of the fifth class may also provide for the additional penalty of prohibition to draw cheques, except those allowing the withdrawal of funds by the drawer from the drawee or certified cheques, for a maximum period of three years.

A regulation which sanctions a petty offence of the fifth class may also provide, as an additional penalty, the imposition of community service for a period of twenty to a hundred and twenty hours.

ARTICLE 131-18

Where a petty offence is punishable by one or more of the additional penalties referred to under articles 131-16 and 131-17, the court may decide to impose only the additional penalty, or one or more of the additional penalties.

Subsection 5
The contents and modes of implementation of certain penalties — Articles 131-19 to 131-35-1

ARTICLE 131-19

Prohibition to draw cheques entails for the convicted person the mandatory obligation to return all the forms in his possession or in the possession of his agents to the banker who issued them.

Where this prohibition is incurred as an additional penalty for a felony or misdemeanour, it may not exceed five years.

ARTICLE 131-20

The prohibition to use payment cards entails for the convicted person the mandatory obligation to return the cards in his possession or in the possession of his agents to the banker who issued them.

Where this prohibition is incurred as an additional penalty for a felony or misdemeanour, it may not exceed five years.

ARTICLE 131-21

(Act no. 92-1336 of 16 December 1992 Articles 342, 343 and 373 Official Journal of 23 December 1992 into force 1 March 1994)

(Act no. 2003-495 of 12 June 2003 art. 6 II Official Journal of 13 June 2003)

(Act no. 2004-204 of 9 March 2004 article 60 II Official Journal of 10 March 2004)

Confiscation is mandatory for the articles defined as dangerous or noxious by statute or by regulations.

Confiscation affects the thing which was used or intended for the commission of the offence or of the thing which is its product, except for articles subject to restitution. It may also relate to any movable property defined by the statutes or the regulations sanctioning the offence.

The subject-matter of an offence is treated as a thing used for the commission of the offence or the product of an offence in the sense of paragraph two above.

Where the thing confiscated has not been seized or cannot be produced, confiscation in value is imposed. For the recovery of the sum representing the value of the thing confiscated, the provisions governing judicial enforcement of public debts apply.

The thing confiscated devolves to the State, except where a specific provision prescribes its destruction or its attribution, but remains encumbered up to its full value with any proprietary right lawfully created in favour of third parties.

Where the thing confiscated is a vehicle that has not been seized or impounded during the investigation, the offencer must, on the orders of the public prosecutor, hand over the vehicle to the department or organisation responsible for destroying or disposing of it.

ARTICLE 131-22

(Act no. 92-1336 of 16 December 1992 Articles 342 and 373 Official Journal of 23 December 1992 in force on 1 March 1994)

(Act no. 2003-495 of 12 June 2003 art. 5 IV Official Journal 13 June 2003)

(Act no. 2004-204 of 9 March 2004 article 174 2° Official Journal of 10 March 2004, in force 31 December 2006)

A court imposing community service shall determine the period within which the community service work is to be performed, which shall not exceed twelve months. It also determines the prison sentence or fine incurred by the convicted person for failure to comply with the terms of the community service sentence. The period expires on the completion of the entire work. It may be temporarily suspended on serious medical, familial, professional or social grounds. The time limit is suspended for the time during which the convicted person is imprisoned, or while he discharges national service duties.

The terms for carrying out the community service order and the suspension of the period set out in the previous paragraph are decided by the penalty enforcement judge within whose territorial jurisdiction the convicted person has his usual residence, or where he does not have a usual residence in France, by the penalty enforcement judge attached to the court that decided the case at first instance.

Where the person has been convicted of a misdemeanour provided for by the Traffic Code or articles 221-6-1, 222-19-1, 222-20-1 and 434-10, the offender should preferably carry out community service in one of the specialist centres dealing with victims of road traffic accidents.

During the period provided for by the present article, the convicted person must comply with the supervision measures set out under article 132-55.

ARTICLE 131-23

Community service work is governed by the legal and regulatory prescriptions concerning night work, hygiene and security, as well as those relating to women and young persons at work. Community service work may be executed at the same time as a professional activity.

ARTICLE 131-24

The State is answerable for the damage or portion of damage which is caused to a third party by a convicted person and which directly results from the implementation of a decision carrying the obligation to perform community service.

The State is subrogated as of right to the claims of the victim.

Proceedings for damages or indemnification are brought before the judicial courts.

ARTICLE 131-25

(Act no. 2004-204 of 9 March 2004 article 173 2° Official Journal of 10 March 2004, in force 1 January 2005

Where a day-fine is imposed the total sum is payable upon expiry of the period corresponding to the number of day-fines imposed.

Total or partial failure to pay this amount leads to the imprisonment of the convicted person for a time equal to the number of unpaid day-fines. This is carried out according to the rules for the enforcement of public debts. Detention so imposed comes under the regime of custodial sentences.

ARTICLE 131-26

Forfeiture of civic, civil and family rights covers:

1° the right to vote;

2° the right to be elected;

3° the right to hold a judicial office, or to give an expert opinion before a court, or to represent or assist a party before a court of law;

4° the right to make a witness statement in court other than a simple declaration;

5° the right to be tutor or curator; this prohibition does not preclude the right to become a tutor or a curator of one's own children, after obtaining the guardianship judge's approval, and after having heard the family council.

Forfeiture of civic, civil and family rights may not exceed a maximum period of ten years in the case of a sentence imposed for a felony and a maximum period of five years in the case of a sentence imposed for a misdemeanour.

The court may impose forfeiture of all or part of these rights.

The forfeiture of the right to vote or to be elected imposed pursuant to the present article also entails the prohibition or incapacity to hold public office

ARTICLE 131-27

Where it is incurred as an additional penalty for a felony or a misdemeanour, the prohibition to exercise a public office or a professional or social activity is either permanent or temporary. In the latter case, the prohibition may not exceed a term of five years.

This prohibition may not be enforced against the discharge of an electoral mandate or union stewardship. Nor is it applicable for a press misdemeanour.

ARTICLE 131-28

The prohibition to exercise a professional or social activity may affect either the professional or social activity in the exercise of which, or on the occasion of which, the offence was committed, or any other professional or social activity definec by the law punishing the offence.

ARTICLE 131-29

Where the prohibition to exercise all or part of the rights enumerated under article 131-26 or the prohibition to exercise a public office or a social or professional activity are imposed together with an immediate custodial sentence, these sanctions are enforceable from the beginning of this sentence and they continue for the length of time determined by the decision, from the day when the custodial sentence ends.

PENAL CODE

ARTICLE 131-30

(Act no. 93-1027 of 24 August 1993 Article 33 Official Journal of 29 August 1993)
(Act no. 97-396 of 24 April Article 16 Official Journal of 25 April 1997)
(Act no. 98-349 of 11 May 1998 Article 37 Official Journal of 12 May 1998)
(Act no. 2003-1119 of 26 November 2003 Article 78 I Official Journal of 27 November 2003)

Where it is provided for by Statute, banishment from French territory may be ordered, either permanently or for a maximum period of ten years, against any alien convicted of a felony or a misdemeanour.

Banishment from French territory automatically involves the removal of the convicted person to the frontier, at the end of his prison sentence, where applicable.

Where banishment from French territory is imposed together with an immediate custodial sentence, its enforcement is suspended during the execution of the sentence. It resumes from the day when the custodial sentence has ended, for the length of time determined by the convicting judgment.

Banishment from French territory imposed at the same time as a custodial sentence does not prevent the sentence being made subject to measures of semi-liberty, external placement, placement under electronic surveillance or permission to leave prison, with a view to preparing a request for the ban to be lifted.

Article 131-30-1

(Inserted by Act no. 2003-1119 of 26 November 2003 Article 78 II Official Journal of 27 November 2003

In misdemeanour cases the court may only order banishment from French territory by means of a specially reasoned judgment which takes the seriousness of the offence and the personal and familial situation of an alien into account where the case involves:

1° an alien, who is not living in a polygamous relationship, who is the father or mother of a French minor who resides in France, on condition that he or she shows he or she has actively contributed to the support or education of the child under the conditions provided for by article 371-2 of the Civil Code from the latter's birth, or for at least a year;

2° an alien who has been married to a French national for at least two years, provided that the marriage took place before the offence leading to the conviction, that conjugal life is continuing, and that the spouse has retained French nationality;

3° an alien who establishes by any means that he has ordinarily resided in France for more than fifteen years, unless at any time during this period he has held a temporary residence permit for students;

4° an alien who has been lawfully resident in France for more than ten years, unless he has ever, during this period, held a temporery residence permit for students;

5° an alien who is in receipt of an industrial accident or occupational disease annuity paid by a French organisation, and for whom the rate of permanent incapacity is equal to or greater than 20%.

Article 131-30-2

(Inserted by Act no. 2003-1119 of 26 November 2003 Article 78 II Official Journal of 27 November 2003

Banishment from French territory may not be ordered where the case involves

1° an alien who establishes by any means that he has been habitually resident in France since the age of thirteen years or before;

2° an alien who has been lawfully resident in France for more than twenty years;

3° an alien who has been lawfully resident in France for at least ten years and who, while not living in a polygamous relationship, has been married for at least three years to a French national who has retained French nationality, provided that the marriage took place before the offence leading to the conviction, and that conjugal life is continuing; or that the alien is married, under the same conditions, to a foreign national who comes under the provisions of 1°;

4° an alien, who has lawfully resided in France for more than ten years, and is not living in a polygamous relationship, who is the father or mother of a French minor who resides in France, on the condition that he or she shows that he or she has actively contributed to the support or education of the child under the conditions provided for by article 371-2 of the Civil Code, since the birth of the child or for at least a year;

5° an alien who has been residing in France by means of a residence permit provided for by 11° of article 12 bis of Decree no. 45-2658 of 2 November 1945 relating to the conditions of entry and residence of foreigners in France.

The provisions set out in 3° and 4° are, however, inapplicable where the offence that led to the conviction was committed against the alien's spouse or children.

The provisions of the present article are not applicable to offences involving violation of the fundamental interests of the nation, provided for by chapters I, II and IV of title I of book IV and by articles 413-1 to 413-4, 413-10 and 413-11, or acts of terrorism provided for by articles 431-14 to 431-17, or by counterfeiting offences provided for by articles 442-1 to 442-4.

ARTICLE 131-31

The penalty of banishment from a specified area entails prohibition to appear in certain places determined by the court. Supervision and support measures are also imposed. The list of the prohibited places and the supervision and support measures to be imposed may be modified by the penalty enforcement judge, pursuant to the conditions set down by the Code of Criminal Procedure.

Banishment from an area may not exceed a period of ten years in the case of a conviction for a felony, and five years in the case of a conviction for a misdemeanour.

ARTICLE 131-32

Where area banishment is imposed together with an immediate custodial sentence, it applies from the beginning of

the custodial sentence and its execution continues for the period fixed when the sentence was imposed, running from the day on which the custodial sentence ends.

Any detention served during the area banishment period is deducted from this period.

Subject to the application of article 763 of the Code of Criminal Procedure, area banishment ceases as of right when the convicted person reaches the age of sixty-five.

ARTICLE 131-33

Mandatory closure of an establishment entails the prohibition to exercise on such premises the activity that occasioned the commission of the offence.

ARTICLE 131-34

Disqualification from public tenders entails prohibition to participate, directly or indirectly, in any contract concluded by the State and its public bodies, territorial collectivities, their associations and public bodies, as well as enterprises granted as a concession or controlled by the State or by territorial collectivities or their associations.

ARTICLE 131-35

(Act no. 2004-575 of 21 June 2004 Article 2 III Official Journal of 22 June 2004)

The penalty of displaying a notice of the decision or otherwise disseminating it is carried out at the convicted person's expense. However, the expenses recovered against a convicted parson may not exceed a sum in excess of any fine applicable.

The court may order the display or circulation of all or a part of the decision, or of a communiqué informing the public of the contents of the decision and its reasons. It shall determine, where appropriate, the extracts of the decision and the terms of the communiqué to be displayed or circulated.

The display or dissemination of the decision or communiqué may disclose the identity of the victim only with his agreement, or with that of his legal representative or successor.

A public display order is carried out in such places and for such a period as the court determines. Unless the Statute sanctioning the offence otherwise provides, a public display may not extend beyond two months. If the notices posted are removed, concealed or torn, a renewed display is made at the expense of the person found guilty of so doing.

Circulation of the decision is made by the Official Journal of the Republic, by one or more other press publications, or by one or more means of electronic public communication. The publications or means of electronic communication entrusted with that circulation are designated by the court. They may not refuse to carry them.

ARTICLE 131-36

A Decree of the Conseil d'État shall determine the conditions of application of the provisions of this sub-section of the present Code.

This Decree shall also lay down the conditions under which convicted persons carry out their community service as well as the nature of the work to be given.

It shall determine in addition the conditions according to which:

1° the penalty enforcement judge, after hearing the opinion of the public prosecutor and consulting any public institution with competence in the field of the prevention of crime, establishes the list of the community service work liable to ba performed within his jurisdiction;

2° community service work, for those who are employed, may extend beyond the maximum legal working week;

3° associations referred to under the first paragraph of Article 131-8 are accredited to offer community service work.

ARTICLE 131-35-1

(Inserted by Act no. 2003-495 of 12 June 2003 art. 6 III Official Journal of 13 June 2003)

Where it is incurred as an additional penalty, the obligation to complete a road safety awareness course is carried out at the expense of the offender, within six months from the date on which the sentence becomes final.

Upon completion of the course, the offender receives a certificate which he must send to the district prosecutor.

Subsection 6
Of socio-judicial probation — Articles 131-36-1 to 131-36-8

ARTICLE 131-36-1

(Inserted by Act no. 1998-468 of 17 June 1998 Article 1 Official Journal of 18 June 1998)
(Act no. 2004-204 of 9 March 2004 article 46 Official Journal of 10 March 2004)

Where the law so provides, the trial court may order socio-judicial probation.

Socio-judicial probation entails, for the convicted person, the duty to submit, under the supervision of the penalty enforcement judge for the period determined by the trial court, to measures of supervision and assistance designed to prevent recidivism. The period of socio-judicial probation may not exceed ten years in the case of conviction for a misdemeanour or twenty years in the case of conviction for a felony.

However, in misdemeanour cases, this probation period may be extended to twenty years by means of a special and reasoned decision issued by the court of trial; in the case of a felony punishable by thirty years' imprisonment, this probation period is thirty years; in the case of a felony punishable by life imprisonment, the Cour d'assises may impose a period of socio-judicial probation unlimited in time, subject to the right of the court for the application of penalties to suspend this measure after thirty years, according to the conditions set out in article 712-7 of the Code of Criminal Procedure.

The convicting judgment also fixes the maximum term of imprisonment to be served by the convicted person where he fails to observe the obligations imposed upon him. This imprisonment may not exceed three years in the case of a conviction for a misdemeanour or seven years in the case of a conviction for a felony. The manner in which the penalty enforcement judge may order the imprisonment to be wholly or partly executed is determined by the Code of Criminal Procedure.

The president of the court, after giving judgment, warns the convicted person of the obligations arising from it and of the consequences if they are not fulfilled.

ARTICLE 131-36-2

(Inserted by Act no. 1998-468 of 17 June 1998 Article 1 Official Journal of 18 June 1998)

The measures of supervision applicable to the person sentenced to socio-judicial probation are those laid down by article 132-44.

The convicted person may also be subjectec by the convicting judgment or by the penalty enforcement judge to the obligation specified by article 132-45. He may also be subjected to one or more of the following obligations:

1° not to be present in such places or such category of places as specifically designated, in particular where minors are to be found;

2° not to visit or to have contact with certain persons or certain categories of persons, and particularly minors, except, where relevant, those specified by the court;

3° not to carry out any professional or voluntary activity involving regular contact with minors.

ARTICLE 131-36-3

(Inserted by Act no. 1998-468 of 17 June 1998 Article 1 Official Journal of 18 June 1998)

The object of support measures imposed on a person sentenced to socio-judicial probation has is to aid the person's social rehabilitation.

ARTICLE 131-36-4

(Inserted by Act no. 1998-468 of 17 June 1998 Article 1 Official Journal of 18 June 1998)

Socio-judicial probation may include a requirement of treatment.

This requirement may be ordered by the trial court if it is established after a report by a medical expert, obtained in the conditions laid down by the Code of Criminal Procedure, that the person prosecuted is a suitable case for such treatment. This examination is carried out by two experts in the case of a prosecution for the murder of a minor preceded or accompanied by rape, torture or acts of barbarity. The president warns the convicted person that no treatment may be undertaken without his consent, but that if he refuses the treatment offered to him, imprisonment imposed under the third paragraph of article 131-36-1 may be enforced.

Where the trial court orders treatment and a non-suspended custodial sentence has also been imposed on the relevant person, the presiding judge informs the convicted person that he has the option of starting treatment whilst serving the sentence.

ARTICLE 131-36-5

(Inserted by Act no. 1998-468 of 17 June 1998 Article 1 Official Journal of 18 June 1998)

Where the socio-judicial probation order is imposed with an immediate custodial sentence, the probation order is enforced, for the period fixed in the sentence, to run from the day when the custodial sentence comes to an end.

The socio-judicial probation order is suspended by any detention that intervenes while it is running.

Imprisonment ordered on account of failure to observe the obligations contained in the socio-judicial probation order is consecutive to any immediate custodial sentence imposed for offences committed during the currency of the order, and may not be concurrent with them.

ARTICLE 131-36-6

(Inserted by Act no. 1998-468 of 17 June 1998 Article 1 Official Journal of 18 June 1998)

Socio-judicial probation may not be ordered together with a custodial sentence which is suspended, in whole or in part, on condition of good behaviour.

ARTICLE 131-36-7

(Inserted by Act no. 1998-468 of 17 June 1998 Article 1 Official Journal of 18 June 1998)

In misdemeanour cases, socio-judicial probation may be imposed as the main sentence.

ARTICLE 131-36-8

(Inserted by Act no. 1998-468 of 17 June 1998 Article 1 Official Journal of 18 June 1998)

The manner of enforcement of a socio-judicial probation order is determined by title VII bis of Book V of the Code of Criminal Procedure.

PENAL CODE

ARTICLE 131-37

Penalties for felonies and misdemeanours incurred by legal persons are:

1° a fine;

2° in the cases set out by law, the penalties enumerated under Article 131-39.

ARTICLE 131-38

(Act no. 2004-204 of 9 March 2004 article 55 I Official Journal of 10 March 2004)

The maximum amount of a fine applicable to legal persons is five times that which is applicable to natural persons by the law sanctioning the offence.

Where this is an offence for which no provision is made for a fine to be paid by natural persons, the fine incurred by legal persons is €1,000,000.

ARTICLE 131-39

(Act no. 2001-504 of 12 June 2001 Article 14 Official Journal of 13 June 2001)
(Act no. 2004-575 of 21 June 2004 article 2 III Official Journal of 22 June 2004)

Where a statute so provides against a legal person, a felony or misdemeanour may be punished by one or more of the following penalties:

1° dissolution, where the legal person was created to commit a felony, or, where the felony or misdemeanour is one which carries a sentence of imprisonment of three years or more, where it was diverted from its objects in order to commit them;

2° prohibition to exercise, directly or indirectly one or more social or professional activity, either permanently or for a maximum period of five years;

3° placement under judicial supervision for a maximum period of five years;

4° permanent closure or closure for up to five years of the establishment, or one or more of the establishments, of the enterprise that was used to commit the offences in question;

5° disqualification from public tenders, either permanently or for a maximum period of five years;

6° prohibition, either permanently or for a maximum period of five years, to make a public appeal for funds;

7° prohibition to draw cheques, except those allowing the withdrawal of funds by the drawer from the drawee or certified cheques, and the prohibition to use payment cards, for a maximum period of five years;

8° confiscation of the thing which was used or intended for the commission of the offence, or of the thing which is the product of it;

9° posting a public notice of the decision or disseminating the decision in the written press or using any form of communication to the public by electronic means.

The penalties under 1° and 3° above do not apply to those public bodies which may incur criminal liability. Nor do they apply to political parties or associations, or to unions. The penalty under 1° does not apply to institutions representing workers.

Subsection 2
Penalties for petty offences — Articles 131-40 to 131-44

ARTICLE 131-40

The penalties incurred by legal persons for petty offences are:

1° a fine;

2° the penalties entailing forfeiture or restriction of rights set out under article 131-42.

These penalties do not preclude the imposition of one or more of the additional penalties set out under article 131-43.

ARTICLE 131-41

The maximum amount of a fine applicable to legal persons is five times that which is appliceble to natural persons by the regulation sanctioning the offence.

ARTICLE 131-42

In relation to any petty offence of the fifth class, a fine may be replaced by one or more of the following penalties entailing forfeiture or restriction of rights:

1° prohibition to draw cheques, except those allowing the withdrawal of funds by the drawer from the drawee or certified cheques, and the prohibition to use payment cards, for a maximum period of one year;

2° confiscation of the thing which was used or was intended for the commission of an offence, or of any thing which is the product of it.

ARTICLE 131-43

The regulation that sanctions a petty offence may provide for the additional penalty mentioned under 5° of article 131-16 where the offender is a legal person. In relation to petty offences of the fifth class, the regulation may also set out the additional penalty referred to under the first paragraph of article 131-17.

ARTICLE 131-44

Where a petty offence is punishable by one or more of the additional penalties referred to under articles 131-43, the court may decide to impose only the additional penalty, or one or more of the additional penalties

ARTICLE 131-45

The decision ordering the dissolution of a legal person entails its referral to the court competent for its liquidation.

ARTICLE 131-46

(Act no. 1992-1336 of 16 December 1992 Articles 345, 346 and 373 Official Journal of 23 December into force 1 March 1994)

The decision to place a legal person under judicial supervision entails the appointment of a judicial officer whose remit is determined by the court. His remit may only bear upon the activity in the exercise of which, or on the occasion of which, the offence was committed. At least once every six months, the judicial officer shall report to the penalty enforcement judge on the fulfilment of his remit.

Upon examining this report, the penalty enforcement judge may refer the matter to the court that ordered judicial supervision. The court may then either impose a new penalty, or release the legal person from judiciel supervision.

ARTICLE 131-47

Prohibition to make a public appeal for funds entails prohibition, for the sale of any type of security, to have recourse to any banking institutions, financial establishments or investment service providers or to any form of advertising.

- ARTICLE 131-48

The prohibition to exercise one or more social or professional activities entails the consequences set out under article 131-28.

The mandatory closure of one or more establishments entails the consequences set out in 131-33.

Disqualification from public tenders entails the consequences set out in article 131-34.

Prohibition to issue cheques entails the consequences set out under the first paragraph of article 131-19.

The confiscation of a thing is ordered pursuant to the conditions set out under article 131-21.

The public display or dissemination of the decision is ordered pursuant to the conditions set out under article 131-35.

ARTICLE 131-49

A Decree in the Conseil d'État shall determine the conditions for the implementation of the provisions of articles 131-45 to 131-47 and shall determine the conditions pursuant to which the worker's representatives are informed of the date of the hearing.

ARTICLE 132-1

Where statutes or regulations sanction an offence, the rules governing the penalties that may be imposed are those set out in the present Chapter except where the law otherwise provides.

ARTICLE 132-2

There is a concurrence of offences where an offence is committed by a person before having been finally convicted for another offence.

ARTICLE 132-3

Where, in the course of the same proceedings, the accused person is found guilty of several concurrent offences, each of the penalties applicable may be imposed. Nevertheless, where several penalties of a similar nature are incurred, only one such penalty may be imposed within the limit of the highest legal maximum.

Each penalty imposed is deemed to be common to the concurrent offences within the limit of the legal maximum applicable to each one of them.

ARTICLE 132-4

Where, in the course of separate proceedings, the person prosecuted is convicted of several concurrent offences, the penalties imposed operate cumulatively, up to the limit of the highest legal maximum. Nevertheless, the partial or total concurrent running of sentences of a similar nature may be ordered either by the last court called upon to determine the matter, or pursuant to the conditions set out under the Code of Criminal Procedure.

ARTICLE 132-5

(Act no. 1992-1336 of 16 December 1992 Articles 347 and 373 Official Journal of 23 December into force 1 March 1994)

For the purposes of articles 132-3 and 132-4, all custodial sentences are of a similar nature and all custodial sentences run concurrently within a life sentence.

Recidivism is taken into account, where relevant.

Where criminal imprisonment for life is applicable to one or more of the concurrent offences but is not imposed, the legal maximum is fixed at thirty years' criminal imprisonment.

The legal maximum amount and length of day-fines and of community service work is determined by articles 131-5 and 131-8 respectively.

The benefit of partial or total suspension applied to one of the penalties imposed for concurrent offences does not prevent the enforcement of sentences of a similar nature which are not suspended.

ARTICLE 132-6

(Act no. 1992-1336 of 16 December 1992 Articles 348 and 373 Official Journal of 23 December into force 1 March 1994)

When a pardon or reinstatement has been granted in respect of a penalty, account is taken of the penalty ensuing from such a measure or decision when determining the extent of the concurrent running of penalties.

A reinstatement which takes place after the concurrent running of penalties is applicable to the penalty resulting from such concurrence.

Where a penalty is reduced, the reduction is deducted from the penalty which remains to be served after the concurrent running of penalties, where this occurs.

ARTICLE 132-7

By way of exception to the previous provisions, fines imposed for petty offences are cumulated with those incurred or imposed for concurrent felonies or misdemeanours.

Subsection 2
Sentences applicable in the event of recidivism — Articles 132-8 to 132-16-2

Paragraph 1
Natural persons — Articles 132-8 to 132-11

ARTICLE 132-8

Where a natural person who has already received a final sentence for a felony or misdemeanour punishable by law with ten years' imprisonment, commits a felony, the maximum period of criminal imprisonment or criminal detention is life imprisonment where the maximum sentence legally applicable to the felony is twenty or thirty years. Where the felony is punishabla by fifteen years' imprisonment the maximum is raised to thirty years' criminal imprisonment or criminal detention

ARTICLE 132-9

Where a natural person who has already received a final sentence for a felony or for a misdemeanour punishable by law with ten years' imprisonment commits within ten years of when the previous sentence expired or became time-barred a further misdemeanour which is similarly punishable, the maximum term of imprisonment and fine applicable is doubled.

Where a natural person who has already received a final sentence for a felony or misdemeanour punishable by ten years' imprisonment commits within five years of when the previous sentence expired or became time-barred another misdemeanour punishable with between one and ten years' imprisonment, the maximum term of the imprisonment and fine applicable is doubled.

ARTICLE 132-10

Where a natural person, who has already received a final sentence for a misdemeanour, commits within a period of five years from when the previous sentence expired or became time-barred either the same misdemeanour, or a misdemeanour which is assimilated to it for the purposes of the rules relating to recidivism, the maximum term of the imprisonment and fine is doubled.

ARTICLE 132-11

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force on 1 January 2002)

(Act no. 2003-495 of 12 June 2003 art. 6 III Official Journal of 13 June 2003)

If a regulation so provides, where a natural person who has already received a final sentence for a petty offence of the fifth class commits the same petty offence within a period of one year from when the previous sentence expired or became time-barred, the maximum fine is raised to €3,000.

In cases where the law provides that re-offending by the commission of a petty offence of the fifth class constitutes a misdemeanour, recividism is established if the acts are committed within a period of three years from the expiry or time-barring of the previous sentence.

Paragraph 2
Legal persons — Articles 132-12 to 132-15

ARTICLE 132-12

(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 into force 1 January 2002)

Where a legal person, having already received a final sentence for a felony or a misdemeanour legally punishable

with a fine of €100,000 in the case of a natural person, incurs criminal liability for a felony, the maximum fine which may be imposed is ten times that provided by the law applicable to that felony. In such a case the legal person is additionally liable to the penalties enumerated under article 131-39, subject to the provisions of the last paragraph of that article.

ARTICLE 132-13

(Act no. 2001-504 of 12 June 2001 Article 15 Official Journal of 13 June 2001)
(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 into force 1 January 2002)

Where a legal person which has already received a final sentence in relation to a felony or a misdemeanour legally punishable in the case of a natural person by a fine of €100,000 incurs criminal liability for a misdemeanour punishable by the same penalty within a period of ten years from when the previous sentence expired or became time-barred, the maximum fine which may be imposed is ten times that provided by the statute by which the misdemeanour is punishable.

Where a legal person which has already received a final sentence for a felony or for a misdemeanour legally punishable in the case of natural persons by a fine of €100,000, incurs within a period of five years from when the previous sentence expired or became time-barred criminal liability for a misdemeanour which by statute is punishable in the case of natural persons with a fine of more than €15,000, the maximum fine which may be imposed is ten times that provided by the statute by which the misdemeanour is punishable.

ARTICLE 132-14

Where a legal person which has already received a final sentence for a misdemeanour incurs within a period of five years from when the previous sentence expired or became time-barred criminal liability for either the same misdemeanour or a misdemeanour assimilated to it under the rules governing recidivism, the maximum fine which may be imposed is ten times that provided for natural persons by the statute punishing the misdemeanour.

ARTICLE 132-15

Where a regulation so provides, a legal person which has already received a final sentence for a petty offence of the fifth class incurs criminal liability for the same petty offence within a period of one year from when the penalty for the of the previous offence expired or became time-barred, the maximum fine which may be imposed is ten times that provided for natural persons by the regulation punishing the petty offence.

Paragraph 3
General provisions — Articles 132-16 to 132-16-2

ARTICLE 132-16

Theft, extortion, blackmail, fraudulent obtaining and breach of trust are considered to be the same offence in respect of the rules governing recidivism.

ARTICLE 132-16-1

(Inserted by Act no. 1998-468 of 17 June 1998 Article 10 Official Journal of 18 June 1998)

The misdemeanours of sexual aggression and sexual assault are considered as the same offence for the purpose of the rules governing recidivism.

ARTICLE 132-16-2

(Inserted by Act no. 2003-495 of 12 June 2003 art. 4 III Official Journal of 13 June 2003)

For the purposes of racividism, the misdemeanours of manslaughter and the incapacitation of another person occasioned when driving a motor vehicle, provided for by articles 221-6-1, 222-19-1 and 222-20-1 are considered to be the same offence.

For the purposes of recividism, the misdemeanours provided by articles L.221-2, L.234-1, L.235-1 and L.413-1 of the Traffic Code are considered to be the same offence. The are also assimilated to the misdemeanours mentioned in the preceding paragraph when they constitute the second element in the recidivism.

Subsection 3
The imposition of penalties — Articles 132-17 to 132-22

ARTICLE 132-17

No penalty may be enforced where the court has not expressly imposed it.

The court may decide to impose only one of the penalties applicable to the offence before it.

ARTICLE 132-18

Where an offence is punished by criminal imprisonment or criminal detention for life the court may impose criminal imprisonment or detention for a term, or imprisonment for not less than two years.

Where an offence is punished by a determinate sentence of criminal imprisonment or criminal detention, the court may impose a sentence of criminal imprisonment or detention shorter than the maximum, or a sentence of ordinary imprisonment of not less than a year.

ARTICLE 132-19

Where an offence is punished by a sentence of imprisonment, the court may impose a sentence of imprisonment for less than the maximum term.

The court may only impose an immediate custodial sentence for a misdemeanour on giving special grounds for such a choice of penalty.

ARTICLE 132-20

Where an offence is punished by a fine the court may impose a lower fine than the sum specified.

ARTICLE 132-21

The forfeiture of all or part of the civic, civil and family rights enumerated under Article 131-26 does not follow automatically from a conviction, notwithstanding any provision to the contrary.

A person affected by a prohibition, forfeiture or incapacity automatically resulting from a conviction by reason of special provisions may be wholly or partly released from the prohibition, forfeiture or incapacity by the initial conviction or a later judgment. This applies even in relation to the length of the sanction, pursuant to conditions determined by the Code of Criminal Procedure.

ARTICLE 132-22

The public prosecutor, the juge d'instruction or the trial court may require the parties, any public administration, financial institution or persons holding funds for the defendant, to communicate relevant information of a financial or fiscal nature, without confidentiality being raised as an objection.

Subsection 4
The safety period — Article 132-23

ARTICLE 132-23

In the case of an immediate custodial sentence for a term of ten years or more imposed for offences specifically set out by statute, the convicted person is not entitled to benefit from provisions governing the suspension or division of the penalty, posting to a non-custodial assignment, temporary leave, semi-detention or parole, during the safety period.

The safety period is half that of the custodial sentence or, in case of criminal imprisonment for life, eighteen years. The Cour d'assises or trial court may nevertheless by a special decision either extend this period up to two-thirds of the prison sentence or up to twenty-two years in the case of imprisonment for life, or may decide to reduce these periods.

In all the other cases, where it imposes a non-suspended custodial sentence exceeding five years, the court may determine a safety-period during which the convicted person may not be granted the benefit of any one of the modes of execution of penalties referred to under the first paragraph. The length of this safety period may not exceed two-thirds of the penalty imposed, or twenty-two years in the event of life imprisonment.

Reductions of sentences granted during the safety period will be deducted only from the portion of the penalty exceeding this period.

SECTION II
PERSONALIZATION OF PENALTIES — Articles 132-25 to 132-24

ARTICLE 132-24

Within the limits fixed by Statute, the court imposes penalties and determines their regime according to the circumstances and the personality of the offender.

When the court imposes a fine, it determines its size taking into account the income and expenses of the perpetrator of the offence.

Subsection 1
Semi-detention — Articles 132-25 to 132-26-3

ARTICLE 132-25

(Act no. 2004-204 of 9 March 2004 art. 185 II, III, V; Official Journal of 10 March 2004, in force 1 January 2005)

Where a trial court imposes a custodial sentence of one year's imprisonment or less, it may determine that the sentence is to be served in semi-detention where the convicted person establishes that he has a trade or profession, or regularly attends a course of education or a professional training course, or apprenticeship or temporary employment with a view to social rehabilitation, or that he plays a vital role in the life of his family, or need to undergo medical treatment.

In the cases provided for in the previous paragraph, the court may also determine that the prison sentence be carried out under the system of external placement.

Where the convicted person has been placed or kept in detention, under the provisions of article 397-4 of the Code of Criminal Procedure, the court applying the present article may order that the semi-detention or external placement be provisionally imposed.

ARTICLE 132-26

(Act no. 2004-204 of 9 March 2004 art. 185 II, III, V; Official Journal of 10 March 2004, in force 1 January 2005)

A convicted person who has been granted the benefit of semi-detention is obliged to enter the penitentiary institution pursuant to the conditions determined by the penalty enforcement judge, according to the time necessary for

him to carry out his profession, course of education, professional training, participation in family life or medical treatment in consideration of which he was granted the regime of semi-detention. He is obliged to remain within the establishment during the days when his external obligations are interrupted, whatever the reason for the interruption.

A convicted person who benefits from external placement is employed outside the penitentiary institution, and carries out work monitored by the authorities.

The trial court may also impose the conditions provided for by articles 132-43 to 132-46 on a convicted person who benefits from semi-detention or external placement.

ARTICLE 132-26-1

(Inserted by Act no. 2004-204 of 9 March 2004 article 185-VI Official Journal of 10 March 2004, in force 1 January 2005)

Where a trial court imposes a custodial sentence of one year's imprisonment or less, it may rule that the prison sentence is to be replaced by placement under electronic surveillance where the convicted person establishes that he has a trade or profession, or regularly attends a course of education or a professional training course or temporary employment with his social rehabilitation in mind, or that he plays a vital role in the life of his family, or needs to undergo medical treatment.

A decision to place a defendant under electronic surveillance may only be taken with the consent of the defendant who has first been informed that he may request for assistance from his advocate, where appropriate the latter being automatically designated by the president of the bar council, before giving his consent.

If the defendant is an unemancipated minor, this decision may only be taken with the consent of those holding parental authority over him. Where the convicted person has been placed or kept in detention pursuant to the terms of article 397-4 of the Code of Criminal Procedure, a trial court applying the provisions of the previous paragraph may order that placement under electronic surveillance be provisionally imposed.

ARTICLE 132-26-2

(Inserted by Act no. 2004-204 of 9 March 2004 article 185-VI Official Journal of 10 March 2004, in force 1 January 2005)

For the convicted person, placement under electronic surveillance entails prohibition to leave his residence or any other place determined by the penalty enforcement judge outside such periods as the judge prescribes. The periods and places are determined taking into account: the fact that the convicted person has a trade or profession; that he regularly attends a course of education or a professional trainirg course, or has temporary employment with a view to his social rehabilitation; his participation in the life of his family; his need to undergo medical treatment. Placement under electronic surveillance also entails for the convicted person the requirement to respond to the summons of any public authority designated by the penalty enforcement judge.

ARTICLE 132-26-3

(Inserted by Act no. 2004-204 of 9 March 2004 article 185-VI Official Journal of 10 March 2004, in force 1 January 2005)

The trial court may also impose the measures provided for by articles 132-43 to 132-46 on a convicted person who has been placed under electronic surveillance.

Subsection 2
Division of penalties — Articles 132-27 to 132-28

ARTICLE 132-27

Where compelling medical, family, professional or social reasons are established, the court may decide that a custodial sentence of a year or less imposed for a misdemeanour is served in instalments over a period not exceeding three years. None of those instalments may be shorter than two days.

ARTICLE 132-28

(Act no. 2003-495 of 12 June 2003 art. 5 V Official Journal of 13 June 2003)

Where compelling medical, family, professional or social reasons are established, the court may decide that a fine imposed for a misdemeanour or a petty offence will be paid by instalments over a period not exceeding three years. The same applies where a natural person is sentenced to pay day-fines or his driving licence is suspended; but the suspension of a driving licence may not be so divided when imposed for misdemeanours or petty offences for which the law or regulation precludes this penalty being limited to driving outside professional activities.

Subsection 3
Ordinary suspension — Articles 132-30 to 132-29

ARTICLE 132-29

A court imposing a sentence may order it to be suspended in the cases and pursuant to the conditions set out hereafter.

After the imposition of a suspended sentence, the presiding judge of the court shall caution the convicted person, where he is present, of the consequences following another conviction for a new offence committed within the period set out under articles 132-35 and 132-37

Paragraph 1

Conditions for the granting of ordinary suspension — Articles 132-30 to 132-34

ARTICLE 132-30

(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 into force 1 January 2002)

An ordinary suspension may only be granted to a natural person in respect of a felony or misdemeanour where the defendant has not been sentenced to a custodial sentence for an ordinary felony or misdemeanour in the five years prior to that offence.

A suspended sentence may only be granted to a legal person where it has not been sentenced to a fine in excess of €60,000 for an ordinary felony or misdemeanour within the same period.

ARTICLE 132-31

Ordinary suspension is applicable to natural persons for custodial sentences not exceeding five years, for a fine or day-fine, for the penalties entailing forfeiture or restriction of rights enumerated under article 131-6 other than confiscation, and for the additional penalties enumerated under article 131-1 other than confiscation, or of the mandatory closure of an establishment and public notice of the sentence.

An ordinary suspension may only be granted for a custodial sentence where the defendant was sentenced to a penalty other than criminal or ordinary imprisonment during the period set out under article 132-30.

A court may decide that the suspension of the custodial sentence is granted in part only and for a period, subject to a maximum of five years, which it determines.

ARTICLE 132-32

An ordinary suspension is applicable to legal persons in respect of fines and for the penalties enumerated in 2°, 5°, 6° and 7° of Article 131-39.

ARTICLE 132-33

(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 into force 1 January 2002)

Ordinary suspension may not be granted to a natural person for a penalty for a petty offence where the defendant was sentenced to a custodial sentence for an ordinary felony or misdemeanour in the five years prior to the offence.

An ordinary suspension may only be granted to a legal person where it has not been sentenced to a fine of more than €15,000 for an ordinary felony or misdemeanour within the same period.

ARTICLE 132-34

Ordinary suspension is applicable to natural persons for the penalties entailing forfeiture or restriction of rights enumerated under article 131-14 other than confiscation, for the additional penalties enumerated under 1°, 2° and 4° of article 131-16, as well as for the additional penalty set out by the first paragraph of article 131-17. It is also applicable to fines imposed for petty offences of the fifth class.

Ordinary suspension is applicable to legal persons for prohibition to draw chequas or to use payment cards undar articles 131-42 and 131-43. It is also applicable to fines imposed for petty offences of the fifth class.

Paragraph 2

Consequences of ordinary suspension — Articles 132-35 to 132-39

ARTICLE 132-35

A sentence imposed for felony or a misdemeanour which has been suspended is deemed non-existent where the convicted person who has benefited from a suspension has not within a period of five years of that sentence committed any ordinary felony or misdemeanour leading to an immediate sentence entailing the revocation of the suspension.

ARTICLE 132-36

Any new custodial sentence revokes the suspension granted previously, irrespective of the nature of the initial sentence.

Any new sentence imposed upon a natural or legal person other than a custodial sentence revokes the suspension granted previously for another sentence other than a custodial sentence.

ARTICLE 132-37

A for a petty offence that was imposed and suspended is deemed non-existent where the convicted person who has benefited from such a suspension does not within a period of two years commit a fifth-class petty offence leading to a new immediate sentence entailing revocation pursuant to the conditions set out under article 132-36.

ARTICLE 132-38

Where an ordinary suspension is revoked, the first penalty is served without being allowed to run concurrently with the second.

However, the court may pronounce by a special and reasoned decision that the sentence it imposes does not revoke the suspended sentence previously granted, or that it only revokes the suspension in part and for the length of time specified. It may also restrict the scope of the revocation exemption to one or more of the suspended sentences previously granted.

ARTICLE 132-39

Where the benefit of an ordinary suspension was granted for only a part of the penalty, the sentence is deemed non-existent in respect of all its elements if revocation of the suspension has not taken place, a day-fine or fine or non-suspended part of the fine remaining due.

Subsection 4
Suspension with probation — Articles 132-40 to 132-53

Paragraph 1
Conditions for the granting of suspension with probation — Articles 132-40 to 132-42

ARTICLE 132-40

(Act no. 2003-1119 of 26 November 2003 Article 78 I Official Journal of 27 November 2003
(Act no. 2004-204 of 9 March 2004 article 175 I Official Journal of 10 March 2004)

A court imposing a custodial sentence may order its suspension under the conditions set out hereafter, the convicted natural person being placed on probation.

After the imposition of a suspended custodial sentence with probation, the president of the court shall notify the convicted person, where he is present, of the obligations he must heed during this period while his sentence is suspended and he is on probation and warns him of the consequences of conviction for any new offence committed during the probation period or of any violation of the supervision measures or special obligations imposed on him. The president shall inform him of the possibility of having his sentence deemed non-existent if he behaves satisfactorily.

Where the court imposes as an additional penalty banishment from French territory for any period not exceeding ten years, this is suspended during such time as the person is placed on probation, subject to the provisions of the first paragraph.

ARTICLE 132-41

Suspension with probation is applicable to custodial sentences not exceeding five years imposed for an ordinary felony or misdemeanour.

Wherever a court has not ordered the provisional enforcement of a sentence, a probation order is only applicable from the day when the sentence becomes enforceable pursuant to the conditions set out under the second paragraph of article 708 of the Code of Criminal Procedure.

ARTICLE 132-42

*(Act no. 2004-204 of 9 March 2004 article 175 II Official Journal of 10 March 2004, in force 31 December 2006****)*

A criminal court shall determine the length of the probation order, which must be at least twelve months and may not exceed three years.

It may decide this suspension will only apply to part of a custodial sentence, the length of which it shall determine.

Paragraph 2
The regime of suspension with probation — Articles 132-43 to 132-46

ARTICLE 132-43

During the probation period, the convicted person must undergo the supervision measures set out in article 132-44 and any particular obligations set out in article 132-45 that have been specially imposed on him. The convicted person may also be granted assistance designed to promote his social reintegration.

These measures and particular obligations cease to be applicable and the probation period is suspended during the time when the convicted person is incarcerated. The probation period is also suspended during the time when the convicted person performs his national service.

ARTICLE 132-44

(Act no. 2000-516 of 15 June 2000 Article 124 Official Journal of 16 June 2000)

The supervision measures to which the convicted person is subject are the following:

1° to attend when required to do so by the penalty enforcement judge or the designated social worker;

2° to receive visits by the social worker and to provide him with such information or documents as are necessary to verify his means of existence and the fulfilment of his obligations;

3° to inform the social worker of any change of employment;

4° to inform the social worker of any changes of residence or of any journey in excess of fifteen days and to account for his return;

5° to obtain prior authorisation from the penalty enforcement judge for any journey abroad and, where it is liable to obstruct the fulfilment of his obligations, for any change of employment or residence.

ARTICLE 132-45

(Act no. 2003-495 of 12 June 2003 art. 6 IV Official Journal of 13 June 2003)

A trial court or a penalty enforcement judge may specially impose on the convicted person the duty to fulfil one or more of the following obligations:

1° to exercise a professional activity or to follow a course of education or professional training;

2° to establish his residence *in a determined place*;

3° to undergo medical examination, treatment or medical care, and where necessary hospitalisation;

4° to demonstrate that he is contributing to family expenses or is regularly paying any alimony that he may owe;

5° to *make good, in all* or part, according to his ability to pay, the damage caused by the offence, even in the absence of a court decision on civil liability;

6° to demonstrate that he is paying according to his ability to pay the amounts due to the public Treasury in consequence of the sentence;

7° to abstain from driving certain vehicles determined by the category of driving licences provided for under the Traffic Code;

8° not to engage in professional activity in the exercise of which or on the occasion of which the offence was committed;

9° not to appear in any specially designated places;

10° not to engage in betting, especially in betting shops;

11° not to frequent public houses;

12° not to keep company with certain convicted persons, especially other offenders or accomplices to the offence;

13° to abstain from contacting certain persons, especially with the victim of the offence;

14° not to hold or carry any weapon;

15° where the offence was committed while driving a motor vehicle, the completion of a road safety awareness course at the offender's expense;

16° to abstain from broadcasting any audiovisual work which he has produced or co-produced and which deals, in part or in whole, with the offence committed, and to abstain from any public appearance relating to this offence; the provisions of the present article are only applicable in cases of conviction for felonies or offences relating to wilful attacks on life, sexual aggressions or sexual assault;

17° to deliver his children to those who have been granted custody of them by a legal ruling;

18° to complete a citizenship course.

ARTICLE 132-46

The objective of an assistance measure is to support the convicted person's efforts towards social reintegration.

These measures take the form of social, and if need be, financial assistance, and are implemented by the probation service with the participation, where appropriate, of any private or public institution.

Paragraph 3

Revocation of suspension with probation in the event of a new offence

Articles 132-47 to 132-51

ARTICLE 132-47

(Act no. 1992-1336 of 16 December 1992 Articles 350 and 373 Official Journal of 23 December 1992 into force 1 March 1994)

(Act no. 2004-204 of 9 March 2004 article 183 Official Journal of 10 March 2004, in force 1 January 2005)

Suspension with probation may be revoked by the trial court pursuant to the conditions set out under article 132-48.

It may also be revoked by the penalty enforcement judge, pursuant to the conditions set out under the Code of Criminal Procedure, where the convicted person has not complied with supervision measures or any particular duties that have been imposed upon him. Any violation of these measures and duties committed after the suspension with a probation has became enforceable may cause the revocation of the suspension. However, revocation may not be ordered before a conviction has become final. If this revocation is ordered before the conviction has become final, it becomes null and void where the conviction is later invalidated or annulled.

ARTICLE 132-48

(Act no. 1992-1336 of 16 December 1992 Articles 351 and 373 Official Journal of 23 December 1992 into force 1 March 1994)

(Act no. 2003-1119 of 26 November 2003 Article 79 II Official Journal of 27 November 2003)

Where the convicted person commits an ordinary felony or misdemeanour followed by a non-suspended custodial sentence during a probation period, the trial court may order the total or partial revocation of any suspension or suspensions granted previously, after hearing the penalty enforcement judge's opinion. This revocation may not be ordered for offences committed before the suspended sentence became final.

Banishment from French territory is automatically enforceable in cases of suspension with probation under the conditions provided for in the present article.

ARTICLE 132-49

A partial revocation of the suspension may be ordered only once.

The decision ordering a partial revocation of the suspension does not put an end to the probation regime and does not attach to the sentence the consequences of an immediate sentence.

ARTICLE 132-50

Where a court orders the execution of the prison sentence to be served in its entirety and the suspension with probation was granted after a earlier sentence already imposed subject to the same conditions, the first penalty is

enforced first unless, by a special and reasoned decision, the court grants the convicted person a dispensation from all or part of its execution.

ARTICLE 132-51

(Act no. 2000-516 of 15 June 2000 Article 124 Official Journal of 16 June 2000)

Where a court orders the revocation of a suspension in full or in part, it may order the convicted person to be incarcerated pursuant to a special and reasoned decision, which is enforceable provisionally.

Paragraph 4
Consequences of a suspension with probation — Articles 132-52 to 132-53

ARTICLE 132-52

A suspended sentence with probation is deemed non-existent where the convicted person has not been the subject a decision ordering the enforcement of the totality of the prison sentence.

Where the benefit of the suspension with probation has bean granted for only part of the prison sentence, the sentence is deemed non-existent in all its constituent elements where no revocation of the suspension is ordered pursuant to the conditions set out under the previous paragraph.

ARTICLE 132-53

(Act no. 2004-204 of 9 March 2004 article 183 X Official Journal of 10 March 2004, in force 1 January 2005)

Where suspension with probation has been granted after a first sentence already imposed with the same benefit, this first conviction is deemed non-existent if the second is deemed non-existent pursuant to the conditions and time-limits set out under the first paragraph of article 132-52 above or under article 744 of the Code of Criminal Procedure.

Subsection 5
Suspension with the obligation to perform community service work — Articles 132-54 to 132-57

ARTICLE 132-54

(Act no. 2004-204 of 9 March 2004 article 177 I, article 178 Official Journal of 10 March 2004, in force 1 January 2005)

A court may, under the conditions and according to the terms set out under articles 132-40 and 132-41, provide that the convicted person shall perform community service for the benefit of a public body or that of an association accredited to implement community service work, for a period of forty to two hundred and ten hours.

The court may rule that the obligations imposed on the convicted person will remain in place after the completion of the community service work, within a time period which may not exceed twelve months.

Suspension with the obligation to perform community service work may not be ordered where the defendant rejects this or was not present at the hearing.

The terms of application of the duty to perform community service are governed by the provisions of articles 131-22 to 131-24. On completing the whole of the community service to be performed, the sentence is deemed non-existent, unless the provisions of the last paragraph of article 132-55 have been applied.

ARTICLE 132-55

During the period, determined by the court, within which the community service must be completed, a convicted person must, in addition to carrying out the prescribed work, satisfy the following supervision measures:

1° to obey summons issued by the penalty enforcement judge or the designated social worker;

2° to undergo any medical examination to be carried out prior to the enforcement of the sentence, designed to establish whether he suffers from any ailment dangerous for other workers, and whether he is medically fit for the work for which he is being considered;

3° to justify the grounds for any change of employment or residence where such changes obstruct the enforcement of the community service work according to the terms decided;

4° to obtain prior authorisation of the penalty enforcement judge for any journey which would obstruct the completion of the community service work according to the terms laid down;

5° to receive the visits by the social worker and to provide him with any document or information relating to the serving of the sentence.

He must also fulfil any particular obligations set out under article 132-45 which the court has specially imposed upon him, within a time period determined by the court which may not exceed twelve months.

ARTICLE 132-56

Suspension with the obligation to perform community service work follows the same rules as those prescribed for suspension with probation, except for those referred to under the second paragraph of article 132-42 and under the second paragraph of article 132-52. The obligation to perform community service is assimilated to a particular obligation of the suspension with probation and the period provided for by article 131-22 is assimilated to the probation period.

ARTICLE 132-57

(Act no. 1992-1336 of 16 December 1992 Articles 352 and 373 Official Journal of 23 December 1992 into force 1 March 1994)

(Act no. 1995-125 of 8 February 1995 Article 45 Official Journal of 9 February 1995)

Any court having imposed for an ordinary misdemeanour a sentence including a custodial sentence not exceeding six months may, where that sentence is no longer appealable by the convicted person, order this sentence to be suspended and that the convicted person shall perform in the interest of a local authority, a public body or an association, unpaid community service work for a period not less than forty hours or more than two hundred and ten hours. The enforcement of the obligation to perform community service work is subject to the provisions of the third paragraph of article 132-54 and articles 132-55 and 132-56. The penalty enforcement judge may also rule that the convicted person will serve a day-fine sentence, pursuant to the provisions of articles 131-5 and 131-25.

Subsection 6
Exemption and deferment of penalties - Common provisions — Articles 132-59 to 132-58

ARTICLE 132-58

In the case of a misdemeanour or, except in relation to the matters considered under articles 132-63 to 132-65, and in the case of a petty offence, the court, after finding the defendant guilty and ordering, if need be, the confiscation of dangerous or noxious objects, may either exempt the defendant from any other sentence, or defer sentence in the cases and pursuant to the conditions set out in the following articles.

At the same time as it decides on the defendant's guilt, the court rules, if necessary, on any civil claim for damages.

Paragraph 1
Exemption from penalty — Article 132-59

ARTICLE 132-59

An exemption from penalty may be granted where it appears that the reintegration of the guilty party has been achieved, that the damage caused has been made good and that the public disturbance generated by the offence has ceased.

A court granting an exemption from penalty may rule that its decision shall not be registered in the criminal records.

Exemption from penalty does not extend to payment of the costs of the proceedings.

Paragraph 2
Ordinary deferment — Articles 132-60 to 132-62

ARTICLE 132-60

A court may defer sentence where it appears that the reintegration of the guilty party is in the process of being achieved, that the damage caused is in the process of being repaired, and where the public disturbance generated by the offence will cease.

In this case, it determines in its decision the date when it will pronounce sentence.

A deferment may only be ordered where the defendant, in the case of a natural person, or his representative, in the case of a legal person, is present at the hearing.

ARTICLE 132-61

At a reconvened hearing, the court may either exempt the defendant from penalty, or impose the penalty set out by law, or further defer pronouncement of sentence pursuant to the conditions and according to the terms set out under article 132-60.

ARTICLE 132-62

The decision with respect to the penalty must be made no later than a year after the first deferment decision.

Paragraph 3
Deferment with probation — Articles 132-63 to 132-65

ARTICLE 132-63

Where a defendant who is a natural person is present at the hearing, a court may defer sentence pursuant to the conditions and according to the terms as set out under article 132-60 by placing him under probation for a term which shall not exceed a year.

Such a decision is enforceable provisionally.

ARTICLE 132-64

Deferments with probation follow the probation regime as set out under articles 132-43 to 132-46.

ARTICLE 132-65

(Act no. 2004-204 of 9 March 2004 article 180 Official Journal of 10 March 2004, in force 1 January 2005)

At the reconvened hearing the court may, taking into account the offender's behaviour, either exempt him from penalty, or pass sentence as set out by law, or further defer sentence pursuant to the conditions and according to the terms of article 132-63.

Thirty days before the reconvened hearing, the penalty enforcement judge may, with the public prosecutor's

consent, himself exempt the offender from penalty, following a hearing at which both sides are heard, held in accordance with the provisions of article 712-6 of the Code of Criminal Procedure.

The decision regarding the penalty must be made no later than a year after the first deferment decision.

Paragraph 4
Deferment with injunction — Articles 132-66 to 132-70

ARTICLE 132-66

In the cases provided for by statutes or regulations which sanction the violation of specific obligations, a court deferring sentence may give the convicted physical or legal person an injunction to observe one or more prescriptions provided by the statutes or regulations concerned.

The court decrees a time-limit for the enforcement of these prescriptions.

ARTICLE 132-67

The court may reinforce the injunction with a coercive fine where this is provided for by the relevant Statutes or regulations. In such a case, it fixes the rate of the coercive fine and the maximum period for it to apply in accordance with the limits set out by statutes or regulations.

A coercive fine ceases to run from when the prescriptions contained in the injunction have been executed.

ARTICLE 132-68

A deferment with injunction may only be granted once. It may be ordered even where the defendant natural person or the representative of the defendant legal person is not present.

The decision may be declared provisionally enforceable in all cases.

ARTICLE 132-69

At the adjourned hearing the court may either exempt the guilty party from any penalty or impose the penalties set out under the statute or regulation, when the prescriptions enumerated by the injunction have been executed within the period determined

Where the prescriptions have been executed belatedly, the court calculates if need be the amount of the coercive fine and imposes the penalties set out under the law or regulation.

Where the prescriptions were not observed, the court calculates if need be the amount of the coercive fine, imposes the penalties and may in addition order the execution of these prescriptions to be prosecuted at the convicted person's expense pursuant to the conditions laid down by the law or regulation.

Unless otherwise provided, the decision on the penalty is made no later than one year after the first deferment decision.

ARTICLE 132-70

(Act no. 2004-204 of 9 March 2004 article 177 I, article 198 V; Official Journal of 10 March 2004, in force 1 January 2005)

The rate of the coercive fine determined by the deferment decision may not be modified.

For the calculation of the coercive fine, the court considers the absence of execution or of the delay in execution of the prescriptions and takes into account the occurrence of events, if any, not attributable to the delinquent.

A coercive fine does is not enforceable by means of the provisions governing judicial enforcement of public debts.

SECTION III
DEFINITION OF CERTAIN CIRCUMSTANCES ENTAILING THE AGGRAVATION OF PENALTIES — Articles 132-71 to 132-77

ARTICLE 132-71

An organised gang within the meaning of the law is any group formed or association established with a view to the preparation of one or more criminal offences, preparation marked by one or more material actions.

ARTICLE 132-72

Premeditation is the intention formed before an act to commit a given felony or misdemeanour.

ARTICLE 132-73

Breaking in consists of forcing, damaging or destroying any closing device or any kind of enclosure. The use of false keys, unlawfully obtained keys or of any instrument which may be fraudulently employed to operate a closing device without forcing or damaging it is assimilated to breaking in.

ARTICLE 132-74

Climbing in is the act of entering any given premises, either by climbing over an enclosure, or by passing through any aperture not designed to be used as an entrance.

ARTICLE 132-75

(Act no. 1996-647 of 22 July 1996 Article 19 Official Journal of 23 July 1996)

A weapon is any article designed to kill or wound.

Any other article liable to be dangerous to persons is assimilated to a weapon from when it is used to kill, wound or threaten, or intended by its bearer to be used to kill, wound or threaten.

Any article which looks sufficiently like a weapon defined in the first paragraph to cause confusion and is used to threaten kill or wound, or is intended to threaten kill or wound by the person who bears it, is assimilated to a weapon.

The use of an animal to kill, wound or threaten is assimilated to the use of a weapon. Where the owner of the animal is convicted or remains unidentified, a court may decide to hand the animal over to a registered public utility institution for the protection of animals, which will be at liberty to dispose of it.

ARTICLE 132-78

(Act no. 2004-204 of 9 March 2004 article 12 I Official Journal of 10 March 2004)

Where the law so provides, a person who has attempted to commit a felony or a misdemeanour is exempted from penalty if, having alerted the legal or administrative authorities he has enabled the offence to be prevented and, where relevant, to identify the other perpetrators or accomplices.

Where the law so provides, the length of the custodial sentence incurred by a person who has committed a felony or a misdemeanour, is reduced if, by alerting the legal or administrative authorities, the convicted person has enabled the offence to be ended, damage resulting from the offence to be prevented, or the perpetrators or accomplices to be identified.

The provisions of the previous paragraph are also applicable where the person has either made it possible to prevent the commission of a related offence of the same type as the felony or misdemeanour for which he has been prosecuted, or to end the commission of the offence, or to prevent it causing damage, or to enable its perpetrators or accomplices to be identified.

No conviction may be returned solely on the basis of statements made by persons who have been the subject of the provisions of the present article.

ARTICLE 132-79

(Inserted by act no. 2004-575 of 21 June 2004 article 37 Official Journal of 22 June 2004)

Where a means of encryption, in the sense of article 29 of act no. 2004-575 of 21 June 2004 used to ensura confidentiality in the digital economy has been used to prepare or commit a felony or a misdemeanour, or to facilitate the preparation of commission of a felony or a misdemeanour, the maximum prison sentence incurred is raised as follows:

1° where the offence is punished by thirty years' imprisonment, this is increased to life imprisonment;

2° where the offence is punished by twenty years' imprisonment, this is increased to thirty;

3° where the offence is punished by fifteen years' imprisonment, this is increased to twenty;

4°where the offence is punished by ten years' imprisonment, this is increased to fifteen;

5° where the offence is punished by seven years' imprisonment, this is increased to ten;

6° where the offence is punished by five years' imprisonment, this is increased to seven;

7° where the offence is punished by a maximum of three years' imprisonment, this is doubled.

The provisions of the present article are, however, not applicable to the perpetrator of or the accomplice to an offence who, at the request of the judicial or administrative authorities, has provided them with an unencrypted version of the coded messages and the secret keys necessary to decipher them.

ARTICLE 132-76

(Inserted by Act no. 2003-88 of 3 February 2003 Art. 1 Official Journal of 4 February 2003)
(Act no. 2004-204 of 9 March 2004 article 12 I, article 38 Official Journal of 10 March 2004)

Where provided for by law, the penalties incurred for a felony or a misdemeanour are increased when the offence is committed because of the victim's actual or supposed membership or non-membership of a given ethnic group, nation, race or religion.

The aggravating circumstances defined in the first paragraph are established when the offence is preceded, accompanied or followed by written or spoken words, images, objects or actions of whatever nature which damage the honour or the reputation of the victim, or a group of persons to which the victim belongs, on account of their actual or supposed membership or non-membership of a given ethnic group, nation, race or religion.

ARTICLE 132-77

(Inserted by Act no. 2003-239 of 18 March 2003 Art. 47 Official Journal of 19 March 2003)

In the cases provided for by law, the penalties incurred for a felony or a misdemeanour are increased where the offence is committed because of the victim's sexual orientation.

The aggravating circumstances defined in the first paragraph are established when the offence is preceded, accompanied or followed by written or spoken words, images, objects or actions of whatever nature which damage the honour or the reputation of the victim, or a group of persons to which the victim belongs, on account of their actual or supposed sexual identity.

CHAPTER III

THE EXTINCTION OF PENALTIES AND THE ERASURE OF CONVICTIONS Articles 133-2 to 133-1

ARTICLE 133-1

(Act no. 1992-1336 of 16 December 1992 Articles 353 and 373 Official Journal of 23 December 1992 into force 1 March 1994)

The death of a convicted person or the dissolution of the legal person, except where that dissolution is ordered by a criminal court, as well as pardons and amnesty, preclude or interrupt the enforcement of the penalty. However, fines and judicial costs may be recovered and confiscations carried out after the death of the convicted natural person, and after the dissolution of the legal person up until the process of liquidation has been completed.

Where a sentence is time-barred it may not be enforced.
Rehabilitation wipes a conviction out.

SECTION I
LIMITATION — Articles 133-2 to 133-6

ARTICLE 133-2
Subject to the provisions of article 213-5 the penalties imposed for a felony are barred by limitation after twenty years have passed from the date when the conviction became final.

ARTICLE 133-3
A sentence imposed for a misdemeanour is barred by limitation after five years have passed from the date when the conviction became final.

ARTICLE 133-4
(Act no. 2002-1576 of 31 December 2002)
The penalties imposed for a petty offence are barred by limitation after three years have passed from the dete when the conviction became final.

ARTICLE 133-5
Persons convicted by contumacy or by default whose sentences are time-barred are not allowed to purge the contumacy or enter an opposition.

ARTICLE 133-6
Civil obligations resulting from a final criminal decision are barred by limitation according to the rules set out in the Civil Code.

SECTION II
OF PARDON — Articles 133-7 to 133-8

ARTICLE 133-7
A pardon only entails an exemption in respect of the enforcement of the sentence.

ARTICLE 133-8
A pardon does not defeat the victim's right to obtain compensation for the damage caused by the offence.

SECTION III
OF AMNESTY — Articles 133-9 to 133-11

ARTICLE 133-9
An amnesty erases the sentences imposed. It carries the remission of all penalties without entailing any restitution. It restores to the perpetrator or accomplice to an offence the benefit of a suspension which may have been granted for a previous sentence.

ARTICLE 133-10
An amnesty is without prejudice to any third party.

ARTICLE 133-11
Any person who, in the exercise of his functions, has knowledge of criminal convictions, professional or disciplinary sanctions or prohibitions, forfeitures and incapacities erased by an amnesty, is prohibited from recalling their existence in any way whatsoever or to allow an indication of them to remain in any document. However, the original copy of judgments and judicial decisions are excluded from this prohibition. Furthermore an amnesty does not preclude the enforcement of a publication awarded as a compensation.

SECTION IV
REHABILITATION — Articles 133-12 to 133-17

ARTICLE 133-12
Any person punished by a sentence for a felony, misdemeanour or petty offence is entitled, either to a rehabilitation as of right pursuant to the conditions set out in this article, or to a rehabilitation order made pursuant to the conditions contained in the Code of Criminal Procedure.

ARTICLE 133-13
Rehabilitation is acquired as of right by a convicted natural person who has not incurred a new sentence for a felony or misdemeanour within the time-limits specified below:
1° for a sentence to pay a fine or a day-fine, after a period of three years from the date of the payment of the fine or that of the global amount of the day-fines, from the expiry of the enforcement by imprisonment or the incarceration period set out under article 131-25, or the limitation period;
2° for a single sentence either to serve an imprisonment not exceeding one year, or a penalty other than criminal imprisonment or criminal detention, imprisonment, fine or day-fine, after a period from either the enforcement of that sentence, or the expiry of the limitation period;

3° for a single sentence to an imprisonment not exceeding ten years or for a multiple custodial sentence the total of which does not exceed five years, after a period of ten years from either the expiry of the sentence served, or the expiry of the limitation period.

ARTICLE 133-14

Rehabilitation is acquired as of right by a convicted legal person who has not incurred a new sentence for a felony or misdemeanour within the time-limits specified below:

1° for a sentence to pay a fine, after a period of five years from the day of the payment of the fine or from the expiry of the limitation period;

2° for a sentence other than a fine or dissolution, after a period of five years from either the execution of the penalty, or the expiry of the limitation period.

ARTICLE 133-15

Penalties which have been allowed to run concurrently are considered as a single sentence for the application of the provisions of articles 133-13 and 133-14.

ARTICLE 133-16

(Act no. 1998-468 of 17 June 1998 Article 41 Official Journal of 18 June 1998)

Rehabilitation has the same consequences as those set out under articles 133-10 and 133-11. It erases any incapacity or forfeiture resulting from a sentence.

ARTICLE 133-17

The non-contentious remission of a penalty is equivalent to its enforcement for the application of the rules governing rehabilitation.

ARTICLE 211-1

Genocide occurs where, in the enforcement of a concerted plan aimed at the partial or total destruction of a national, ethnic, racial or religious group, or of a group determined by any other arbitrary criterion, one of the following actions are committed or caused to be committed against members of that group:

- wilful attack on life;
- serious attack on psychological or physical integrity;
- subjection to living conditions likely to entail the partial or total destruction of that group;
- measures aimed at preventing births;
- enforced child transfers.

Genocide is punished by criminal imprisonment for life.

The first two paragraphs of article 132-23 governing the safety period apply to the felony provided for by the present article.

ARTICLE 212-1

Deportation, enslavement or the massive and systematic practice of summary executions, abduction of persons followed by their disappearance, of torture or inhuman acts, inspired by political, philosophical, racial or religious motives, and organised in pursuit of a concerted plan against a section of a civil population are punished by criminal imprisonment for life.

The first two paragraphs of article 132-23 governing the safety period are applicable to felonies provided for by the present article.

ARTICLE 212-2

Where they are committed during war time in execution of a concerted plan against persons fighting the ideological system in the name of which are perpetrated crimes against humanity, the actions referred to under article 212-1 are punished by criminal imprisonment for life.

The first two paragraphs of article 132-23 governing the safety period are applicable to felonies set out under the present article.

ARTICLE 212-3

Participation in a group formed or in an agreement established with a view to the preparation, as demonstrated by one or more material actions, of any of the felonies defined by articles 211-1, 212-1 and 212-2 is punished by criminal imprisonment for life.

The first two paragraphs of article 132-23 governing the safety period are applicable to the felony set out under the present article.

CHAPTER III
COMMON PROVISIONS — Articles 213-1 to 213-5

ARTICLE 213-1

Natural persons convicted of the offences set out under the present Subtitle also incur the following penalties:
1° forfeiture of civic, civil and family rights, pursuant to the conditions set out under article 131-26;
2° prohibition to hold public office, pursuant to the conditions set out under article 131 -27;
3° area banishment, pursuant to the conditions set out under Article 131-31;
4° confiscation of any or all of their assets.

ARTICLE 213-2

(Act no. 1993-1027 of 24 August 1993 Article 33 Official Journal of 29 August 1993)
(Act no. 1998-349 of 11 Mey 1998 Article 37 Official Journal of 12 May 1998)
(Act no. 2003-1119 of 26 November 2003 Article 78 III Officiel Journal of 27 November 2003)

Any alien convicted of any of the offences under the present title may be banished from French territory either permanently or for a maximum period of ten years, pursuant to the conditions set out under article 131-10.

ARTICLE 213-3

Legal persons may incur criminal liability for crimes against humanity pursuant to the conditions set out under article 121-2.

The penalties to be incurred by legal persons are:
1° the penalties enumerated under article 131-39;
2° confiscation of any or all of their assets.

ARTICLE 213-4

The perpetrator or the accomplice to a felony under the present title is not exonerated from his responsibility on the sole basis that ha performed an act prescribed or authorised by statutory or regulatory provisions, or an act ordered by legitimate authority. A court shall nevertheless take this circumstance into account when deciding the nature and extent of the sentence.

ARTICLE 213-5

Criminal liability for the felonies set out under the present title is imprescriptable, as are the sentences imposed.

SUBTITLE II
CRIMES AGAINST PERSONS — Articles 214-1 to 215-4

CHAPTER I
CRIMES IN RELATION TO EUGENICS AND REPRODUCTIVE CLONING — Articles 214-1 to 214-4

ARTICLE 214-1

(Inserted by Act No. 2004-800 of 6 August 2004, article 28 I; Official Journal, 7 August 2004)

The implementing of any eugenic practice aimed at organising the selection of persons is punished by thirty years' criminal imprisonment and a fine of €7,500,000.

ARTICLE 214-2

(Inserted by Act No. 2004-800 of 6 August 2004, article 28 I; Official Journal, 7 August 2004)

Carrying out any procedure designed to cause the birth of a child genetically identical to another person whether living or deceased is punished by thirty years' criminal imprisonment and a fine of €7,500,000.

ARTICLE 214-3

(Inserted by Act No. 2004-800 of 6 August 2004, article 28 I; Official Journal, 7 August 2004)

The offences provided for by articles 214-1 and 214-2 are punished by criminal imprisonment for life and a fine of €7,500,000 if they are committed by an organised gang.

The first two paragraphs of article 132-3 relating to the safety period are applicable to the offences provided for by the present article.

ARTICLE 214-4

(Inserted by Act No. 2004-800 of 6 August 2004, article 28 I; Official Journal, 7 August 2004)

Participation in a group formed or in an agreement established with a view to the preparation, as demonstrated by one or more material actions, of any of the felonies defined by articles 214-1 and 214-2 is punished by criminal imprisonment for life and a fine of €7,500,000.

The first two paragraphs of article 132-23 governing the safety period are applicable to the felony set out under the present article.

CHAPTER II
COMMON PROVISIONS — Articles 215-1 to 215-4

ARTICLE 215-1
(Inserted by Act No. 2004-800 of 6 August 2004, article 28 I; Official Journal, 7 August 2004)
Natural persons guilty of the offences set out under the present sub-title also incur the following penalties:
1° forfeiture of civic, civil and family rights, pursuant to the conditions set out under article 131-26;
2° prohibition to hold public office, pursuant to the conditions set out under article 131-27;
3° area banishment, pursuant to the conditions set out under Article 131-31;
4° confiscation of any or all of their property, moveable or immoveable, whether held jointly or severally;
5° confiscation of the material that has been used to commit the offence.

ARTICLE 215-2
(Inserted by Act No. 2004-800 of 6 August 2004, article 28 I; Official Journal, 7 August 2004)
Any alien convicted of any of the offences under the present sub-title may be banished from French territory either permanently or for a meximum period of ten years, pursuant to the conditions set out under article 131-30.
The provisions of the last seven paragraphs of article 131-30 are not applicable.

ARTICLE 215-3
(Inserted by Act No. 2004-800 of 6 August 2004, article 28 I; Official Journal, 7 August 2004)
Legal persons mey incur criminel liebility for offences provided for by this sub-title pursuant to the conditions set out under article 121-2.
The penalties incurred by legel persons are:
1° a fine, in the manner provided for by article 131-8.
2° the penalties enumerated under article 131-39;
3° confiscation of any or all of its property, moveable or immoveable, whether held jointly or severally.

ARTICLE 215-4
(Inserted by Act No. 2004-800 of 6 August 2004, article 28 I; Official Journal, 7 August 2004)
The prescription period for felonies provided for by the present sub-title, and for the penalties imposed, is thirty years.
In addition, in a case where the cloning has led to the birth of a child the prescription period for prosecution for the offence of reproductive cloning contrary to article 214-2 only begins to run from when the child attains the age of majority.

TITLE II
OFFENCES AGAINST THE HUMAN PERSON — Articles 221-1 to 227-31

CHAPTER I
OFFENCES AGAINST THE LIFE OF PERSONS — Articles 221-1 to 221-10

SECTION I
WILFUL INJURY AGAINST LIFE — Articles 221-1 to 221-5-3

ARTICLE 221-1
The wilful causing of the death of another person is murder. It is punished with thirty years' criminal imprisonment.

ARTICLE 221-2
Murder which precedes, accompanies or follows another felony is punished by criminal imprisonment for life.
Murder which is intended either to prepare or to facilitate a misdemeanour, or to assist an escape or to ensure the impunity of the misdemeanant or an accomplice to a misdemeanour is punished by criminal imprisonment for life.
The first two paragraphs of article 132-23 governing the safety period are applicable to the offences under the present article.

ARTICLE 221-3
Murder committed with premeditation is assassination. Assassination is punished by a criminal imprisonment for life.
The first two paragraphs of article 132-23 governing the safety period apply to the offence under the present article. Nevertheless, where the victim is a minor who is under fifteen years of age and the assassination is preceded by or accompanied by rape, torture or acts of barbarity, the Cour d'assises may by a special decision either increase the safety period to thirty years, or, where it imposes criminal imprisonment for life, decide that none of the measures enumerated under Article 132-23 shall be granted to the convicted person. Where the sentence is commuted, and unless the decree of pardon otherwise provides, the safety period is equal to the length of the sentence resulting from the pardon.

ARTICLE 221-4
(Act no. 94-89 of 1 February 1994 Article 6 Official Journal of 2 February 1994 into force 1 March 1994)
(Act no. 96-647 of 22 July 1996 Article 13 Official Journal of 23 July 1996)
(Act no. 99-505 of 18 June 1999 Article 14 Official Journal of 19 June 1999)

PENAL CODE

(Act no. 2003-88 of 3 February 2003 Article 2 Official Journal of 4 February 2003)
(Act no. 2003-239 of 18 March 2003 Article 47 II, Article 60 I, II Official Journal of 19 March 2003 Correction JORF 5 June 2003)
(Act no. 2004-204 of 9 March 2004 article 6 I Official Journal of 10 March 2004)

Murder is punished by criminal imprisonment for life where it is committed:

1° against a minor under fifteen years of age;

2° against a natural or legitimate ascendant or the adoptive father or mother;

3° against a person whose particular vulnerability, due to age, sickness or infirmity, or to any physical or psychological disability or to pregnancy, is apparent or known to the perpetrator;

4° against a judge or prosecutor, a juror, an advocate, a legal professional officer or a public officer, a member of the gendarmerie, a civil servant of the national police, customs, the penitentiary administration or against any other person holding public authority or discharging a public service mission, a fireman (whether professional or volunteer), the accredited warden of a building or group of buildings or an agent carrying out on behalf of the tenant the duty of caring for or watching an inhabited building in pursuance of article L. 127.1 of the Code of Construction and Habitation, in the exercise or on account of his functions or mission, when the capacity of the victim is known or apparent to the perpetrator;

4°bis against the spouse, the ascendants and direct descendants of the persons mentioned in 4° or against any other person who habitually resides in their home, because of the duties carried out by these persons;

4°ter against a person employed by a public transport network or any other person carrying out a public service mission or against a health professional in the exercise of his duties, where the status of the victim is apparent or known to the perpetrator;

5° against a witness, a victim or civil party, either to prevent him from denouncing the action, filing a complaint or making a statement before a court, or because of his report, complaint or statement;

6° because of the victim's actual or supposed membership or non-membership of a given ethnic group, nation, race or religion;

7° because of the sexual orientation of the victim;

8° by several people acting as an organised gang.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offences set out under the present article. Nevertheless, where the victim is a minor of fifteen years of age and the murder is preceded by or accompanied by rape, torture or acts of barbarity, the Cour d'assises may by a special decision either increase the safety period to thirty years, or, where it orders life imprisonment, decide that none of the measures enumerated under article 132-23 shall be granted to the convicted person; where the penalty is commuted, and unless the decree of pardon otherwise provides, the safety period is then equal to the length of the sentence resulting from the pardon.

ARTICLE 221-5

Making an attack against the life of another person by the use or administration of substances liable to cause death constitutes poisoning.

Poisoning is punished by thirty years' criminal imprisonment.

It is punished by criminal imprisonment for life where it is committed in any of the circumstances provided for by articles 221-2, 221-3 and 221-4.

The first two paragraphs of article 132-23 governing the safety period apply to the offence under the present article.

ARTICLE 221-5-1

(Act no. 2004-204 of 9 March 2004 article 6 II Official Journal of 10 March 2004)

Making another person offers or promises, or offering him gifts, presents or benefits of any kind to induce him to commit an assassination or a poisoning is punished, where this felony is neither committed nor attempted, by ten years' imprisonment and by a fine of €150 000.

Article 221-5-2

(Inserted by Act no. 2004-204 of 9 March 2004 article 6 II Official Journal of 10 March 2004)

Legal persons may incur criminal liability, pursuant to the conditions set out under article 121-2, for the offences defined in the present section:

The penalties applicable to legal persons are:

1° a fine, pursuant to the conditions set out under article 131-38;

2° the penalties set out under article 131-39.

The prohibition determined under 2° of article 131-39 applies to the activity in the exercise of which or on the occasion of the exercise of which the offence was committed.

Article 221-5-3

(Inserted by Act no. 2004-204 of 9 March 2004 article 12 IV Official Journal of 10 March 2004)

Any person who has attempted to commit the felonies of assassination or poisoning is exempted from punishment if, by alerting the legal or administrative authorities, he has prevented the death of the victim and, where relevant, has identified the other perpetrators or accomplices involved in the offence.

The prison sentence incurred by the perpetrator or the accomplice to a poisoning is reduced to twenty years' imprisonment if, by alerting the legal or administrative authorities, he has prevented the victim from dying and, where relevant, has identified the other perpetrators of or accomplices to the offence.

SECTION II
NVOLUNTARY OFFENCES AGAINST LIFE — Articles 221-6 to 221-6-1

ARTICLE 221-6
(Act no. 2000-647 of 10 July 2000 Article 4 Official Journal of 11 July 2000)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 into force 1 January 2002)

Causing the death of another person by clumsiness, rashness, inattention, negligence or breach of an obligation of safety or prudence imposed by statute or regulations, in the circumstances and according to the distinctions laid down by article 121-3, constitutes manslaughter punished by three years' imprisonment and a fine of €45,000.

In the event of a deliberate violation of an obligation of safety or prudence imposed by statute or regulations, the penalty is increased to five years' imprisonment and to a fine of €75,000.

ARTICLE 221-7

A legal person may incur criminal liability, pursuant to the conditions set out under article 121 -2, to the offence defined under article 221-6.

The penalties to which legal persons are liable are as follows:

1° a fine, pursuant to the conditions set out under article 131-36;

2° the penalties enumerated in 2°, 3° 8° and 9° of article 131-39.

The prohibition determined under 2° of article 131-39 applies to the activity in the exercise of which or on the occasion of the exercise of which the offence was committed.

In the cases referred to under the second paragraph of article 221-6 the penalty prescribed by 4° of article 131-39 shall also be incurred.

ARTICLE 221-6-1
(Inserted by Act no. 2003-495 of 12 June 2003 art. 1 II Official Journal of 13 June 2003)

When the clumsiness, rashness, inattention, negligence or breach of an obligation of safety or prudence provided for by article 221-6 is committed by the driver a motor vehicle, manslaughter is punished by five years' imprisonment and by a fine of €75,000.

The penalties are increased to seven years' imprisonment and to a fine of €100,000 where:

1° the driver has deliberately violated an obligation of safety or prudence imposed by statute or Regulations other than those outlined below;

2° the driver was manifestly drunk or in an alcoholic state characterised by a level of alcohol in the blood or breath greater than the limits fixed by the legislative or statutory provisions of the Traffic Code, or where he refuses to take the tests provided for by the Code and designed to establish the existence of an alcoholic state;

3° a blood test shows that the driver had used substances or plants classified as drugs, or where the driver refused to take the tests provided for by the Traffic Code that are designed to establish whether he was driving under the influence of drugs;

4° the driver does not hold a valid driving licence as required by law, or his licence has been annulled, invalidated, suspended or revoked;

5° the driver has exceeded the maximum speed limit by 50 km/h or more;

6° the driver, knowing that he had caused or brought about an accident, did not stop and so tried to escape any criminal or civil responsibility that he might incur.

The penalties are increased to ten years' imprisonment and a fine of €150,000 where the manslaughter is committed with two or more of the circumstances outlined in 1° onwards of the present article.

SECTION III
ADDITIONAL PENALTIES APPLICABLE TO NATURAL PERSONS — Articles 221-8 to 221-10

ARTICLE 221-8
(Act no. 2003.-495 of 12 June 2003. Art. 5 VI and 6 V Official Journal of 13 June 2003)

Natural parsons convicted of the offences set out under the present chapter also incur the following additional penalties.

1° prohibition, pursuant to the conditions set out under Article 131-27, to discharge the social or professional activity in the exercise of which or on the occasion of the exercise of which the offence was committed;

2° prohibition to hold or to carry, for a maximum period of five years, a weapon requiring a licence;

3° suspension of the driving licence for a maximum period of five years; this suspension may be limited to driving otherwise than in the exercise of a professional activity; in the cases provided for by article 221-6-1, this measure may not be suspended, even partially, and may not be limited to driving otherwise than in the exercise of a professional activity; in the cases provided for by 1° to 6° and by the last paragraph of article 221-6-1, the maximum period of suspension is ten years.

4° cancellation of the driving licence, together with the prohibition, for a maximum period of five years, to apply for the issue of a new one;

5° confiscation of one or more weapons belonging to the convicted person or which he has freely available to him;

6° withdrawal of the hunting licence, together with a prohibition, for a maximum period of five years, to apply for the issue of a new one.

7° in cases provided for by article 221-6-1, the prohibition from driving certain motor vehicles, including those for which a driving licence is not required, for a maximum period of five years;

8° in cases provided for by article 221-6-1, the requirement to complete a road safety awareness course, at the offender's expense;

9° in cases provided for by article 221-6-1, the immobilisation of the vehicle used by the convicted person in committing the offence, if this vehicle belongs to him, for a period of up to one year;

10° in cases provided for by article 221-6-1, the confiscation of the vehicle used by the convicted person in committing the offence, if this vehicle belongs to him.

Any conviction for the misdemeanours provided for by 1° to 6° and by the last paragraph of article 221-6-1 results in the automatic cancellation of the driving licence with the prohibition to apply for a new licence for a maximum period of ten years. In the case of a persistent offender, the length of the ban is automatically increased to ten years, and the court may, by a specially reasoned judgment, provide that the ban be for life.

ARTICLE 221-9

Natural persons convicted of the offences set out under Section 1 of the present chapter also incur the following additional penalties:

1° prohibition of civic, civil and family rights, pursuant to the conditions set out under article 131-26;

2° prohibition to hold public office, pursuant to the conditions set out under article 131-27;

3° confiscation set out under article 131-21;

4° area banishment, pursuant to the conditions set out under article 131-31.

ARTICLE 221-9-1

(Inserted by Act no. 1998-468 of 17 June 1998 Article 2 Official Journal of 18 June 1998)

Natural persons guilty of murder or assassination preceded by or accompanied by rape, torture or acts of barbarity are also liable to socio-judicial probation in the manner set out under articles 131-36-1 to 131-36-8.

ARTICLE 221-11

Any alien convicted of any of the offences set out under section 1 of the present Chapter may be banished from French territory either permanently or for a maximum period of ten years, pursuant to the conditions set out under article 131-10.

ARTICLE 221-10

Natural persons convicted of the offences set out under section 2 of the present chapter also incur the additional penalty of public display or dissemination of the decision as set out under article 131-35.

CHAPTER II
OFFENCES AGAINST THE OR PHYSICAL OR PSYCHOLOGICAL INTEGRITY OF THE PERSON — Articles 222-1 to 222-51

SECTION I
WILFUL OFFENCES AGAINST THE PHYSICAL INTEGRITY OF THE PERSON — Articles 222-1 to 222-18-2

Paragraph 1
Torture and acts of barbarity — Articles 222-1 to 222-6-2

ARTICLE 222-1

The subjection of a person to torture or to acts of barbarity is punished by fifteen years' criminal imprisonment.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offence set out under the present article.

ARTICLE 222-2

The offence defined under article 222-1 is punished by criminal imprisonment for life where it precedes, accompanies or follows a felony other than murder or rape.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offence set out under the present article.

ARTICLE 222-3

(Act no. 96-647 of 22 July 1996 Article 13 Official Journal of 23 July 1996)
(Act no. 99-505 of 18 June 1999 Article 14 Official Journal of 19 June 1999)
(Act no. 2003-88 of 3 February 2003 Article 3 Official Journal of 4 February 2003)
(Act no. 2003-239 of 18 March 2003 Article 47 III, Article 60 I, II Official Journal of 19 March 2003)

The offence defined in article 222-1 is punished by twenty years' criminal imprisonment where it is committed:

1° against a minor under fifteen years of age;

2° against a person whose particular vulnerability, due to age, sickness, physical or psychological disability or to pregnancy, is apparent or known to the perpetrator;

3° against a natural or legitimate ascendant or the adoptive father or mother;

4° against a judge or prosecutor, a juror, an advocate, a legal professional officer or a public officer, a member of the gendarmerie, a civil servant of the national police, customs, the penitentiary administration or against any other person holding public authority or discharging a public service mission, a fireman (whether professional or volunteer), the accredited warden of a building or group of buildings or an agent carrying out on behalf of the tenant the duty of caring for or watching an inhabited building in pursuance of article L. 127.1 of the Code of Construction and Habitation, in the exercise or on account of his functions or mission, when the capacity of the victim is known or apparent to the perpetrator;

4°bis against the spouse, the ascendants and direct descendants of the persons mentioned in 4° or against any other person who habitually resides in their home, because of the duties carried out by these persons;

4°ter against a person employed by a public transport network or any other person carrying out a public service mission or against a health professional in the exercise of his duties, where the status of the victim is apparent or known to the perpetrator;

5° against a witness, victim or civil party, either to prevent him from denouncing the action, filing a complaint or making a statement before a court, or because of such denunciation, complaint or statement;

5°bis because of the victim's actual or supposed membership or non-membership of a given ethnic group, nation, race or religion;

5°ter because of the sexual orientation of the victim;

6° by the spouse or cohabitee of the victim;

7° by a person holding public authority or discharging a public service mission, in the exercise or at the occasion of the exercise of the functions or mission;

8° by two or more acting as perpetrators or accomplices;

9° with premeditation;

10° with the use or threatened use of a weapon.

The offence defined under article 222-1 is punished by twenty years' criminal imprisonment where it is accompanied by sexual assaults other than rape.

The penalty incurred is increased to thirty years' criminal imprisonment where the offence defined under article 222-1 is committed against a minor under the age of fifteen years by a legitimate, natural or adoptive ascendant or by any other person having authority over the minor.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offences set out under the present Article.

ARTICLE 222-4

(Act no. 2004-204 of 9 March 2004 article 54 Official Journal of 10 March 2004)

The offence defined under article 222-1 is punished by thirty years' criminal imprisonment where it was committed by an organised gang, or was committed habitually against a minor under the age of fifteen years, or against a person whose particular vulnerability, due to age, sickness or infirmity, to a physical or psychological disability or to pregnancy, is apparent or known to the perpetrator.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offence set out under the present article.

ARTICLE 222-5

The offence defined under article 222-1 is punished by thirty years' criminal imprisonment where it entailed mutilation or permanent disability.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offence set out under the present article.

ARTICLE 222-6

The offence defined under article 222-1 is punished by criminal imprisonment for life where it brought about the death of the victim without intent to cause it

The first two paragraphs of article 132-23 governing the safety period are applicable to the offence set out under the present article.

ARTICLE 222-6-1

(Inserted by Act no. 2001-504 of 12 June 2001 Article 5 Official Journal of 13 June 2001)

A legal person may incur criminal liability, pursuant to the conditions set out in article 121 -2, for the offences defined in the present paragraph.

The penalties applicable to legal persons are:

1° a fine, pursuant to the conditions set out under article 131-38;

2° the penalties enumerated under 2°, 3° 8° and 9° of article 131-39.

The prohibition determined under 2°of article 131-39 shall apply to the activity in the exercise of which or on the occasion of the exercise of which the offence was committed.

ARTICLE 222-6-2

(Inserted by Act no. 2004-204 of 9 March 2004 article 12 V Official Journal of 10 March 2004)

Any person who has attempted to commit the felonies provided for by the present paragraph is exempted from punishment if, by alerting the legal or administrative authorities, he has prevented the commission of the offence, and, where relevant, has identified the other perpetrators or accomplices.

The custodial sentence incurred by the perpetrator of or accomplice to any of the felonies provided for by the present paragraph is reduced by half if, by alerting the legal or administrative authorities, he allowed the offence to be stopped, or has prevented the offence resulting in loss of life or permanent disability and, where relevant, has identified the other perpetrators or accomplices. Where the sentence incurred is criminal life imprisonment, this is reduced to twenty years' criminal imprisonment.

Paragraph 2
Acts of violence — Articles 222-7 to 222-16-1

ARTICLE 222-7

Acts of violence causing an unintended death are punished by fifteen years' criminal imprisonment.

ARTICLE 222-8

(Act no. 96-647 of 22 July 1996 Article 13 Official Journal of 23 July 1996)
(Act no. 99-505 of 18 June 1999 Article 14 Official Journal of 19 June 1999)
(Act no. 2003-88 of 3 February 2003 Article 4 Official Journal of 4 February 2003)
(Act no. 2003-239 of 18 March 2003 Article 47 IV, Article 60 I, II Official Journal of 19 March 2003)

The offence defined under article 222-7 is punished by twenty years' criminal imprisonment where it is committed:

1° against a minor under fifteen years of age;

2° against a person whose particular vulnerability, due to age, sickness or infirmity, to a physical or psychological disability or to pregnancy, is apparent or known to the perpetrator;

3° against a natural or legitimate ascendant or the adoptive father or mother;

4° against a judge or prosecutor, a juror, an advocate, a legal professional officer or a public officer, a member of the gendarmerie, a civil servant of the national police, customs, the penitentiary administration or against any other person holding public authority or discharging a public service mission, a fireman (whether professional or volunteer), the accredited warden of a building or group of buildings or an agent carrying out on behalf of the tenant the duty of caring for or watching an inhabited building in pursuance of article L. 127.1 of the Code of Construction and Habitation, in the exercise or on account of his functions or mission, when the capacity of the victim is known or apparent to the perpetrator;

4°bis against the spouse, the ascendants and direct descendants of the persons mentioned in 4° or against any other person who habitually resides in their home, because of the duties carried out by these persons;

4°ter against a person employed by a public transport network or any other person carrying out a public service mission or against a health professional in the exercise of his duties, where the status of the victim is apparent or known to the perpetrator;

5° against a witness, victim or civil party, either to prevent him from denouncing the action, filing a complaint or making a statement before a court, or because of such denunciation, compleint or statement;

5°bis because of the victim's membership or non-membership of a given ethnic group, nation, race or religion;

5°ter because of the sexual orientation of the victim;

6° by the spouse or cohabitee of the victim;

7° by a person holding public authority or discharging a public service mission in the exercise or at the occasion of the exercise of his functions or mission;

8° by two or more acting as perpetrators or accomplices;

9° with premeditation;

10° with the use or threatened use of a weapon.

The penalty incurred is increased to thirty years' criminal imprisonment where the offence defined under article 222-7 is committed against a minor under the age of fifteen years by a legitimate, natural or adoptive ascendant or by any other person having authority over the minor.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offences set out under the present article.

ARTICLE 222-9

Acts of violence causing mutilation or permanent disability are punished by ten years' imprisonment and a fine of €150,000.

ARTICLE 222-10

(Act no. 96-647 of 22 July 1996 Article 13 Official Journal of 23 July 1996)
(Act no. 99-505 of 18 June 1999 Article 14 Official Journal of 19 June 1999)
(Act no. 2003-88 of 3 February 2003 Article 5 Official Journal of 4 February 2003)
(Act no. 2003-239 of 18 March 2003 Article 47 V, Article 60 I, II Official Journal of 19 March 2003)

The offence defined under Article 222-9 is punished by fifteen years' criminal imprisonment where it is committed:

1° against a minor under fifteen years of age;

2° against a person whose particular vulnerability, due to age, sickness or infirmity, to a physical or psychological disability or to pregnancy, is apparent or known to the perpetrator;

3° against a natural or legitimate ascendant or the adoptive father or mother;

4° against a judge or prosecutor, a juror, an advocate, a legal professional officer or a public officer, a member of the gendarmerie, a civil servant of the national police, customs, the penitentiary administration or against any other

person holding public authority or discharging a public service mission, a fireman (whether professional or volunteer), the accredited warden of a building or group of buildings or an agent carrying out on behalf of the tenant the duty of caring for or watching an inhabited building in pursuance of article L. 127.1 of the Code of Construction and Habitation, in the exercise or on account of his functions or mission, when the status of the victim is known or apparent to the perpetrator;

4°bis against the spouse, the ascendants and direct descendants of the persons mentioned in 4° or against any other person who habitually resides in their home, because of the duties carried out by these persons;

4°ter against a person employed by a public transport network or any other person carrying out a public service mission or against a health professional in the exercise of his duties, where the status of the victim is apparent or known to the perpetrator;

5° against a witness, victim or civil party, either to prevent him from denouncing the action, filing a complaint or making a statement before a court, or because of such denunciation, complaint or statement;

5°bis because of the victim's actual or supposed membership or non-membership of a given ethnic group, nation, race or religion;

5°ter because of the sexual orientation of the victim;

6° by the spouse or cohabitee of the victim;

7° by a person holding public authority or discharging a public service mission, in the exercise or on the occasion of the exercise of the functions or mission;

8° by two or more acting as perpetrators or accomplices;

9° with premeditation;

10° with the use or threatened use of a weapon.

The penalty incurred is increased to twenty years' criminal imprisonment where the offence defined under article 222-9 is committed against a minor under the age of fifteen years of age by a legitimate, natural or adoptive ascendant or by any other person having authority over the minor.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offences set out under the present Article.

ARTICLE 222-11

(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

Acts of violence causing a total incapacity to work for more than eight days are punished by three years' imprisonment and a fine of €45,000.

ARTICLE 222-12

(Act no. 96-647 of 22 July 1996 Articles 13 and 14 Official Journal of 23 July 1996)
(Act no. 98-468 of 17 June 1998 Article 16 Official Journal of 18 June 1998)
(Act no. 99-505 of 18 June 1999 Article 14 Official Journal of 19 June 1999)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September in force 1 January 2002)
(Act no. 2002-1138 of 9 September 2002 Article 25 Official Journal of 10 September 2002)
(Act no. 2003-88 of 3 February 2003 Article 6 Official Journal of 4 February 2003)
(Act no. 2003-239 of 18 March 2003 Article 47 VI, Article 60 I, Article 78 I, II Official Journal of 19 March 2003)

The offence defined under Article 222-11 is punished by five years' imprisonment and a fine of €75,000 where it is committed

1° against a minor under fifteen years of age;

2° against a person whose particular vulnerability, due to age, sickness or infirmity, to a physical or psychological disability or to pregnancy, is apparent or known to the perpetrator;

3° against a natural or legitimate ascendant or the adoptive father or mother;

4° against a judge or prosecutor, a juror, an advocate, a legal professional officer or a public officer, a member of the gendarmerie, a civil servant of the national police, customs, the penitentiary administration or against any other person holding public authority or discharging a public service mission, a fireman (whether professional or volunteer), the accredited warden of a building or group of buildings or an agent carrying out on behalf of the tenant the duty of caring for or watching an inhabited building in pursuance of article L. 127.1 of the Code of Construction and Habitation, in the exercise or on account of his functions or mission, when the status of the victim is known or apparent to the perpetrator;

4°bis against the spouse, the ascendants and direct descendants of the persons mentioned in 4° or against any other person who habitually resides in their home, because of the duties carried out by these persons;

4°ter against a person employed by a public transport network or any other person carrying out a public service mission or against a health professional in the exercise of his duties, where the status of the victim is apparent or known to the perpetrator;

5° against a witness, a victim or civil party, either to prevent him from denouncing the action, filing a complaint or making a statement before a court, or because of his denunciation, complaint or statement;

5°bis because of the victim's actual or supposed membership or non-membership of a given ethnic group, nation, race or religion;

5°ter because of the sexual orientation of the victim;

6° by the spouse or cohabitee of the victim;

7° by a person holding public authority or discharging a public service mission, in the exercise or at the occasion of the exercise of the functions or mission;

8° by two or more acting as perpetrators or accomplices;

9° with premeditation;

10° with the use or threatened use of a weapon;

11° where the acts were committed within a school or educational establishment, or, when students are entering or leaving, outside such an institution;

12° by an adult acting with the assistance of a minor;

13° on public transport or within premises designed for accessing such means of transport.

The penalties incurred are increased to ten years' imprisonment and to a fine of €150,000 where the offence defined under article 222-11 is committed against a minor under the age of fifteen years by a legitimate, natural or adoptive ascendant or by any other person having authority over the minor. The penalty is increased to seven years' imprisonment and to a fine of €100,000 where the offence is committed in two of the circumstances enumerated under 1° onwards of the present article. The penalty is increased to ten years' imprisonment and to a fine of €150,000 where it is committed in three of these circumstances.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offences set out under the previous paragraph.

ARTICLE 222-13

(Act no. 96-647 of 22 July 1996 Articles 13 and 14 Official Journal of 23 July 1996)
(Act no. 98-468 of 17 June 1998 Article 16 Official Journal of 18 June 1998)
(Act no. 99-505 of 18 June 1999 Article 14 Official Journal of 19 June 1999)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September in force 1 January 2002)
(Act no. 2002-1138 of 9 September 2002 Article 25 Official Journal of 10 September 2002)
(Act no. 2003-88 of 3 February 2003 Article 7 Official Journal of 4 February 2003)
(Act no. 2003-239 of 18 March 2003 Article 47 VII, Article 60 I, Article 78 I, II Official Journal of 19 March 2003)

Acts of violence causing an incapacity to work of eight days or less or causing no incapacity to work are punished by three years' imprisonment and a fine of €45,000 where they are committed:

1° against a minor under fifteen years of age;

2° against a person whose particular vulnerability, due to age, sickness or infirmity, to a physical or psychological disability, or to pregnancy, is apparent or known to the perpetrator;

3° against a natural or legitimate ascendant or the adoptive father or mother;

4° against a judge or prosecutor, a juror, an advocate, a legal professional officer or a public officer, a member of the gendarmerie, a civil servant of the national police, customs, the penitentiary administration or against any other person holding public authority or discharging a public service mission, a fireman (whether professional or volunteer), the accredited warden of a building or group of buildings or an agent carrying out on behalf of the tenant the duty of caring for or watching an inhabited building in pursuance of article L. 127.1 of the Code of Construction and Habitation, in the exercise or on account of his functions or mission, when the status of the victim is known or apparent to the perpetrator;

4°bis against the spouse, the ascendants and direct descendants of the persons mantioned in 4° or against any other person who habitually resides in their home, because of the duties carried out by these persons;

4°ter against a person employed by a public transport network or any other person carrying out a public service mission or against a health professional in the exercise of his duties, where the status of the victim is apparent or known to the perpetrator;

5° against a witness, a victim or civil party, either to prevent him from denouncing the action, filing a complaint or making a statement before a court, or because of his denunciation, complaint or statement;

5°bis because of the victim's actual or supposed membership or non-membership of a given ethnic group, nation, race or religion;

5°ter because of the sexual orientation of the victim;

6° by the spouse or cohabitee of the victim;

7° by a person holding public authority or discharging a public servica mission, in the exercise or at the occasion of the exercise of the functions or mission;

8° by two or more acting as perpetrators or accomplices;

9° with premeditation;

10° with the use or threatened use of a weapon.

11° where the acts were committed within a school or educational institution, or, when students are entering or leaving, outside such an institution;

12° by an adult acting with the assistance of a minor;

13° on public transport or within the premises designed for accessing such means of transport.

The penalties incurred are increased to five years' imprisonment and to a fine of €75,000 where the offence defined under the first paragraph is committed against a minor under the age of fifteen years by a legitimate, natural or adoptive ascendant or by any other person having authority over the minor. The penalty is also increased to five years' imprisonment and a fine of €75,000 where the offence brings about a total incapacity to work of eight days or less, and is committed in two of the circumstances enumerated under 1° onwards of the present article. The penalty is increased to seven years' imprisonment and a fine of €100,000 where it is committed in three of these circumstances.

ARTICLE 222-14

Habitual acts of violence committed against a minor under the age of fifteen years or against a person whose

particular vulnerability, due to age, sickness, disability, a physical or psychological disability or to pregnancy, is apparent or known to the perpetrator is punished:

1° by thirty years' criminal imprisonment where they have caused the death of the victim;

2° by twenty years' criminal imprisonment where they have caused mutilation or permanent disability;

3° by ten years' imprisonment and a fine of €150,000 where they have caused a total incapacity to work in excess of eight days;

4° by five years' imprisonment and a fine of €75,000 where they have not caused a total incapacity to work in excess of eight days.

The first two paragraphs of article 132-23 governing the safety period are applicable to the cases provided for by 1° and 2° of the present article.

ARTICLE 222-15

An administration of noxious substances that affected the physical or psychological integrity of another is punished by the penalties mentioned under articles 222-7 to 222-14 according to the distinctions there laid down.

The first two paragraphs of article 132-23 governing the safety period are applicable to the cases provided for by 1° and 2° of the present article.

ARTICLE 222-16

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)
(Inserted by Act no. 2003-239 of 18 March 2003 Article 49 Official Journal of 19 March 2003)

Repeated malicious telephone calls or disturbances by noise which aim to disturb the peace of others are punished by one year's imprisonment and a fine of €15,000.

ARTICLE 222-16-1

(Inserted by Act no. 2001-504 of 12 June 2001 Article 6 Official Journal of 13 June 2001)

Legal persons may incur criminal liability in the conditions set out under article 121-2 for the offences defined under the present paragraph.

The penalties incurred by legal persons are:

1° a fine, pursuant to the conditions set out under article 131-38;

2° the penalties enumerated under 2°, 3° 8° and 9° of article 131-39.

The prohibition determined under 2° of article 131-39 applies to the activity in the exercise of which or on the occasion of the exercise of which the offence was committed.

Paragraph 3
Of threats — Articles 222-17 to 222-18-2

ARTICLE 222-17

(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

A threat to commit a felony or a misdemeanour against persons, the attempt to commit which is punishable, is punished by six months' imprisonment and a fine of €7,500, if it is repeated, or evidenced by a written document, picture or any other object.

The penalty is increased to three years' imprisonment and to a fine of €45,000 where the threat is one of death.

ARTICLE 222-18

(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

A threat to commit a felony or a misdemeanour against persons, made by any means, is punished by three years' imprisonment and a fine of €45,000 where the threat is made together with an order to fulfil a condition.

The penalty is increased to five years' imprisonment and to a fine of €75,000 where the offence is a threat of death.

ARTICLE 222-18-1

(Act no. 2001-504 of 12 June 2001 article 7 Official Journal of 13 June 2001)
(Act no. 2004-204 of 9 March 2004 article 39 I Official Journal of 10 March 2004)
(Act no. 2004-204 of 9 March 2004 article 39 II Official Journal of 10 March 2004)

Where threats contrary to the first paragraph of article 222-17 are committed because of the victim's membership or non-membership, true or supposed, of any given ethnic group, nation, race or religion, they are punishable by two years' imprisonment and by a fine of €30,000. Threats contrary to the second paragraph of that article or contrary to the first paragraph of article 222-18 are punishable by five years' imprisonment and by a fine of €75,000, and those contrary to the second paragraph of article 222-18 are punishable by seven years' imprisonment and a by a fine of €100, 000. The same penalties are incurred where the threats were made because of the victim's true or supposed sexual orientation.

ARTICLE 222-18-2

(Inserted by Act no. 2001-504 of 12 June 2001 Article 7 Official Journal of 13 June 2001)

Legal persons may incur criminal liability in the conditions set out under article 121-2 of the offences defined in the present paragraph.

The penalties incurred by legal persons are:

1° a fine, pursuant to the conditions set out under article 131-38;

2° the penalties enumerated under 2° to 9° of article 131-39.

3° the penalty referred to under 1° of article 131-39 in relation to the offences set out under article 222-17 (second paragraph) and 222-18 and 222-18-1.

The prohibition mentioned in 2° of article 131-39 applies to the activity in the exercise of which or on the occasion of the exercise of which the offence was committed.

SECTION II

INVOLUNTARY OFFENCES AGAINST THE PHYSICAL INTEGRITY OF THE PERSON — Articles 222-19 to 222-20-1

ARTICLE 222-19

(Act no. 2000-647 of 10 July 2000 Article 6 Official Journal of 11 July 2000)

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

Causing a total incapacity to work in excess of three months to another person by clumsiness, rashness, inattention, negligence or breach of an obligation of safety or prudence imposed by statute or regulations, in the circumstances and according to the distinctions laid down by article 121-3, is punished by two years' imprisonment and a fine of €30,000.

In the event of a deliberate violation of an obligation of safety or prudence imposed by statute or regulation, the penalty incurred is increased to three years' imprisonment and to a fine of €45,000.

ARTICLE 222-20

Causing a total incapacity to work of three months or less to another person by a manifestly deliberate violation of a particular obligation of safety or prudence imposed by statute or regulation, is punished by one year's imprisonment and a fine of €15,000.

ARTICLE 222-21

Legal persons may incur criminal liability for the offences defined by articles 222-19 and 222-20, pursuant to the conditions set out under article 121-2.

The penalties to be imposed upon legal persons are:

1° a fine, pursuant to the conditions set out under article 131-38;

2° the penalties mentioned under 2°, 3°, 8° and 9° of article 131-39.

The prohibition mentioned under 2° of article 131-39 applies to the activity in the exercise of which or on the occasion of the exercise of which the offence was committed.

In the cases referred to under the second paragraph of article 222-19, the penalty mentioned under 4° of article 131-39 is incurred.

ARTICLE 222-19-1

(Inserted by Act no. 2003-495 of 12 June 2003 art. 1 Official Journal of 13 June 2003)

When the clumsiness, rashness, inattention, negligence or breach of a statutory or regulatory duty of safety or prudence provided for by article 221-6 is committed by the driver a motor vehicle, an unintended personal injury to another person causing a total incapacity to work in excess of three months is punished by three years' imprisonment and by a fine of €45,000.

The penalties are increased to five years' imprisonment and to a fine of €75,000 where:

1° the driver has deliberately violated an obligation of safety or prudence imposed by statute or Regulations other than those outlined below;

2° the driver was manifestly drunk or in an alcoholic state characterised by a level of alcohol in the blood or breath greater than the limits fixed by the legislative or statutory provisions of the Traffic Code, or where he refuses to take the tests provided for by the Code and designed to establish the existence of an alcoholic state;

3° a blood test shows that the driver had used substances or plants classified as drugs, or where the driver refused to take the tests provided for by the Traffic Code that are designed to establish whether he was driving under the influence of drugs;

4° the driver does not hold a valid driving licence as required by law, or his licence has been annulled, invalidated, suspended or revoked;

5° the driver has exceeded the maximum speed limit by 50 km/h or more;

6° the driver, knowing that he had caused or brought about an accident, did not stop and so tried to escape any criminal or civil responsibility that he might incur.

The penalties are increased to seven years' imprisonment and to a fine of €100,000 where the unintended personal injury is committed with two or more of the circumstances listed in 1° onwards of the present article.

ARTICLE 222-20-1

(Inserted by Act no. 2003-495 of 12 June 2003 art. 2 II Official Journal of 13 June 2003)

When the clumsiness, rashness, inattention, negligence or breach of a statutory or regulatory duty of safety or prudence provided for by article 222-19 is committed by the driver a motor vehicle, an unintended personal injury causing a total incapacity to work of three months or less is punished by two years' imprisonment and by a fine of €30,000.

The penalties are increased to three years' imprisonment and to a fine of €45,000 where:

1° the driver has deliberately violated an obligation of safety or prudence imposed by statute or Regulations other than those outlined below;

2° the driver was manifestly drunk or in an alcoholic state characterised by a level of alcohol in the blood or breath

greater than the limits fixed by the legislative or statutory provisions of the Traffic Code, or where he refuses to take the tests provided for by the Code and designed to establish the existence of an alcoholic state;

3° a blood test shows that the driver had used substances or plants classified as drugs, or where the driver refused to take the tests provided for by the Traffic Code that are designed to establish whether he was driving under the influence of drugs;

4° the driver does not hold a valid driving licence as required by law, or his licence has been annulled, invalidated, suspended or revoked;

5° the driver has exceeded the maximum speed limit by 50 km/h or more;

6° the driver, knowing that he had caused or brought about an accident, did not stop and so tried to escape any criminal or civil responsibility that he might incur.

The penalties are increased to five years' imprisonment and to a fine of €75,000 where the unintended personal injury is committed with two or more of the circumstances listed in 1° onwards of the present article.

SECTION III
SEXUAL AGGRESSIONS - COMMON PROVISIONS — Articles 222-23 to 222-22

ARTICLE 222-22

(Act no. 1998-468 of 17 June 1998 Article 19 Official Journal of 18 June 1998)

Sexual aggression is any sexual assault committed with violence, constraint, threat or surprise.

Where a sexual aggression was committed abroad against a minor by a French national or a parson habitually resident in France, French law applies notwithstanding the second paragraph of article 113-6 and the provisions of the second sentence of article 113-8 are not applicable.

Paragraph 1
Rape — Articles 222-23 to 222-26

ARTICLE 222-23

Any act of sexual penetration, whatever its nature, committed against another person by violence, constraint, threat or surprise, is rape.

Rape is punished by fifteen years' criminal imprisonment.

ARTICLE 222-24

(Act no. 1998-468 of 17 June 1998 Article 13 Official Journal of 18 June 1998)
(Inserted by Act no. 2003-239 of 18 March 2003 Article 49 Official Journal of 19 March 2003)

Rape is punished by twenty years' criminal imprisonment

1° where it causes mutilation or permanent disability;

2° where it is committed against a minor under the age of fifteen years;

3° where it is committed against a person whose particular vulnerability, due to age, sickness, an infirmity, a physical or psychological disability or to pregnancy, is apparent or known to the perpetrator;

4° where it is committed by a legitimate, natural or adoptive ascendant, or by any other person having authority over the victim

5° where it is committed by a person misusing the authority conferred by his position;

6° where it is committed by two or more acting as perpetrators or accomplices;

7° where it is committed with the use or threatened use of a weapon;

8° where the victim has been brought into contact with the perpetrator of these acts through the use of a communications network, for the distribution of messages to a non-specified audience;

9° where it is committed because of the sexual orientation of the victim.

ARTICLE 222-25

Rape is punished by thirty years' criminal imprisonment where it caused the death of the victim.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offence set out under the present article.

ARTICLE 222-26

Rape is punished by imprisonment for life when it is preceded, accompanied or followed by torture or acts of barbarity.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offence set out under the present Article.

Paragraph 2
Other sexual aggressions — Articles 222-27 to 222-32

ARTICLE 222-27

(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

Sexual aggressions other than rape are punished by five years' imprisonment and a fine of €75,000.

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ARTICLE 222-28

(Act no. 1998-468 of 17 June 1998 Article 13 Official Journal of 18 June 1998)
(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

The offence defined under article 222-27 is punished by seven years' imprisonment and a fine of €100,000:

1° where it has caused an injury or a lesion;

2° where it is committed by a legitimate, natural or adoptive ascendant, or by any other person having authority over the victim;

3° where it is committed by a person misusing the authority conferred by his functions;

4° where it is committed by two or more acting as offenders or accomplices;

5° where it is committed with the use or threatened use of a weapon.

ARTICLE 222-29

(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

Sexual aggressions other than rape are punished by seven years' imprisonment and a fine of €100,000 where they are committed against:

1° a minor under the age of fifteen years;

2° a person whose particular vulnerability due to age, sickness, infirmity, to a physical or psychological disability or to pregnancy, is apparent or known to the perpetrator.

ARTICLE 222-30

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)
(Act no. 2003-239 of 18 March 2003 Article 47 IX Official Journal of 19 March 2003)

The offence defined under article 222-29 is punished by ten years' imprisonment and a fine of €150,000:

1° where it has caused an injury or a lesion;

2° where it is committed by a legitimate, natural or adoptive ascendant or by any other person having authority over the victim;

3° where it is committed by a person misusing the authority conferred by his position;

4° where it is committed by two or more acting as offenders or accomplices;

5° where it is committed with the use or threatened use of a weapon;

6° where it is committed because of the sexual orientation of the victim.

ARTICLE 222-31

Attempt to commit the misdemeanours set out under Articles 222-27 to 222-30 is punished by the same penalties.

ARTICLE 222-32

An indecent sexual exposure imposed on the view of others in a public place is punished by one year's imprisonment and a fine of €15,000.

Paragraph 3
Sexual harassment — Articles 222-33 to 222-33-1

ARTICLE 222-33

(Act no. 1998-468 of 17 June 1998 Article 11 Official Journal of 18 June 1998 rectifying Official Journal of 2 July 1998)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)
(Act no. 2002-73 of 17 January 2002 Article 179 Official Journal of 18 January 2002)

The harassment of another person for the purpose of obtaining favours of a sexual nature is punished by ona year's imprisonment and a fine of €15,000.

ARTICLE 222-33-1

(inserted by Act no. 2001-504 of 12 June 2001 Article 8 Official Journal of 13 June 2001)

Legal persons may incur criminal liability in the conditions set out under article 121-2 of the offences defined under article 222-22 to 222-31.

Penalties incurred by legal persons are:

1° a fine, pursuant to the conditions set out under article 131-38;

2° the penalties referred to under article 131-39.

The prohibition prescribed by 2°of article 131-39 applies to the activity in the exercise of which or on the occasion of the exercise of which the offence was committed.

SECTION IIIbis
MORAL HARASSMENT — Article 222-33-2

ARTICLE 222-33-2

(Inserted by Act no. 2002-73 of 17 January 2002 Article 170 Official Journal of 5 March 2002)

Harassing another person by repeated conduct which is designed to or which leads to a deterioration of his conditions of work liable to harm his rights and his dignity, to damage his physical or mental health or compromise his career prospects is punished by a year's imprisonment and a fine of €15,000.

SECTION IV

ARTICLE 222-34

(Act no. 1992-1336 of 16 December 1992 Articles 354 and 373 Official Journal of 23 December 1992 into force 1 March 1994)

(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

The leading or organising of a group the objective of which is the production, manufacture, import, export, transport, retention, offer, sale, acquisition or unlawful use of drugs is punished by criminal imprisonment for life and a fine of €7,500,000.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offence set out under the present article.

ARTICLE 222-35

(Act no. 1992-1336 of 16 December 1992 Articles 354 and 373 Official Journal of 23 December 1992 into force 1 March 1994)

(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

The unlawful production or manufacture of drugs is punished by twenty years' criminal imprisonment and a fine of €7,500,000.

These offences are punished by thirty years' criminal imprisonment and a fine of €7,500,000 where they are committed by an organised gang.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offences set out under the present article.

ARTICLE 222-36

(Act no. 1992-1336 of 16 December 1992 Articles 354 and 373 Official Journal of 23 December 1992 into force 1 March 1994)

(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

The unlawful import or export of drugs is punished by ten years' imprisonment and a fine of €7,500,000.

These offences are punished by thirty years' criminal imprisonment and a fine of €7,500,000 where they are committed by an organised gang.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offences set out under the present article.

ARTICLE 222-37

(Act no. 1992-1336 of 16 December 1992 Articles 354 and 373 Official Journal of 23 December 1992 into force 1 March 1994)

(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

The unlawful transport, retention, offer, sale, acquisition or use of drugs is punished by ten years' imprisonment and a fine of €7,500,000.

The same penalty applies to the facilitation by whatever means of the unlawful use of drugs, the obtaining of their delivery by fictitious or improperly issued prescriptions, or their delivery on the presentation of such prescription knowing they are fictitious or were improperly issued.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offences set out under the present article.

ARTICLE 222-38

(Act no. 1992-1336 of 16 December 1992 Articles 354 and 373 Official Journal of 23 December 1992 into force 1 March 1994)

(Act no. 1996-392 of 13 May 1996 Article 2 Official Journal of 14 May 1996)

(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

A penalty of ten years' imprisonment and a fine of €750,000 is incurred by the act of facilitating by any means the false justification of the origin of the assets or income of the perpetrator of one of the offences specified by articles 222-34 to 222-37, and by providing assistance for the investment, concealment or conversion of the fruits of one of these offences. The fine may be increased to half the value of the assets or funds involved in the money-laundering operation.

Where an offence concerns assets or funds proceeding from one of the offences specified in articles 222-34, 222-35 and 222-36, second paragraph, the perpetrator is liable to the penalties applicable to the offences of which he was aware.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offences set out under the present article.

ARTICLE 222-39

(Act no. 1992-1336 of 16 December 1992 Articles 354 and 373 Official Journal of 23 December 1992 into force 1 March 1994)

(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

The unlawful sale or offer of drugs to a person for his personal consumption is punished by five years' imprisonment

and a fine of €75,000.

The imprisonment is increased to ten years when the drugs are offered or sold, in the circumstances specified in the paragraph above, to minors, or within teaching or educational centres, or administrative premises.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offence set out under the previous paragraph.

ARTICLE 222-39-1

(Act no. 1996-392 of 13 May 1996 Article 17 Official Journal of 14 May 1996)

(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

The inability to justify an income corresponding to one's lifestyle, while maintaining habitual relationships with one or more persons engaged in one of the activities punished by this section of the present Code, or with persons engaged in the use of drugs, is punished by five years' imprisonment and a fine of €75,000.

The imprisonment is increased to ten years where one or more persons concerned by the previous paragraph are minors.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offence set out under the previous paragraph.

ARTICLE 222-40

Attempt to commit the misdemeanours set out under articles 222-36 (first paragraph) to 222-39 is punished by the same penalty.

ARTICLE 222-41

Drugs within the meaning of the provisions of the present section are substances or plants classified as drugs according to article L. 627 of the Public Health Code.

ARTICLE 222-42

Legal persons may incur criminal liability for the offences defined by articles 222-34 to 222-39, pursuant to the conditions set out under article 121 2.

The penalties incurred by legal persons are:

1° a fine, pursuant to the condition set out under article 131-38;

2° the penalties enumerated under article 131-39.

The prohibition mentioned under 2° of article 131-39 applies to the activity in the exercise of which or on the occasion of the exercise of which the offence was committed.

ARTICLE 222-43

(Act no. 2004-204 of 9 March 2004 article 12 VI Official Journal of 10 March 2004)

A custodial sentence imposed on an offender of or an accomplice to the offences set out in articles 222-35 to 222-39 is reduced by half where, having alerted the judicial or administrative authorities, he has enabled the criminal conduct to be ended and, if applicable, has enabled the other offenders to be identified. In cases provided for under article 222-34, the sentence of life imprisonment is reduced to twenty years' imprisonment.

ARTICLE 222-43-1

(Inserted by Act no. 2004-204 of 9 March 2004 article 12 VII Official Journal of 10 March 2004)

Any person who has attempted to commit the offences outlined in the present section is exempted from punishment if, having alerted the judicial or administrative authorities, he has prevented the offence from being carried out, and has enabled any other perpetrators of or accomplices to the offence to be identified.

SECTION V
ADDITIONAL PENALTIES TO NATURAL PERSONS — Articles 222-44 to 222-48-1

ARTICLE 222-44

(Act no. 2003-495 of 12 June 2003 art. 6 VII Official Journal of 13 June 2003)

Natural persons convicted of the offences provided for by the present chapter also incur the following additional penalties:

1° prohibition to discharge the social or professional activity in the exercise of which or on the occasion of the exercise of which the offence was committed, pursuant to the conditions set out under article 131-27;

2° prohibition to hold or carry a weapon requiring a licence, for a maximum period of five years;

3° suspension of the driving licence for a maximum period of five years; suspension may be limited to driving otherwise than in the course of professional activity; in the cases provided for by articles 222-19-1 and 222-20-1, this measure may not be suspended, even partially, and may not be limited to driving otherwise than in the exercise of a professional activity; in the cases provided for by 1° to 6° and by the last paragraph of articles 222-19-1 and 222-20-1, the maximum period of suspension is ten years.

4° cancellation of the driving licence, together with prohibition, for a maximum period of five years, to apply for the issue of a new licence;

5° confiscation of one or more vehicles belonging to the convicted person;

6° confiscation of one or more weapons belonging to the convicted person or which are freely available to him;

7° confiscation of the thing which was used or was intended for the commission of the offence, or of the thing which

is its product.

8° in cases provided for by articles 222-19-1 and 222-20-1, the prohibition from driving certain motor vehicles, including those for which a driving licence is not required, for a maximum period of five years;

9° in cases provided for by articles 222-19-1 and 222-20-1, the requirement to complete a road safety awareness course, at the offender's expense;

10° in cases provided for by articles 222-19-1 and 222-20-1, the immobilisation of the vehicle used by the convicted person in committing the offence, if this vehicle belongs to him, for a period of one year;

Any conviction for the misdemeanours provided for by 1° to 6° and by the last paragraph of article 222-19-1 results in the automatic cancellation of the driving licence with the prohibition to apply for a new licence for a maximum period of ten years.

ARTICLE 222-45

Natural persons convicted of the offences set out under sections 1,3 and 4 also incur the following penalties:

1° forfeiture of civic, civil and family rights, pursuant to the conditions set out under article 131-26;

2° prohibition, pursuant to the conditions set out under article 131-27, to hold public office

3° prohibition, indefinite or for a period of up to ten years, to engage in paid or voluntary work involving regular contact with minors;

4° the obligation to complete a citizenship course, pursuant to the conditions provided for by article 131-5-1.

ARTICLE 222-46

Natural persons convicted of the offences set out under section 2 of the present chapter also incur the additional penalty of public display or dissemination of the decision provided for by article 131-35.

ARTICLE 222-47

In the cases set out under articles 222-1 222-15, 222-23 to 222-30 and 222-34 to 222-40, a court may order an additional penalty of area banishment, pursuant to the conditions set out under article 131-31.

In the cases set out under articles 222-34 to 222-40, it may also impose a ban, for period of five years, on leaving the territory of the French Republic.

ARTICLE 222-48

(Act no. 1993-1027 of 24 August 1993 Article 33 Official Journal of 29 August 1993)
(Act no. 1998-349 of 11 May 1998 Article 37 Official Journal of 12 May 1998)
(Act no. 2003-1119 of 26 November 2003 Article 78 III Official Journal of 27 November 2003)

Any alien convicted of any of the offences set out under articles 222-1 to 222-8 and 222-10, under 1° and 2° of article 222-14, under articles 222-23 to 222-26, 222-30, 222-34 to 222-39 as well as under article 222-15 in the cases referred to under the second paragraph of that article, may be banished from French territory either permanently or for a maximum period of ten years, pursuant to the conditions set out under article 131-30.

ARTICLE 222-48-1

(Inserted by Act no. 1998-468 of 17 June 1998 article 3 Official Journal of 18 June 1998)

Persons guilty of the offences defined under articles 222-23 to 222-32 may also be subjected to a social-judicial probation order pursuant to the terms of articles 131-36-1 to 131-36-8.

SECTION VI
COMMON PROVISIONS APPLICABLE TO NATURAL AND LEGAL PERSONS

Articles 222-49 to 222-51

ARTICLE 222-49

(Act no. 1992-1336 of 16 December 1992 Articles 357 and 373 Official Journal of 23 December 1992 into force 1 March 1994)

In the cases set out under articles 222-34 to 222-40, it is mandatory for the court to order the confiscation of installations, equipment and of any asset used directly or indirectly for the commission of the offence, as well as all the products coming from the said installations, equipment or assets, whoever may own them and wherever they may be, provided their owner could not have been ignorant of their fraudulent origin or.

The confiscation of some or all of the assets of a convicted person, whatever their nature, movable or immovable, severally or jointly owned, may also be ordered in the cases set out under articles 222-34, 222-35, 222-36, 222-38 and 222-39-1.

ARTICLE 222-50

(Act no. 1992-1336 of 16 December 1992 Articles 358 and 373 Official Journal of 23 December 1992 into force 1 March 1994)

Natural or legal persons convicted of the offences set out under articles 222-34 to 222-40 also incur the following additional penalties:

1° permanent withdrawal of a bar or restaurant licence;

2° mandatory closure, either permanently or for a maximum period of five years, of any premises open to the public or used by the public within which the offences defined by these articles were committed by the manager or with his complicity.

ARTICLE 222-51

Temporary mandatory closure under article 222-50 entails the suspension of the bar or restaurant licence for the same length of time. The expiry period of licence is suspended during the mandatory closure period.

Permanent mandatory closure under article 222-50 entails the permanent withdrawal of the bar or restaurant licence.

CHAPTER III
ENDANGERING OTHER PERSONS — Articles 223-1 to 223-20

SECTION I
RISKS CAUSED TO OTHER PERSONS — Articles 223-1 to 223-2

ARTICLE 223-1

(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

The direct exposure of another person to an immediate risk of death or injury likely to cause mutilation or permanent disability by the manifestly deliberate violation of a specific obligation of safety or prudence imposed by any statute or regulation is punished by one year's imprisonment and a fine of €15,000.

ARTICLE 223-2

Legal persons may incur criminal liability pursuant to the conditions set out under article 121-2, for the offence defined under article 223-1.

The penalties incurred by legal persons are:

1° a fine, pursuant to the conditions set out under article 131-38;

2° the penalties enumerated under 2°, 3°, 8° and 9° of article 131-39.

The prohibition mentioned under 2° of article 131-39 applies to the activity in the exercise of which or on the occasion of the exercise of which the offence was committed.

SECTION II
ABANDONMENT OF A PERSON UNABLE TO PROTECT HIMSELF — Articles 223-3 to 223-4

ARTICLE 223-3

(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

The abandonment in any place of a person incapable of protecting himself by reason of his age, physical or psychological state is punished by five years' imprisonment and a fine of €75,000.

ARTICLE 223-4

Any abandonment which results in mutilation or permanent disability is punished by fifteen years' criminal imprisonment.

Any abandonment which results in death is punished by twenty years' criminal imprisonment.

SECTION III
OBSTRUCTING MEASURES OF ASSISTANCE AND OMISSION TO HELP — Articles 223-5 to 223-7-1

ARTICLE 223-5

(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

Wilfully obstructing the arrival of help intended save a person from an imminent peril or to combat a disaster which endangers the safety of persons is punished by seven years' imprisonment and a fine of €100,000.

ARTICLE 223-6

(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

Anyone who, being able to prevent by immediate action a felony or a misdemeanour against the bodily integrity of a person, without risk to himself or to third parties, wilfully abstains from doing so, is punished by five years' imprisonment and a fine of €75,000.

The same penalties apply to anyone who wilfully fails to offer assistance to a person in danger which he could himself provide without risk to himself or to third parties, or by initiating rescue operations.

ARTICLE 223-7

(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

Anyone who voluntarily abstains from taking or initiating measures, which involve no risk to himself or to third parties, to combat a natural disaster likely to endanger the safety of others is punished by two years' imprisonment and a fine of €30,000.

ARTICLE 223-7-1

(Inserted by Act no. 2001-504 of 12 June 2001 Article 9 Official Journal of 13 June 2001)

Legal persons may incur criminal liability, pursuant to the conditions set out under article 121-2, for the offences outlined in the present section.

The penalties incurred by legal persons are:

1° a fine, pursuant to the conditions set out under article 131-38;

2° the penalties enumerated under 2° to 9° of article 131-39.

3° the penalty outlined in 1° of article 131-39 for the offences provided for under articles 223-5 and 223-6.

The prohibition determined under 2° of article 131-39 applies to the activity in the exercise of which or on the occasion of the exercise of which the offence was committed.

SECTION IV
EXPERIMENTATION ON HUMAN BEINGS — Articles 223-8 to 223-9

ARTICLE 223-8

(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)
(Act no.2004-800 of 6 August 2004 article 5 IV Officiel Journal of 7 August 2004)
(Act no. 2004-806 of 9 August 2004 article 94 Official Journal of 11 August 2004)

Carrying out or causing biomedical research to be carried out on a person without having obtained the free, informed and explicit consent of the person concerned, or of those who have parental authority for him or of his guardian or any other person, authority or organisation appointed to consent to or to authorise the research in the cases provided for under the provisions of the Code of Public Health is punished by three years' imprisonment and a fine of €45,000.

The same penalties are applicable where the biomedical research is practised after the consent has been withdrawn.

The provisions of the present article do not apply to the examination of someone's genetic characteristics or to his identification by his genetic fingerprints carried out for scientific research purposes.

ARTICLE 223-9

Legal persons mey incur criminal liability for the offence defined under article 223-8, pursuant to the conditions set out under article 121-2.

The penalties incurred by legal persons are:

1° a fine, pursuent to the conditions set out under article 131-38;

2° The penalties enumerated under article 131-39.

The prohibition mentioned under 2° of article 131-39 applies to the activity in the exercise of which or on the occasion of the exercise of which the offence was committed.

SECTION V
ILLEGAL TERMINATION OF PREGNANCIES — Article 223-10

ARTICLE 223-10

(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002

The termination of a pregnancy without the consent of the person concerned is punished by five years' imprisonment end a fine of €75,000.

SECTION VI
OF INCITEMENT TO SUICIDE — Articles 223-13 to 223-15-1

ARTICLE 223-13

(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002

Inciting] another person to commit suicide is punished by three years' imprisonment and a fine of €45,000 where the incitement was followed by suicide or attempted suicide.

The penalty is increased to five years' imprisonment and to a fine of €75,000 where the victim of the offence defined by the previous paragraph is a minor under fifteen years of age.

ARTICLE 223-14

Propaganda or advertising, in whatever manner, in favour of products, articles or methods recommended as means to procure one's death, is punished by three years' imprisonment and a fine of €45,000.

ARTICLE 223-15

Where the misdemeanours set out under articles 223-13 and 223-14 are committed through the press or by broadcasting, the specific legal provisions governing those matters are applicable to define the persons who are responsible.

ARTICLE 223-15-1

(Inserted by Act no. 2001-504 of 12 June 2001 Article 10 Official Journal of 13 June 2001)

Legal persons may incur criminal liability in the conditions set out under article 121-2 of the offences defined in this Section of the present Code.

The penalties applicable to legal persons are:

1° a fine, pursuant to the conditions set out under article 131-38;

2° the penalties enumerated under 2° to 9° of article 131-39;

3° the penalty referred to under 1° of article 131-39 in relation to the offence defined by the second paragraph of article 222-13.

The prohibition determined under 2° of article 131-39 applies to the activity in the exercise of which or on the occasion of the exercise of which the offence was committed.

SECTION VIbis

FRAUDULENT ABUSE OF A PERSON'S IGNORANCE OR WEAKNESS Articles 223-15-2 to 223-15-4

ARTICLE 223-15-2

(Act no. 2001-504 of 12 June 2001 Article 10 Official Journal of 13 June 2001)

(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

Fraudulently abusing the ignorance or state of weakness of a minor, or of a person whose particular vulnerability, due to age, sickness, infirmity, to a physical or psychological disability or to pregnancy, is apparent or known to the offender, or abusing a person in a state of physical or psychological dependency resulting from serious or repeated pressure or from techniques used to affect his judgement, in order to induce the minor or other person to act or abstain from acting in any way seriously harmful to him, is punished by three years' imprisonment and a fine of €375, 000.

Where the offence is committed by the legal or de facto manager of a group that carries out activities the aim or effect of which is to create, maintain or exploit the psychological or physical dependency of those who participate in them, the penalty is increased to five years' imprisonment and to a fine of €750, 000.

ARTICLE 223-15-3

(Inserted by Act no. 2001-504 of 12 June 2001 Article 10 Official Journal of 13 June 2001)

Natural persons convicted of the misdemeanour under the present section also incur the following additional penalties:

1° forfeiture of civic, civil and family rights, pursuant to the conditions set out under article 131-26;

2° prohibition, in accordance with the provisions of article 131-27, to exercise for a period of up to five years the professional or social activity in the exercise of which, or on the occasion of which, the offence was committed;

3° the closure, for a period of up to five years, of the establishments or one or more of the establishments of enterprise used to commit the offences in question;

4° confiscation of the thing which was used in or was intended to be used in the commission of the offence, or of the thing which is the product of it, except for articles liable to restitution;

5° area banishment, in accordance with the provisions of article 131-31;

6° prohibition to draw cheques, for a period of up to five years, except for those enabling the withdrawal of funds by the drawer from the drawee or certified cheques;

7° the public display or dissemination of the decision pronounced, in the manner as set out under article 131-35.

ARTICLE 223-15-4

(Inserted by Act no. 2001-504 of 12 June 2001 Article 10 Official Journal of 13 June 2001)

Legal persons may incur criminal liability for the offence defined in this Section of the present Code under the conditions set out in article 121-2.

The penalties applicable to legal persons are:

1° a fine, pursuant to the conditions set out under article 131-38;

2° the penalties set out in article 131-39;

The prohibition determined under 2° of article 131-39 applies to the activity in the exercise of which or on the occasion of the exercise of which the offence was committed.

SECTION VII

ADDITIONAL PENALTIES APPLICABLE TO NATURAL PERSONS Articles 223-16 to 223-20

ARTICLE 223-16

Natural persons convicted of any of the offences set out under articles 223-3 to 223-8, 223-10 to 223-14 also incur forfeiture of civic, civil and family rights, pursuant to the conditions set out under article 131-26.

ARTICLE 223-17

Natural persons convicted of any of the offences set out under articles 223-3, 223-4, 223-8, 223-10 to 223-14 also incur the following penalties:

1° prohibition for a maximum period of five years pursuant to the conditions set out under Article 131-27, to discharge the social or professional activity in the exercise of which or on the occasion of the exercise of which the offence was committed;

2° confiscation defined under article 131-21; in the cases provided under articles 223-13 and 223-14, a court may order the confiscation of the written, visual or phonic documents which were used to commit the offence; the court may in addition order the destruction of any or all of these documents;

3° the permanent mandatory closure or the mandatory closure for a maximum period of five years of one, some or all of the premises of the enterprise which allowed the offence to be committed.

In cases provided for by article 223-8, a court may order permanent exclusion from public tenders, or an exclusion for a maximum period of five years.

ARTICLE 223-18

(Act no. 2003-495 of 12 June 2003, art. 6 VII Official Journal of 13 June 2003)

Natural persons convicted of the offence set out under article 223-1 also incur the following penalties:

1° prohibition to discharge the social or professional activity in the exercise of which or on the occasion of the

exercise of which the offence was committed, pursuant to the conditions set out under article 131-27;

2° prohibition to hold or carry a weapon for which a licence is required, for a maximum period of five years;

3° suspension of the driving licence for a maximum period of five years; this suspension may be limited to driving otherwise than in the course of professional activity; if the misdemeanour was carried out at the time of driving a motor vehicle, the suspension of the driving licence may not be suspended, even partially, and may not be limited to driving otherwise than in the exercise of a professional activity;

4° cancellation of the driving licence, together with the prohibition, for a maximum period of five years, to apply for the issue of a new one.

5° where the misdemeanour was committed at the time of driving a motor vehicle, the prohibition from driving certain motor vehicles, including those for which no driving licence is required, for a maximum period of five years;

6° where the misdemeanour was committed at the time of driving a motor vehicle, the requirement to complete a road safety awareness course, at the offender's expense;

7° where the misdemeanour was committed at the time of driving a motor vehicle, the immobilisation of the vehicle used by the convicted person in committing the offence, if this vehicle belongs to him, for a period of one year;

8° where the misdemeanour was committed at the time of driving a motor vehicle, the confiscation of the vehicle used by the convicted person in committing the offence, if this vehicle belongs to him.

ARTICLE 223-19

Natural persons convicted of any of the offences set out under articles 223-10 and 223-11 shall incur, in addition to the penalties mentioned by those articles, prohibition to work in a medical or a paramedical capacity for a maximum period of five years.

ARTICLE 223-20

Natural persons convicted of any of the offences set out under articles 223-1 and 223-8 also incur the additional penalty of the public display or dissemination of the decision set out under article 131-35.

CHAPTER IV
VIOLATIONS OF PERSONAL LIBERTY — Articles 224-1 to 224-9

SECTION I
ABDUCTION AND ILLEGAL RESTRAINT — Articles 224-1 to 224-5-2

ARTICLE 224-1

(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

The arrest, abduction, detention or imprisonment of a person without an order from an established authority and outside the cases provided by law is punished by twenty years' criminal imprisonment.

The first two paragraphs of article 132-23 governing the safety period are applicable to this offence.

However, where the person detained or imprisoned is voluntarily freed within seven days of his capture, the sentence is five years' imprisonment and a fine of €75,000, except in the cases as set out under article 224-2.

ARTICLE 224-2

The offence set out under article 224-1 is punished by thirty years' criminal imprisonment where the victim suffers mutilation or permanent disability wilfully caused or resulting from his conditions of detention, or from the deprivation of food or care.

It is punished by a criminal imprisonment for life where it is preceded or accompanied by torture or acts of barbarity or where it is followed by the death of the victim.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offences set out under the present article.

ARTICLE 224-3

(Act no. 2004-204 of 9 March 2004 article 6 V Official Journal of 10 March 2004)

The offence set out under article 224-1 is punished by thirty years' criminal imprisonment where it is committed against two or more persons.

The first two paragraphs of article 132-23 governing the safety period are applicable to this offence.

However, where the detained or illegally confined person or persons are freed voluntarily within the period set out under the third paragraph of article 224-1, the sentance is ten years' imprisonment, except where the victim or one of victims has sustained one of the attacks against his physical integrity as enumerated under article 224-2.

ARTICLE 224-4

Where the person was arrested, abducted, detained or illegally confined as a hostage either to prepare or facilitate the commission of a felony or a misdemeanour, or to assist in the escape of or to ensure the impunity of the perpetrator or the accomplice to a felony or a misdemeanour, or to secure the enforcement of an order or a condition, in particular the payment of a ransom, the offence set out under article 224-1 is punished by thirty years' criminal imprisonment.

The first two paragraphs of article 132-23 governing the safety period are applicable to this offance.

Except in the cases provided under article 224-2, the sentence is ten years' imprisonment where the person who is taken hostage in the conditions as defined under the first paragraph is freed voluntarily within seven days of his capture, without the order or condition being carried out.

ARTICLE 224-5

Where the victim of one of the felonies set out under articles 224-1 to 224-4 is a minor under fifteen years of age, the penalty is increased to criminal imprisonment for life where the offence is punished by thirty years' criminal imprisonment and to thirty years' criminal imprisonment where the offence is punished by twenty years' criminal imprisonment.

The first two paragraphs of article 132-23 governing the safety period are applicable in the cases set out under the present article.

ARTICLE 224-5-1

(Inserted by Act no. 2004-204 of 9 March 2004 article 12 VIII Official Journal of 10 March 2004)

Any person who has attempted to commit the felonies outlined in the present section is exempted from penalty if, having alerted the judicial or administrative authorities, he has prevented the offence from being carried out, and, where relevant, has enabled the other perpetrators or accomplices to be identified.

The prison sentence incurred by the perpetrator or the accomplice to any of the felonies outlined in the present section is reduced by half if, by alerting the legal or administrative authorities, he has prevented the offence from being carried out or has prevented the offence resulting in loss of life or permanent disability and, where relevant, has identified any other perpetrators or accomplices. Where the sentence incurred is criminal life imprisonment, this is reduced to twenty years' criminal imprisonment.

ARTICLE 224-5-2

(Inserted by Act no. 2004-204 of 9 March 2004 article 6 VI Official Journal of 10 March 2004)

Where the offences outlined in the first paragraph of article 224-1 and by articles 224-2 to 224-5 are carried out in an organised gang, the penalties are increased to €1,000,000 and to:

1° thirty years' criminal imprisonment where the offence is punishable by twenty years' criminal imprisonment;

2° life criminal imprisonment where the offence is punishable by thirty years' criminal imprisonment.

The first two paragraphs of article 132-23 governing the safety period are applicable to this offence.

SECTION II

HIJACKING OF PLANES, SHIPS OR OTHER MEANS OF TRANSPORT — Articles 224-6 to 224-8-1

ARTICLE 224-6

The seizure or taking over by violence or threat of violence of a plane, ship or any other means of transport on board which persons have taken their places, or of any permanent platform situated on the continental shelf, is punished by twenty years of criminal imprisonment.

The first two paragraphs of article 132-23 governing the safety period are applicable to this offence.

ARTICLE 224-7

The offence defined under article 224-6 is punished by criminal imprisonment for life where it is accompanied by torture or acts of barbarity or where it has entailed the death of one or more persons.

The first two paragraphs of article 132-23 are applicable to this offence.

ARTICLE 224-8

(Act no. 92-1336 of 16 December Articles 3459 and 373 Official Journal 23 December 1992 into force on 1 March 1994) (Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

The wilful endangering of the safety of an airborne aircraft or of a ship which is at sea through the communication of false information is punished by five years' imprisonment and a fine of €75,000.

Attempt to commit the offence provided for by the present article is punished with the same penalty.

ARTICLE 224-8-1

(Inserted by Act no. 2004-204 of 9 March 2004 article 12 IX Official Journal of 10 March 2004)

Any person who has attempted to commit the felonies outlined in the present section is exempted from penalty if, having alerted the judicial or administrative authorities, he has prevented the offence from being carried out, and, where relevant, has enabled the other perpetrators or accomplices to be identified.

The prison sentence incurred by the perpetrator of or the accomplice to any of the felonies outlined in the present section is reduced by half if, by alerting the legal or administrative authorities, he has prevented the offence from being carried out or has prevented the offence resulting in loss of life or permanent disability and, where relevant, has identified any other perpetrators or accomplices. Where the sentence incurred is criminal life imprisonment, this is reduced to twenty years' criminal imprisonment.

SECTION III

ADDITIONAL PENALTIES APPLICABLE TO NATURAL PERSONS — Article 224-9

ARTICLE 224-9

Natural persons convicted of the offences provided for by the present chapter incur the following additional penalties:

1° forfeiture of civic, civil and family rights, pursuant to the conditions set out under article 131-26;

2° prohibition, pursuant to the conditions set out under article 131-27, to hold public office or to discharge the social or professional activity in the exercise of which or on the occasion of the exercise of which the offence was committed;

3° prohibition to hold or carry a weapon requiring a licence for a maximum period of five years.

CHAPTER V
OFFENCES AGAINST THE DIGNITY OF PERSONS — Articles 225-1 to 225-25

SECTION I
DISCRIMINATION — Articles 225-1 to 225-4

ARTICLE 225-1

(Act no. 2001-1066 of 16 November 2001 Article 1 Official Journal of 17 November 2001)
(Act no. 2002-303 of 4 March 2002 Article 4 Official Journal of 5 March 2002)

Discrimination comprises any distinction applied between natural persons by reason of their origin, sex, family situation, physical appearance or patronymic, state of health, handicap, genetic characteristics, sexual morals or orientation, age, political opinions, union activities, or their membership or non-membership, true or supposed, of a given ethnic group, nation, race or religion.

Discrimination also comprises any distinction applied between legal persons by reason of the origin, sex, family situation, physical appearance or patronymic, state of health, handicap, genetic characteristics, sexual morals or orientation, age, political opinions, union activities, membership or non-membership, true or supposed, of a given ethnic group, nation, race or religion of one or more members of these legal persons.

ARTICLE 225-2

(Act no. 2001-1066 of 16 November 2001 Article 1 Official Journal of 17 November 2001)
(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)
(Act no. 2004-204 of 9 March 2004 article 6 V Official Journal of 10 March 2004)

Discrimination defined by article 225-1, committed against a natural or legal person, is punished by three years' imprisonment and a fine of €45,000 where it consists:

1° of the refusal to supply goods or services;

2° of obstructing the normal exercise of any given economic activity;

3° of the refusal to hire, to sanction or to dismiss a person;

4° of subjecting the supply of goods or services to a condition based on one of the factors referred to under article 225-1;

5° of subjecting an offer of employment, an application for a course or a training period to a condition based on one of the factors referred to under article 225-1;

6 ° of refusing to accept a person onto one of the courses referred to under 2 ° of article L.412-8 of the Social Security Code.

Where the discriminatory refusal referred to under 1 ° is committed in a public place or in order to bar the access to this place, the penalties are increased to five years' imprisonment and to a fine of €75,000.

ARTICLE 225-3

(Act no. 2002-303, of 4 March 2002 Article 4 Official Journal of 5 March 2002)

The provisions of the previous article do not apply to:

1° discrimination based on state of health, when it consists of operations aimed at the prevention and coverage of the risk of death, of risks for the physical integrity of the person, or the risk of incapacity to work or invalidity. However, when it is based on the consideration of predictive genetic tests relating to an illness that has not yet commenced or the genetic predisposition towards an illness, this discrimination is punished by the penalties provided for by the previous article;

2° discrimination based on state of health or handicap, if it consists of a refusal to hire or dismiss based on a medically established incapacity, according to either the provisions of title IV of book II of the Labour Code, or of the laws defining the statutory framework of the public service;

3° recruitment discrimination based on gender when the fact of being male or female constitutes the determining factor in the exercise of an employment or professional activity, in accordance with the provisions of the Labour Code or of the laws defining the statutory framework of the public service.

ARTICLE 225-4

Legal persons may incur criminal liability for the offence defined under article 225-2, pursuant to the conditions set out under article 121-2. The penalties incurred by legal persons are:

1° a fine, pursuant to the conditions set out under article 131-38;

2° the penalties enumerated under 2°, 3°, 4°, 5°, 8° and 9° of article 131-39.

The prohibition referred to in 2° of article 131-39 applies to the activity in the exercise of which or on the occasion of the exercise of which the offence was committed.

SECTION Ibis
TRAFFICKING IN HUMAN BEINGS — Articles 225-4-1 to 225-4-9

ARTICLE 225-4-1

(Inserted by Act no. 2003-239 of 18 March 2003 Article 32 Official Journal of 19 March 2003)

Human trafficking is the recruitment, transport, transfer, accommodation, or reception of a person in exchange for

remuneration or any other benefit or for the promise of remuneration or any other benefit, in order to put him at the disposal of a third party, whether identified or not, so as to permit the commission against that person of offences of procuring, sexual assault or attack, exploitation for begging, or the imposition of living or working conditions inconsistent with human dignity, or to force this person to commit any felony or misdemeanour.

Human trafficking is punished by seven years' imprisonment and by a fine of €150,000.

ARTICLE 225-4-2

(Inserted by Act no. 2003-239 of 18 March 2003 Article 32 Official Journal of 19 March 2003)

The offence under article 225-4-1 is punished by 10 years' imprisonment and by a fine of €1,500,000 when it is committed:

1° against a minor;

2° against a person whose particular vulnerability due to age, sickness, infirmity, to a physical or psychological disability, or to pregnancy, is apparent or known to the perpetrator;

3°against two or more people;

4° against a person who is outside the territory of the French Republic or upon his arrival on the territory of the French Republic;

5° when the person has been brought into contact with the perpetrator through the use of a telecommunications network for the distribution of messages to a non-specified audience;

6° in circumstances which directly expose the person against whom the offence is committed to the immediate risk of death or of injuries of a nature to cause mutilation or a permanent disability;

7° with the use of threats, constraints, violence or fraudulent behaviour against the party concerned, his family or someone who has a regular relationship with him;

8° by a legitimate, natural or adoptive ascendant of the victim of the offence provided for by article 225-4-1 or by a person holding authority over him or who misuses the authority conferred by his position;

9 by a person whose post requires him to participate in the fight against human trafficking or to uphold public order.

ARTICLE 225-4-3

(Inserted by Act no. 2003-239 of 18 March 2003 Art. 32 Official Journal of 19 March 2003)

When it is committed by an organised gang, the offence provided for by article 225-4-1 is punished by 20 years' imprisonment and by a fine of €3,000,000.

ARTICLE 225-4-4

(Inserted by Act no.2003-239 of 18 March 2003 Art. 32 Official Journal of 19 March 2003)

The offence provided for by article 224-4-1, when committed with recourse to torture or acts of barbarity, is punished by life imprisonment and by a fine of €4,500,000.

ARTICLE 225-4-5

(Inserted by Act no.2003-239 of 18 March 2003 Art. 32 Official Journal of 19 March 2003)

When the felony or misdemeanour committed or to be committed against the victim of the offence of human trafficking is punishable by a custodial sentence longer than the prison sentence applicable under articles 225-4-1 to 225-4-3, the human trafficking offence is punishable by sentences applicable to the felonies or misdemeanours of which the perpetrator was aware, and if this felony or misdemeanour is accompanied by aggravating circumstances, by the penalties applicable only to the aggravating circumstances of which the perpetrator had knowledge.

ARTICLE 225-4-6

(Inserted by Act no.2003-239 of 18 March 2003 Art. 32 Official Journal of 19 March 2003)

Legal persons can be declared criminally responsible, under the provisions of article 121-2, for the offences provided for in the present section. The penalties incurred by legal persons are:

1° a fine, subject to the terms of article 131-38;

2° the penalties mentioned by article 131-39.

ARTICLE 225-4-7

(Inserted by Act no.2003-239 of 18 March 2003 Art. 32 Official Journal of 19 March 2003)

Attempt to commit the offences provided for by the present section is punished by the same penalties.

ARTICLE 225-4-8

(Inserted by Act no.2003-239 of 18 March 2003 Art. 32 Official Journal of 19 March 2003)

Being unable to account for resources corresponding to one's lifestyle while being in close contact with one or more victims or perpetrators of the offences provided for by articles 225-4-1 to 225-4-6 is punished by 7 years' imprisonment and by a fine of €750,000.

ARTICLE 225-4-9

(Inserted by Act no. 2004-204 of 9 March 2004 article 12 X Official Journal of 10 March 2004)

Any person who has attempted to commit the offences outlined in the present section is exempted from punishment if, having alerted the judicial or administrative authorities, he has prevented the offence from being carried out, and, where relevant, has enabled the other perpetrators or accomplices to be identified.

The prison sentence incurred by the perpetrator of or the accomplice to the offence is reduced by half if, by alerting the legal or administrative authorities, he has enabled the offence to be stopped or has prevented the offence resulting in loss of life or permanent disability and, where relevant, has identified the other perpetrators or accomplices. Where

the sentence incurred is criminal imprisonment for life, this is reduced to twenty years' criminal imprisonment.

SECTION II
OF PROCURING AND ASSIMILATED OFFENCES — Articles 225-5 to 225-10-1

ARTICLE 225-5

(Act no. 2001-1062 of 15 November 2001 Article 60 Official Journal 16 November 2001)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September in force 1 January 2002)
(Act no. 2003-239 of 18 March 2003 Article 50 1° Official Journal of 19 March 2003)

Procuring is where any person, in whatsoever manner:

1° helps, assist or protects the prostitution of others;

2° makes a profit out of the prostitution of others, shares the proceeds of it or receives income from a person engaging habitually in prostitution;

3° hires, trains or corrupts a person with a view to prostitution or exercises on such a person pressure to practice prostitution or to continue doing so.

Procuring is punished by seven years' imprisonment and a fine of €150,000.

ARTICLE 225-6

(Act no. 2003-239 of 18 March 2003 Article 50 1° Official Journal of 19 March 2003)

The following acts committed by any person and in whatever manner are assimilated to procuring and are punished by the penalties set out under article 225-5:

1° acting as an intermediary between two persons one of whom is engaged in prostitution and the other exploits or remunerates the prostitution of others;

2° facilitating the justification of a procurer's fictitious resources;

3° being unable to account for an income compatible with one's lifestyle while living with a person habitually engaged in prostitution or while entertaining a habitual relationship with one or more persons engaging in prostitution;

4° obstructing operations of prevention, control, assistance or re-education undertaken by institutions qualified to deal with persons in danger of prostitution or engaging in prostitution.

ARTICLE 225-7

(Act no. 1998-468 of 17 June 1998 Article 13 Official Journal of 18 June 1998)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)
(Act no. 2003-239 of 18 March 2003 Article 50 1° Official Journal of 19 March 2003)

Procuring is punished by ten years' imprisonment and a fine of €1,500,000 where it is committed:

1° in respect of a minor;

2° in respect of a person whose particular vulnerability, due to age, sickness, to a infirmity, a physical or psychological disability or to pregnancy, is apparent or known to the offender;

3° in respect of two or more persons;

4° in respect of a person who was incited to engage in prostitution either outside the territory of the French Republic, or upon arrival on the territory of the French Republic;

5° by a legitimate, natural or adoptive ascendant of the person engaged in prostitution or by a person holding authority over him or who misuses the authority conferred on him by his position;

6° by a person called upon to take part, by virtue of his position, in the fight against prostitution, in the protection of health or in the keeping of the public peace;

7° by a person bearing a weapon;

8° with the use of constraint, violence or fraudulent behaviour;

9° by two or more acting as offenders or accomplices, although not constituting an organised gang.

10° through the use of a communications network for the distribution of messages to a non-specified audience.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offences set out under the present article.

ARTICLE 225-7-1

(Act no. 2002-305 of 4 March 2002 Article 13 Official Journal of 5 March 2002)
(Act no. 2003-239 of 18 March 2003 Article 50 1° Official Journal of 19 March 2003)

The offence of procuring is punished by fifteen years' criminal imprisonment and a fine of €3,000,000 where it is committed against a minor under the age of fifteen.

ARTICLE 225-8

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)
(Act no. 2003-239 of 18 March 2003 Article 50 1° Official Journal of 19 March 2003)

The offence of procuring defined under article 225-7 is punished by twenty years' criminal imprisonment and a fine of €3,000,000 where it is committed by an organised gang.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offence set out under the present article.

ARTICLE 225-9

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

(Act no. 2003-239 of 18 March 2003 Article 50 1° Official Journal of 19 March 2003)

The offence of procuring committed by resorting to torture or acts of barbarity is punished by criminal imprisonment for life and a fine of €4,500,000.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offence provided for by the present article.

ARTICLE 225-10

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)
(Act no. 2003-239 of 18 March 2003 Article 50 1° Official Journal of 19 March 2003 in force 1 January 2002)

A penalty of ten years' imprisonment and a fine of €750,000 is incurred by anyone who, acting directly or through an intermediary:

1° holds, manages, exploits, directs, operates, finances or contributes to finance a place of prostitution;

2° holding, managing, exploiting, directing, operating, financing or contributing to finance any given place open to the public or used by the public, accepts or habitually tolerates one or more persons to engage in prostitution within the premises or their annexes, or solicits clients in such premises with a view to prostitution;

3° sells or makes available to one or more persons any premises or places not open to the public, in the knowledge that they will there engage in prostitution;

4° sells, hires or makes available in any way whatsoever vehicles of any type to one or more persons knowing that they will engage in prostitution in them.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offences set out under 1° and 2° of the present article.

ARTICLE 225-11

(Act no. 2003-239 of 18 March 2003 Article 50 1° Official Journal of 19 March 2003)

Attempt to commit the misdemeanours set out under the present section is subject to the same penalties.

ARTICLE 225-11-1

(Act no. 2004-204 of 9 March 2004 article 12 X Official Journal of 10 March 2004)

Any person who has attempted to commit the offences outlined in the present section is exempted from punishment if, having alerted the judicial or administrative authorities, he has prevented the offence from being carried out, and, where relevant, has enabled the other perpetrators or accomplices to be identified.

The prison sentence incurred by the perpetrator of or the accomplice to the offence is reduced by half if, by alerting the legal or administrative authorities, he has enabled the offence to be stopped or has prevented the offence resulting in loss of life or permanent disability and, where relevant, has identified the other perpetrators or accomplices. Where the sentence incurred is criminal imprisonment for life, this is reduced to twenty years' criminal imprisonment.

ARTICLE 225-12

(Act no. 2003-239 of 18 March 2003 Article 50 1° Official Journal of 19 March 2003)

Legal persons may be convicted of the offences defined by articles 225-5 to 225-10, pursuant to the conditions set out under article 121-2.

The penalties incurred by legal persons are:

1° a fine, pursuant to the conditions set out under article 131-38;

2° the penalties set out under article 131-39.

ARTICLE 225-10-1

(Inserted by Act no. 2003-239 of 18 March 2003 Article 50 2° Official Journal of 19 March 2003)

Publicly soliciting another person by any means, including passive conduct, with a view to inciting them to engage in sexual relations in exchange for remuneration or a promise of remuneration is punished by two months' imprisonment and by a fine of €3,750.

SECTION IIbis
OF RECOURSE TO MINORS' PROSTITUTION

Articles 225-12-1 to 225-12-4

ARTICLE 225-12-1

(Decree no. 2002-305 of 4 March 2002 Article 13 Official Journal of 5 March 2002)
(Act no. 2003-239 of 18 March 2003 Article 50 3° 4° Official Journal of 19 March 2003)

Soliciting, accepting or obtaining, in exchange for remuneration or a promise of a remuneration, relations of a sexual nature with a minor who engages in prostitution, even if not habitually, is punished by three years' imprisonment and a fine of €45,000.

Soliciting, accepting or obtaining in exchange for remuneration or a promise of remuneration, sexual relations with a person whose particular vulnerability, due to age, sickness, infirmity, a physical or psychological disability or to pregnancy, is apparent or known to the offender, and who engages in prostitution, even if not habitually, is punished by the same penalties.

ARTICLE 225-12-2

(Decree no. 2002-305 of 4 March 2002 Article 13 Official Journal of 5 March 2002)
(Act no. 2003-239 of 18 March 2003 Article 50 3° Official Journal of 19 March 2003)

The penalty is increased to five years' imprisonment and to €75,000:

1° where the offence is committed habitually or against more than one person;

2° where the person was put in contact with the offender by the use, for the dissemination of messages to an unrestricted public, of a communication network;

3° where the offence was committed by a person abusing the authority conferred upon him by his position.

Tha penalty is increased to seven years' imprisonment and to a fine of €100.000 where the offence was committed against a minor under fifteen years of age.

ARTICLE 225-12-3

(Inserted by Decree no. 2002-305 of 4 March 2002 Article 13 Official Journal of 5 March 2002)

Where the misdemeanours referred to under articles 225-12-1 to 225-12-2 are committed abroad by a French national or by a person habitually resident on French territory, French law is applicable notwithstanding the second paragraph of article 113-6, and the provisions of the second sentence of article 113-8 do not apply.

ARTICLE 225-12-4

(Inserted by Decree no. 2002-305 of 4 March 2002 Article 13 Official Journal of 5 March 2002)
(Act no. 2003-239 of 18 March 2003 Article 50 3° Official Journal of 19 March 2003)

A legal person may incur criminal liability, pursuant to the conditions set out under article 121 -2, for the offences defined under this Section of the present Code.

The penalties incurred by legal persons are:

1° a fine, pursuant to the conditions set out under article 131-38;

2° tha penalties enumerated in article 131-39.

Tha prohibition under 2° of article 131-39 applies to the activity in the exercise of which or on the occasion of the exercise of which the offence was committed.

SECTION IIter
THE EXPLOITATION OF BEGGING — Articles 225-12-5 to 225-12-7

ARTICLE 225-12-5

(Inserted by Act no. 2003-239 of 18 March 2003 Article 64 11° Official Journal of 19 March 2003)

Exploitation of begging is committed when a person in any way:

1° organises begging by another, with a view to profiting from it;

2° profits from another person's begging, shares the proceeds or receives income from a person who habitually engages in begging;

3° hires, trains or corrupts a person in order to start them begging or exercises pressure on a person for them to beg or to continue to do so;

4° for his personal gain, hires, trains or corrupts a person into offering services on a public highway in return for a donation.

The fact of being unable to account for an income compatible with one's lifestyle while in practice influencing the behaviour of one or more persons who practise begging, or being in a constant relationship with him or them, is assimilated to the exploitation of begging.

Exploitation of begging is punished by three years' imprisonment and by a fine of €45,000.

ARTICLE 225-12-6

(Inserted by Act no. 2003-239 of 18 March 2003 Article 64 I 1° Official Journal of 19 March 2003)

The exploitation of begging is punished by five year's imprisonment and by a fine of €75, 000 when it is committed:

1° against a minor;

2° where it is committed against a person whose particular vulnerability, due to age, sickness, infirmity, a physical of psychological disability or to pregnancy, is apparent or known to the perpetrator;

3° against two or more;

4° against a person who was incited to start begging either outside the territory of the French Republic, or upon his arrival on the territory of the French Republic;

5° by a legitimate, natural or adoptive ascendant of the person begging, or by any other person having authority over him or who misuses the authority conferred by his position;

6° with the use of constraint, violence or fraudulent behaviour towards the person who is begging, or his family or another person in habitual contact with him;

7° by two or more persons acting as perpetrators or accomplices, although not constituting an organised gang.

ARTICLE 225-12-7

(Inserted by Act no.2003-239 of 18 March 2003 Art. 64I I° Official Journal of 19 March 2003.)

The exploitation of another person's begging is punished by ten years' imprisonment and by a fine of €1 500 000 when it is committed by an organised gang.

SECTION III
WORKING AND LIVING CONDITIONS WHICH INFRINGE HUMAN DIGNITY — Articles 225-13 to 225-15-1

ARTICLE 225-13

(Ordinance no. 2000-916 of 19 September 2000 Art.3 Official Journal of 22 September 2000 in force on 1 January 2002) (Act no. 2003-239 of 18 March 2003 Art. 33 Official Journal of 19 March 2003)

Obtaining the performance of unpaid services or services against which a payment is made which clearly bears no relation to the importance of the work performed from a person whose vulnerability or dependence is obvious or known to the offender is punished by five years' imprisonment and by a fine of €150,000.

ARTICLE 225-14

(Ordinance no. 2000-916 of 19 September 2000 Art.3 Official Journal of 22 September 2000 in force on 1 January 2002) (Act no. 2003-239 of 18 March 2003 Art. 34 Official Journal of 19 March 2003)

Subjecting a person, whose vulnerability or dependence is obvious or known to the offender, to working or living conditions incompatible with human dignity is punished by five years' imprisonment and by a fine of €150,000.

ARTICLE 225-15

(Ordinance no. 2000-916 of 19 September 2000 Art.3 Official Journal of 22 September 2000 in force on 1 January 2002) (Act no. 2003-239 of 18 March 2003 Art. 35 Official Journal of 19 March 2003)

The offences under articles 225-13 and 225-14 are punished by seven years' imprisonment and by a fine of €200,000 when they are committed against more than one person.

Where they are committed against a minor, they are punished by seven years' imprisonment and by a fine of €200,000.

Where they are committed against two or more, one or more of whom are minors, they are punished by 10 years' imprisonment and by a fine of €300,000.

ARTICLE 225-16

(Act no. 1998-657 of 29 July 1998 Article 124 Official Journal of 31 July 98)

Legal persons may be convicted of the offences definec by articles 225-13 to 225-15, pursuant to the conditions set out under article 121-2. The penalties incurred by legel persons are:

1° a fine, pursuant to the conditions set out under article 131-38;

2° the penalties set out under article 131-39.

ARTICLE 225-15-1

(Inserted by Act no. 2003-239 of 18 March 2003 Art. 36 Official Journal of 19 March 2003)

For the application of articles 225-13 and 225-14, minors or others who have been victims of tha acts described by these articles upon their arrival on French nationel territory are considered to be vulnerable or in a situation of dependence.

SECTION IIIbis
DEGRADING INITIATION CEREMONIES — Articles 225-16-1 to 225-16-3

ARTICLE 225-16-1

(Act no. 1998-657 of 29 July 1998 Article 14 Official Journal of 31 July 1998; Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

Except in cases of violence, threat or sexual assault, a person who induces another, with or without his consent, to submit to or commit humiliating or degrading acts at demonstrations or meetings linked to schools or socio-educational centres is punished by six months' imprisonment and a fine of €7,500.

ARTICLE 225-16-2

(Act no. 1998-657 of 29 July 1998 Article 14 Official Journal of 31 July 1998; Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

The offence under article 225-16-1 is punished by one year's imprisonment and a fine of €15,000 where it is committed against a person whose perticular vulnerability, due to age, sickness, infirmity, a physical of psychologicel disability or to pregnancy, is apparent or known tc the perpetrator.

ARTICLE 225-16-3

(Act no. 1998-657 of 29 July 1998 Article 14 Official Journal of 31 July 1998; Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

Legal persons may incur criminal liebility, in the manner provided by article 121-2, for the offences committed during demonstrations or meetings linked to educational or socio-educetional centres under 225-16-1 and 225-16-2.

The penalties incurred by legal persons are:

1° a fine, pursuant to the conditions set out under article 131-38;

2° the penalties set out under article 131-39.

SECTION IV
VIOLATIONS OF RESPECT FOR THE DEAD — Articles 225-17 to 225-18-1

ARTICLE 225-17

(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

Any violation of the physical integrity of a corpse, by any means, is punished by one year's imprisonment and a fine of €15,000.

The violation or desecration of tombs, burials grounds or monuments erected to the memory of the dead, committed by any means, is punished by one year's imprisonment and a fine of €15,000.

The penalty is increased to two years' imprisonment and to a fine of €30,000 where the offences defined under the previous paragraph were accompanied by a violation of the physical integrity of the corpse.

ARTICLE 225-18

(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

Where the offences defined under the previous article were committed by reason of the membership or non-membership, true or supposed, of the deceased persons to any given ethnic group, nation, race or religion, penalties are increased to three years' imprisonment and to a fine of €45,000 in for the offences defined under the first two paragraphs of article 225-17 and to five years' imprisonment and to a fine of €75,000 in relation to the offence defined by the last paragraph of that article.

ARTICLE 225-18-1

(Inserted by Act no. 2001-504 of 12 June 2001 Article 11 Official Journal of 13 June 2001)

Legal persons may incur criminal liability for the offence defined under article 225-17 and 225-18, pursuant to the conditions set out under article 121-2.

The penalties incurred by legal persons are:

1° a fine, pursuant to the conditions set out under article 131-38;

2° the penalties enumerated under 2° to 9° of article 131-39;

3° the penalty referred to under 1° of article 131-39 for the offences referred to under article 225-18.

The prohibition referred to in 2° of article 131-39 applies to the activity in the exercise of which or on the occasion of the exercise of which the offence was committed.

SECTION V
OF ADDITIONAL PENALTIES APPLICABLE TO NATURAL PERSONS — Articles 225-19 to 225-21

ARTICLE 225-19

(Act no. 1998-657 of 26 July 1998 Article 124 Official Journal of 31 July 1998)

Natural persons convicted of the offences set out under Sections 1 and 3 of the present chapter also incur the following additional penalties:

1° forfeiture of rights under 2° and 3° of article 131-26 for a maximum period of five years;

2° public display or dissemination of the decision pronounced, pursuant to the conditions set out under article 131-35;

3° mandatory closure, either for a maximum period of five years or permanently, of one, some or all of the premises of the business belonging to the convicted person;

4° exclusion from public tenders either permanently or for a maximum period of five years;

5° confiscation of a housing business that has been used to commit the offence outlined in article 225-14;

6° the obligation to complete a citizenship course, according to the conditions set out under article 131-5-1.

ARTICLE 225-20

(Act no. 2002-305 of 4 March 2002 Article 13 Official Journal of 5 March 2002)
(Act no. 2003-239 of 18 March 2003 Article 64 I 2 ° Official Journal of 19 March 2003)

Natural persons convicted of the offences under sections 1bis, 2, 2bis and 2ter of the present chapter also incur the following additional penalties:

1° forfeiture of civic, civil and family rights, pursuant to the conditions set out under article 131-26;

2° prohibition to discharge the social or professional activity in the exercise of which or on the occasion of the exercise of which the offence was committed, pursuant to the conditions set out under article 131-27;

3° area banishment;

4° prohibition to manage, directly or indirectly, establishments open to the public or used by the public specified in the sentence, to be employed there in any capacity or to have or continue any financial participation;

5° prohibition to hold or carry a weapon requiring a licence, for a maximum period of five years;

6° prohibition, for a maximum period of five years, to leave the territory of the French Republic.

ARTICLE 225-21

(Act no. 2003-239 of 18 March 2003 Article 64 I 3 ° Official Journal of 19 March 2003)

Any alien convicted of any of the offences set out under sections 1bis, 2 and 2ter of the present chapter may be banished from French territory either permanently or for a maximum period of ten years, pursuant to the conditions set out under article 131-10.

SECTION VI
PROVISIONS COMMON TO NATURAL AND LEGAL PERSONS — Articles 225-22 to 225-25

ARTICLE 225-22

Natural or legal persons convicted of the offences set out under Article 225-10 also incur the following additional penalties:

1° permanent withdrawal of a bar or restaurant licence;

2° the mandatory closure, either permanent or for a maximum period of five years, of the entire establishment or of the parts of the establishment used for the purpose of prostitution;

3° seizure of business capital and equipment.

ARTICLE 225-23

Temporary mandatory closure set out under the third paragraph (point 2°) of article 225-22 entails the suspension of the bar or restaurant licence for the same length of time. The expiry of the said licence is suspended during the mandatory closure period.

Permanent mandatory closure provided for under article 225-22 entails the permanent withdrawal of the bar or restaurant licence.

ARTICLE 225-24

Natural or legal persons convicted of the offences set out under articles 225-6 to 225-10 also incur:

1° confiscation of the movable assets directly or indirectly used for the commission of the offence as well as of any products of the offence held by a person other than the person engaging in prostitution;

2° reimbursement of the repatriation expenses of the victim or victims.

ARTICLE 225-25

(Inserted by Act no. 2003-239 of 18 March 2003 Article 37 Official Journal of 19 March 2003)

Natural or legal persons convicted of the offences set out under sections 1bis and 2 of the present chapter, with the exception of the offence set out under article 225-10-1, also incur the additional penalty of the confiscation of any or all of their property, of whatever type, movable or immovable, and whether jointly or separately owned.

CHAPTER VI
OFFENCES AGAINST PERSONALITY — Articles 226-1 to 226-32

SECTION I
OFFENCES AGAINST PRIVACY — Articles 226-1 to 226-7

ARTICLE 226-1

(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

A penalty of one year's imprisonment and a fine of €45,000 is incurred for any wilful violation of the intimacy of the private life of other persons by resorting to any means of:

1° intercepting, recording or transmitting words uttered in confidential or private circumstances, without the consent of their speaker;

2° taking, recording or transmitting the picture of a person who is within a private place, without the consent of the person concerned.

Where the offences referred to by the present article were performed in the sight and with the knowledge of the persons concerned without their objection, although they were in a position to do so, their consent is presumed.

ARTICLE 226-2

The same penalties apply to the keeping, bringing or causing to be brought to the knowledge of the public or of a third party, or the use in whatever manner, of any recording or document obtained through any of the actions set out under article 226-1.

Where the misdemeanour under the previous paragraph is committed through the press or by broadcasting, the specific legal provisions governing those matters are applicable to define the persons who are responsible.

ARTICLE 226-3

The same penalties apply to the manufacture, import, detention, exhibition, offer, rental or sale, in the absence of a ministerial authorisation whose conditions of granting are determined by decree of the Conseil d'Etat, of equipment designed to perform operations which may constitute the offence set out under the second paragraph of article 226-15 or which, being designed for the detection of conversations from a distance, enable the commission of an offence under article 226-1 and are enumerated on a list drawn up pursuant to the conditions determined by that Decree.

The same penalties apply to the advertising of a device liable to enable the commission of the offences set out under article 226-1 and the second paragraph of article 226-15, where this advertisement constitutes an incentive to commit such offences.

ARTICLE 226-4

(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

Entering or unlawfully occupying the residence of another by means of manoeuvres, threats, acts of violence or constraint, except where permitted by law, is punished by one year's imprisonment and a fine of €15,000.

ARTICLE 226-5

Attempts to commit the offences set out under the present section are similarly punishable.

ARTICLE 226-6

In the cases set out under articles 226-1 and 226-2, criminal proceedings may only be initiated on the complaint of

the victim, his legal representative or the legal successor to his rights.

ARTICLE 226-7

Legal persons may incur criminal liability for the offences defined by the present section, pursuant to the conditions set out under article 121-2.

The penalties applicable to legal persons are:

1° a fine, pursuant to the conditions set out under Article 131-38;

2° prohibition, either permanent or for a maximum period of five years, to engage in, either directly or indirectly, the social or professional activity in the exercise of which or on the occasion of the exercise of which the offence was committed;

3° the public display or dissemination of the decision pursuant to the conditions set out under article 131-35.

SECTION II
OFFENCES AGAINST THE IMAGE OF PERSONS — Articles 226-8 to 226-9

ARTICLE 226-8

(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

A sentence of one year's imprisonment and a fine of €15,000 apply to the publication by any means of any montege made that uses the words or the image of a person without the latter's consent, unless it is obvious that it is a montage, or this fact is expressly indicated

When the misdemaanour set out under the previous paragraph is committed through the press or by broadcasting, the specific legal provisions governing those matters are applicable to define the persons who are responsible.

ARTICLE 226-9

Articles 226-5 and 226-7 are applicable to the present section.

SECTION III
MALICIOUS DENUNCIATION — Articles 226-10 to 226-12

ARTICLE 226-10

(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

A denunciation made by any means and directed against a specified person, of a fact that is liable to cause judicial, administrative or disciplinary sanctions and that the maker knows to be totally or partially false, where it is sent either to a judicial officer or to a judicial or administrative police officer, or to an authority with power to follow it up or to refer it to the competent authority, or to hierarchical superiors or to the employer of the person concerned, is punished by five years' imprisonment and a fine of €45,000.

The falsity of the act denounced is conclusively established by a final decision of acquittal, or decision to drop the prosecution, which declares that the alleged facts are not established or that they are not attributable to the person denounced.

In any other case, the court seised with the prosecution of the denouncer weighs the accuracy of the denouncer's accusations.

ARTICLE 226-11

Where the subject matter of the denunciation has led to a criminal prosecution, the prosecution case against the denouncer may not be decided upon until after the decision putting a final end to the proceedings concerning that matter.

ARTICLE 226-12

Legal persons may incur criminal liability, pursuant to the conditions set out under article 121-2, for the offence defined under article 226-10.

The penalties incurred by legal persons are:

1° a fine, pursuant to the conditions set out under article 131-38;

2° prohibition, either permanent or for a maximum period of five years, to engage in, either directly or indirectly, the social or professional activity in the exercise of which or on the occasion of the exercise of which the offence was committed;;

3° the public display or dissemination of the decision taken, pursuant to the conditions set out under article 131-35.

SECTION IV
BREACH OF SECRECY — Articles 226-13 to 226-15

Paragraph 1
Of the breach of professional secrecy — Articles 226-13 to 226-14

ARTICLE 226-13

(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

The disclosure of secret information by a person entrusted with such a secret, either because of his position or

profession, or because of a temporary function or mission, is punished by one year's imprisonment and a fine of €15,000.

ARTICLE 226-14

(Act no. 98-468 of 17 June 1998 Article 15 Official Journal of 18 June 1998)
(Act no.2002-79 of 17 January 2002 article 89 Official Journal of 18 January 2002)
(Act no. 2003-239 of 18 March 2003 article 85 Official Journal of 19 March 2003)
(Act no. 2004-1 of 2 January 2004 article 11 Official Journal of 3 January 2004)

Article 226-13 is not applicable to the cases where the law imposes or authorises the disclosure of the secret. In addition, it is not applicable:

1° to a person who informs a judicial, medical or administrative authority of cruelty or deprivation, including sexual abuse, of which he has knowledge and which has been inflicted on a minor or a persen unable to protect himself because of his age, or physical or psychological state;

2° to a doctor who, with the consent of the victim, brings to the knowledge of the public prosecutor instances of cruelty or deprivation, either physical or psychological, that he has observed in the exercise of his profession that cause him to believe that physical, sexual or psychological violence of any sort, has been committed. Where the victim is a minor, his consent is not necessary;

3° to health profassionals or social work professionals who inform the prefect and, in Paris, the chief of police, that someone who consults them presents a danger to himself or to other people when they know that this person has a weapon or has manifested the intention to acquire one.

Alerting the competent authorities under the conditions provided for by the present article may not lead to disciplinary sanctions.

The provisions of article 226-14 of the Criminal Code are applicable in New Caledonia, French Polynesia and the islands of Wallis and Futuna.

Paragraph 2
Breach of the secrecy of correspondence — Article 226-15

ARTICLE 226-15

(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

Maliciously opening, destroying, delaying or diverting of correspondence sent to a third party, whether or not it arrives at its destination, or fraudulently gaining knowledge of it, is punished by one year's imprisonment and a fine of €45,000.

The same penalty applies to the malicious interception, diversion, use or disclosure of correspondence sent, transmitted or received by means of telecommunication, or the setting up of a device designed to produce such interceptions.

SECTION V
VIOLATIONS OF PERSONAL RIGHTS RESULTING FROM COMPUTER FILES OR PROCESSES — Articles 226-16 to 226-24

ARTICLE 226-16

(Act no. 92-1336 of 16 December 1992 Articles 360 and 373 Official Journal of 23 December 1992 in force 1 March 1994)
(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September in force 1 January 2002)
(Act no.2004-801 of 6 August 2004 Article 14 Official Journal of 7 August 2004)

Processing data or causing data to be processed where the data concerned is of a personal nature, without respecting the formalities required by statute prior to the processing of such data, is punished by five years' imprisonment and a fine of €300,000, even where committed through negligence.

The same penalties apply to processing of data or causing data to be processed that has been subject to one of the measures provided for in 2° of I of article 45 of Act no. 78-17 of 6 January 1978 regulating information technology, files and liberty, even where this is committed through negligence.

ARTICLE 226-16-1

(Inserted by Act no.2004-801 of 6 August 2004 Article 14 Official Journal of 7 August 2004)

Except where this has been authorised under the conditions set out by the afore- mentioned Act no.78-17 of 6 January 1978, processing or causing data to be processed which is personal and which indicates a person or persons' registration number in the National Register of Natural Persons is punished by five years' imprisonment and by a fine of €300,000.

ARTICLE 226-16-1-A

(Inserted by Act no.2004-801 of 6 August 2004 Article 14 Official Journal of 7 August 2004)

Where data is processed or caused to be processed in the situations mentioned in paragraphs I or II of article 24 of the above-mentioned Act no.78-17 of 6 January 1978, and the simplified or exempted norms prescribed for these purposes by tha National Commission for Data-processing and Civil Liberties are not respected, even through negligence, this is punished by five years' imprisonment and by a fine of €30,000.

ARTICLE 226-17

(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

Carrying out or causing to be carried out the processing of personal data without putting into practice the measures required by article 34 of the aforementioned Act no. 78-17 of 6 January 1978 is punished by five years' imprisonment and a fine of €300,000.

ARTICLE 226-18

(Act no. 1994-548 of 1 July 1994 Article 4 Official Journal of 2 July 1994; Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002; Act no.2004-801 of 6 August 2004 Article 14 Official Journal of 7 August 2004)

The collection of personal data by fraudulent, unfair or unlawful means is punished by five years' imprisonment and a fine of €300,000.

ARTICLE 226-18-1

(Inserted by Act no.2004-801 of 6 August 2004 Article 14 Official Journal of 7 August 2004)

Carrying out or causing to be carried out the processing of personal data relating to a natural person despite this person's objection, when the processing is done for the purpose of seeking custom, particularly commercial custom, or when the objection is founded on legitimate reasons, is punished by five years' imprisonment and a fine of €300,000.

ARTICLE 226-19

(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

Except in cases provided for by law, the recording or preserving in a computerised memory, without the express agreement of the persons concerned, of personal data which directly or indirectly reveals their racial origins, political, philosophical or religious opinions, or trade union affiliations, or their health or sexual orientation, is punished by five years' imprisonment and a fine of €300,000.

The same penalty applies to the recording or preserving in a computerised memory of name-bearing information relating to offences, convictions or supervision measures outside the cases provided for by law.

ARTICLE 226-19-1

(Inserted by Act no.2004-801 of 6 August 2004 Article 14 Official Journal of 7 August 2004)

Where the processing of personal data takes place the aim of which is research in the area of health, a penalty of five years' imprisonment and a fine of €300,000 applies to any processing carried out:

1° without having previously individually informed the persons on whose account the personal data have been collected or transmitted of their right to request access, rectification and objection, and of the nature of the data to be transmitted ad the persons to whom it is to be sent;

2° despite the objection of the person concerned or, where this is required by law, in the absence of the informed and express consent of this person, or where the person is dead, despite his refusal expressed when he was alive.

ARTICLE 226-20

(Act no. 2000-321 of 12 April 2000 Article 5 Official Journal of 13 April 2000; Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002; Act no.2004-801 of 6 August 2004 Article 14 Official Journal of 7 August 2004)

The retention of personal data beyond the length of time specified by statute or by regulation, by the request for authorisation or notice, or in the preliminary declaration sent to the National Commission for Data-processing and Civil Liberties, is punished by five years' imprisonment and a fine of €300,000, except where the retention was carried out historical, statistical or scientific purposes in conditions specified by law.

Except where the law otherwise provides, the same penalties apply to any processing of data held beyond the periods mentioned in the previous paragraph, where this is done for purposes other than those which are historical, statistical or scientific.

ARTICLE 226-21

(Act no. 1995-116 of 4 February 1995 Article 34 Official Journal of 5 February 1995; Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002; Act no.2004-801 of 6 August 2004 Article 14 Official Journal of 7 August 2004)

Anyone holding personal data at the time of its recording, classification, transmission or any other form of processing who diverts this information from its proper purpose, as defined by the legislative provision or regulation or decision of the National Commission for Data-processing and Civil Liberties authorising automated processing, or by the preliminary statement made before the implementation of such processing, is punished by five years' imprisonment and a fine of €300,000.

ARTICLE 226-22

(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

Anyone who has collected, at the time of its recording, classification, transmission or any other form of processing, personal data the disclosure of which would result in undermining the reputation of the concerned person or cause harm to the intimacy of his private life, and then brings such information to the knowledge of a third party who has no authority to receive it without prior authorisation of the person concerned, is punished by three years' imprisonment and a fine of €300,000.

Disclosure contrary to the previous paragraph is punished by a fine of €100,000 where it was committed by carelessness or negligence.

In the cases set out under the two previous paragraphs, the prosecution may only be initiated upon the complaint of the victim, his legal representative or successors.

ARTICLE 226-22-1

(Inserted by Act no.2004-801 of 6 August 2004 Article 14 Official Journal of 7 August 2004)

Except in cases provided for by law, transferring or causing to be transferred any personal data used or intended for use in data processing to a State not belonging to the European Community in breach of any measures taken by the National Commission for Data-processing and Civil Liberties described in article 70 of the aforementioned Act no. 78-17 of 6 January 1978 is punished by 5 years' imprisonment and a fine of €300,000.

ARTICLE 226-22-2

(Inserted by Act no.2004-801 of 6 August 2004 Article 14 Official Journal of 7 August 2004)

In the cases provided for by articles 226-16 to 226-22-1, the destruction of the personal data the processing of which has given rise to the offence may be ordered. The members or officials of the National Commission for Data-processing and Civil Liberties are authorised to verify the destruction of such information.

ARTICLE 226-23

(Act no.2004-801 of 6 August 2004 Article 14 Official Journal of 7 August 2004)

The provisions of article 226-19 are applicable to the non-automated processing of personal data, when the processing operation does not take place exclusively in the course of activities that are purely private.

ARTICLE 226-24

(Act no.2004-801 of 6 August 2004 Article 14 Official Journal of 7 August 2004)

Legal persons may incur criminal liability, under the conditions provided by article 121-2, for the offences set out in the present section.

The penalties applicable to legal persons are:

1° a fine, pursuant to the conditions set out under article 131-38;

2° the penalties enumerated under 2°, 3°, 4°, 5°, 7°, 8° and 9° of article 131-39.

The prohibition mentioned under 2° of article 131-39 applies to the activity in the exercise of which or on the occasion of the exercise of which the offence was committed.

SECTION VI

OFFENCES AGAINST PERSONS RESULTING FROM EXAMINATION OF GENETIC CHARACTERISTICS OR IDENTIFICATION OF DNA PROFILES — Articles 226-25 to 226-30

ARTICLE 226-25

(Act no. 1992-1336 of 16 December 1992 Articles 361 and 373 Official Journal of 23 December 1992 into force 1 March 1994; Act no. 1994-653 of 29 July 1994 Article 8 Official Journal of 30 July 1994; Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002; Act no.2004-801 of 6 August 2004 Article 14 Official Journal of 7 August 2004)

The study of the genetic characteristics of a person for purposes other medical purposes or scientific research, or their study for medical purposes or scientific research without having obtained the person's prior consent pursuant to the conditions set out under article 16-10 of the Civil Code, is punished by one year's imprisonment and a fine of €15,000.

ARTICLE 226-26

(Act no. 1994-653 of 29 July 1994 Article 8 Official Journal of 30 July 1994; Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

The diversion from their intended purposes of medical or scientific research any information collected on a person by way of a study of his genetic characteristics is punished by one year's imprisonment and a fine of €15,000.

ARTICLE 226-27

(Act no. 1994-653 of 29 July 1994 Article 8 Official Journal of 30 July 1994; Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002; Act no.2004-801 of 6 August 2004 Article 14 Official Journal of 7 August 2004)

Researching the identification of a person through his DNA profile for medical purposes without obtaining his consent prior pursuant to the conditions set out under article 16-11 of the Civil Code is punished by one year's imprisonment and a fine of €15,000.

ARTICLE 226-28

(Act no. 1994-653 of 29 July 1994 Article 8 Official Journal of 30 July 1994)
(Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)
(Act no. 2005-270 of 24 March 2005 Article 93 II Official Journal of 26 March 2005 in force 1 July 2005)

Researching the identification of a person through his DNA profile, if it does not involve a member of the military deceased during an operation led by the armed forces or a linked group, for purposes neither medical nor scientific, or other than in an inquiry or investigation made in the course of judicial proceedings, is punished by one year's imprisonment and a fine of €15,000.

The same penalty applies to the disclosure of information concerning the identification of a person through his DNA profile or proceeding to the identification of a person through his DNA profile without holding the authorisation provided for under article L. 145-16 of the Public Health Code.

NOTE: Act no. 2005-270 of the 24th March 2005 article 106: the provisions of article 93 are applicable in New-Caledonia, French Polynesia, Wallis-et-Futuna and Mayotte.

ARTICLE 226-29

(Inserted by Act no. 1994-653 of 29 July 1994 Article 8 Official Journal of 30 July 1994)

Attempt to commit the offences defined by articles 226-25, 226-26, 226-27 and 226-28 is subject to the same penalties.

ARTICLE 226-30

Legal persons may incur criminal liability for the offences defined by this section of the present Code pursuant to the conditions set out under article 121-2.

The penalties applicable to legal persons are:

1° a fine, pursuant to the conditions set out under article 131-38;

2° the penalties enumerated under points 2°, 3°, 4°, 5°, 7°, 8° and 9° of article 131-39.

The prohibition referred to in 2° of article 131-39 applies to the activity in the exercise of which or on the occasion of the exercise of which the offence was committed.

SECTION VII
ADDITIONAL PENALTIES APPLICABLE TO NATURAL PERSONS — Articles 226-31 to 226-32

ARTICLE 226-31

(Inserted by Act no. 1994-653 of 29 July 1994 Article 8 Official Journal of 30 July 1994)

Natural persons convicted of any of the offences set out in the present chapter also incur the following additional penalties:

1° forfeiture of civic, civil and family rights, pursuant to the conditions set out under article 131-26;

2° prohibition to discharge the social or professional activity in the exercise of which or on the occasion of the exercise of which the offence was committed, pursuant to the conditions set out under article 131-27;

3° prohibition to hold or carry a weapon requiring a licence, for a maximum period of five years;

4° the public display or dissemination of the decision taken, pursuant to the conditions set out under article 131-35.

5° in the cases under articles 226-1 to 226-3, 226-8, 226-15 and 226-28, the confiscation of the thing which was used or was intended for the commission of the offence, or of the thing which is the product of it. Confiscation of the equipment referred to under article 226-3 is mandatory.

ARTICLE 226-32

(Inserted by Act no. 1994-653 of 29 July 1994 Article 8 Official Journal of 30 July 1994)

Natural persons convicted of the offences under article 226-28 and of any attempt to commit these offences who hold the capacity of a judicially appointed expert are also liable to be struck off the list on which they are inscribed.

CHAPTER VII
OFFENCES AGAINST MINORS AND THE FAMILY — Articles 227-1 to 227-31

SECTION I
DESERTION OF MINORS — Articles 227-1 to 227-2

ARTICLE 227-1

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1January 2002)

The abandonment of a minor under fifteen years of age in any given place is punished by seven years' imprisonment and a fine of €100,000 except where the circumstances of the abandonment enabled the health and the safety of the minor to be assured.

ARTICLE 227-2

The abandonment of a minor under fifteen years of age causing the minor to suffer mutilation or permanent disability is punished by twenty years' criminal imprisonment.

The abandonment of a minor under fifteen years of age causing the death of the minor is punished by thirty years' criminal imprisonment.

SECTION II
DESERTION OF FAMILY — Article 227-3

ARTICLE 227-3

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force the 1 January 2002)

The non-execution of a judicial decision or a judicially affirmed agreement imposing upon a person an obligation to pay, in the interest of a legitimate, natural or adoptive child, of a descendant, an ascendant or spouse, a pension, a contribution, subsidies or benefits of any nature on the basis of one of the family obligations set out in titles V, VI, VII and VIII of Book I of the Civil Code, by remaining more than two months without fulfilling that duty in its entirety is punished by two years' imprisonment and a fine of €15,000.

The offences referred to in the first paragraph of the present article are assimilated to abandoning the family for the purposes of 3° of article 373 of the Civil Code.

ARTICLE 227-4

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Failure by a person bound under the conditions referred to in article 227-3 to pay a pension, a contribution, subsidies or benefits of any nature, to notify a change of official address to the creditor within a time-limit of one month from the date of the change is punished by six months' imprisonment and a fine of €7,500.

ARTICLE 227-4-1

(Inserted by Act no. 2001-504 of 12 June 2001 Article 12 Official Journal of 13th June 2001)

Legal persons may incur criminal liability pursuant to the conditions set out under article 121-2 for offences under this Section of the present Code.

The penalties incurred by legal persons are:

1° a fine, in the manner prescribed by article 131-38;

2° the penalties referred to under 2° to 9° of article 131-39.

The prohibition specified under 2° of article 131-39 relates to the activities in the course of which or on the occasion of the performance of which the offence was committed.

ARTICLE 227-3

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force the 1 January 2002)

(Ordinance no. 2005-759 of 4 July 2005 Article 19 I Official Journal of 7 July 2005 in force 1 July 2006)

The non-execution of a judicial decision or a judicially affirmed agreement imposing upon a person an obligation to pay, in the interest of a child, of a descendant, an ascendant or spouse, a pension, a contribution, subsidies or benefits of any nature on the basis of one of the family obligations set out in titles V, VI, VII and VIII of Book I of the Civil Code, by remaining more than two months without fulfilling that duty in its entirety is punished by two years' imprisonment and a fine of €15,000.

The offences referred to in the first paragraph of the present article are assimilated to abandoning the family for the purposes of 3° of article 373 of the Civil Code.

SECTION III

OFFENCES AGAINST THE EXERCISE OF PARENTAL AUTHORITY — Articles 227-5 to 227-11

ARTICLE 227-5

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The unlawful refusal to produce a minor child to the person who has the right to require the production of the child is punished by one year's imprisonment and a fine of €15,000.

ARTICLE 227-6

(Act no. 96-604 of 5 July 1996 Article 27 Official Journal of 6th July 1996)

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The omission by a person whose children reside habitually with him when moving elsewhere to notify his change of address within one month from the date of such change to those persons entitled to exercise visiting or residence rights over such children pursuant to a judgment or a judicially affirmed agreement is punished by six months' imprisonment and a fine of €7,500.

ARTICLE 227-7

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

(Ordinance no. 2005-759 of 4 July 2005 Article 19 I Official Journal of 7 July 2005 in force 1 July 2006)

The abduction a minor from the care of persons who exercise parental authority over him or from persons to whom he was entrusted, or with whom the child habitually resides, when committed by any ascendant, is punished by one year's imprisonment and a fine of €15,000.

ARTICLE 227-8

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The abduction without fraud or violence of a minor from the care of persons who exercise parental authority over him or from persons to whom the he was entrusted or with whom he habitually resides, when committed by a person other than those referred to in article 227-7, is punished by five years' imprisonment and a fine of €75,000.

ARTICLE 227-9

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

(Act no. 2002-305 of 4 March 2002 Article 16 Official Journal of 5 March 2002)

The offences set out under articles 227-5 and 227-7 are punished by three years' imprisonment and a fine of €45,000:

1° if the minor is retained in excess of five days, when the persons who have the right to claim him do not know where he is;

2° if the minor is unlawfully kept outside the territory of the Republic.

ARTICLE 227-10

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Where the person guilty of the offences set out under articles 227-5 and 227-7 has been divested of parental authority, such offences are punished by three years' imprisonment and a fine of €45,000.

ARTICLE 227-11

Attempt to commit the offences set out under articles 227-7 and 227-8 is subject to the same penalties.

SECTION IV
OFFENCES AGAINST FILIATION — Articles 227-12 to 227-14

ARTICLE 227-12

(Act no. 94-653 of 29 July 1994 Article 4 Official Journal of 30th July 1994; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The incitement of the parents or one of them to abandon a born or unborn child, made either for pecuniary gain, or by gifts, promises, threats or abuse of authority, is punished by six months' imprisonment and a fine of €7,500 €.

Acting for pecuniary gain as an intermediary between a person desiring to adopt a child and a parent desiring to abandon its born or unborn child is punished by one year's imprisonment and a fine of €15,000.

The penalties provided by the second paragraph apply to acting as an intermediary between a person or a couple desiring to receive a child and a woman agreeing to bear this child with the intent to give it up to them. Where the offence is habitually committed for pecuniary gain, the penalties incurred are doubled.

Attempt to commit the offences referred to under the second and third paragraphs of the present article is subject to the same penalties.

ARTICLE 227-13

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Wilful substitution, false representation or concealment which infringes the civil status of a child is punished by three years' imprisonment and a fine of €45,000.

Attempt to commit this offence is subject to the same penalties.

ARTICLE 227-14

Legal persons may incur criminal liability for the offences under the present Section, pursuant to the conditions set out under article 121-2.

The penalties incurred by legal persons are:

1° a fine, pursuant to the conditions set out under article 131-38;

2° the penalties referred to in 1°, 2°, 3°, 8° and 9° of article 131-39.

SECTION V
ENDANGERMENT OF MINORS — Articles 227-15 to 227-28-1

ARTICLE 227-15

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

(Act no. 2003-239 of 18 March 2003 Art. 44 Official Journal of 19 March 2003)

(Ordinance no. 2005-759 of 4 July 2005 Article 19 I Official Journal of 7 July 2005 in force 1 July 2006)

Deprivation of food or care to the point of endangering the health of a minor under fifteen years of age, inflicted by an ascendant or by any other person exercising parental authority or having authority over the minor, is punished by seven years' imprisonment and a fine of €100,000.

Keeping a child under six years of age on a public highway or in a place used for the purposes of public transport with the aim of soliciting the generosity of passers-by also constitutes deprivation of care.

ARTICLE 227-16

The offence defined by the previous article is punished by thirty years' criminal imprisonment where it causes the death of the victim.

ARTICLE 227-17

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

(Act no. 2002-1138 of 9 September 2002 Article 27 Official Journal of 10 September 2002)

(Ordinance no. 2005-759 of 4 July 2005 Article 19 I Official Journal of 7 July 2005 in force 1 July 2006)

Failure by the father or mother, without a legitimate reason, to comply with their legal obligations to the point of endangering the health, safety, morals or education of their minor child is punished by two years' imprisonment and a fine of €30,000.

The offence referred to in the present article is assimilated to abandoning the family for the purposes of 3° of article 373 of the Civil Code.

ARTICLE 227-17-1

(Act no. 98-1165 of 18th December 1998 Article 5 Official Journal of 22nd December 1998)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)
(Act no. 2005-380 of 23 April 2005 Article 8 II Official Journal of 24 April 2005)

Failure by the parents of a child or any other person exercising parental authority or de facto authority over him on a continuous basis to register him in an educational institution without a valid reason, despite the receiving an official warning by the Inspector of the Academy, is punished by six months' imprisonment and a fine of €7,500.

Failure by a director of a private institution running classes without a contract, despite receiving an official warning by the Inspector of Academy, either to to take the necessary steps to ensure that the teaching there given complies with the objects of compulsory education as defined in articles L 131-1-1 and L 131-10 of the Education Code, or to close such classes down, is punished by six months' imprisonment and a fine of €7,500. In addition the court may forbid him to manage or to provide courses, and also order the institution to be closed.

ARTICLE 227-17-2

(Act no. 98-1165 of 18th December 1998 Article 5 Official Journal of 22nd December 1998)
(Act no. 2001-504 of 12 June 2001 Article 13 Official Journal of 13th June 2001)

Legal persons may incur criminal liability pursuant to the conditions set out under article 121-2 for offences under article 227-15 to 227-17-1.

The penalties incurred by legal persons are:

1° a fine in the manner prescribed under article 131-38;

2° penalties referred to under article 131-39.

ARTICLE 227-18

(Act no. 98-468 of 17th June 1998 Article 16 Official Journal of 18th June 1998)

The direct provocation of a minor to make unlawful use of drugs is punished by five years' imprisonment and a fine of €100,000.

Where it concerns a minor under fifteen years of age, or where the offence is committed inside a learning or educational institution or, when the pupils are entering or leaving, outside such an institution, the offence under this article is punished by seven years' imprisonment and a fine €150,000.

ARTICLE 227-18-1

(Act no. 96-392 of 13th May 1996 Article 18 Official Journal of 14th May 1996)
(Act no. 98-468 of 17th June 1998 Article 16 Official Journal of 18th June 1998)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The direct provocation of a minor to transport, keep, offer or give controlled drugs is punished by seven years' imprisonment and a fine of €150,000.

Where it concerns a minor under fifteen years of age or where the offence is committed inside a learning or educational institution or, when the pupils are entering or leaving, outside such an institution, the offence under this article is punished by ten years' imprisonment and a fine of €300,000.

ARTICLE 227-19

(Act no. 98-468 of 17th June 1998 Article 16 Official Journal of 18th June 1998)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The direct provocation of a minor to regular excessive consumption of alcoholic beverages is punished by two years' imprisonment and a fine €45,000.

Where it concerns a minor under fifteen years of age or where the offence is committed inside a learning or educational institution or, when the pupils are entering or leaving, outside such an institution, the offence under this article is punished by three years' imprisonment and a fine of €75,000.

ARTICLE 227-20

Repealed (by Act no. 2003-239 of 18 March 2003 Article 64 Official Journal of 19 March 2003)

ARTICLE 227-21

(Act no. 98-468 of 17 June 1998 Article 16 Official Journal of 18 June 1998)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)
(Act no. 2002-1138 of 9 September 2002 Article 28 Official Journal of 10 September 2002)

The direct provocation of a minor to commit a felony or a misdemeanour is punished by five years' imprisonment

and a fine of €150,000.

Where it concerns a minor under fifteen years of age and this minor is provoked to habitually commit felonies or misdemeanours, or where the offence is committed inside a school or educational institution or outside such an institution when the pupils are entering or leaving, the offence under this article is punished by seven years' imprisonment and a fine of €150,000.

ARTICLE 227-22

(Act no. 98-468 of 17 June 1998 Article 16 Official Journal of 18 June 1998)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)
(Act no. 2004-204 of 9 March 2004 article 6 VII Official Journal of 10 March 2004)

Assisting or attempting to assist in the corruption of a minor is punished by five years' imprisonment and a fine of €75,000. The penalty is increased to seven years' imprisonment and a fine of €100,000 where the minor is under fifteen years of age, where the minor was put in contact with the offender by the use, for the dissemination of messages to an unrestricted public, of a telecommunications network, or where the offence is committed inside a learning or educational institution or, when the pupils are entering or leaving, outside such an institution.

The same penalties are in particular applicable to the organisation, by an adult, of meetings involving indecent exposure or sexual relations at which minors are present or are participating.

The penalties are increased to ten years' imprisonment and to fine of €1,000,000 where the offence was committed by an organised gang.

ARTICLE 227-23

(Act no. 98-468 of 17 June 1998 Article 17 Official Journal of 18 June 1998)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)
(Act No. 2002-305 of 4 March 2002 Article 14 Official Journal of 5 March 2002)
(Act no. 2004-204 of 9 March 2004 article 6 VII Official Journal of 10 March 2004)

Taking, recording or transmitting a picture or representation of a minor with a view to circulating it, where that image or representation has a pornographic character, is punished by three years' imprisonment and a fine of €45,000. Attempting to do so is subject to the same penalties.

The same penalty applies to offering or distributing such a picture or representation by any means, and to importing or exporting it, or causing it to be imported or exported.

The penalties are increased to five years' imprisonment and a fine of €75,000 where use was made of a communication network for the circulation of messages to an unrestricted public in order to circulate the image or representation of a minor.

Possessing such an image or representation is punished by two years' imprisonment and a fine of €30,000.

The offences set out in the second, third and fourth paragraphs are punished by ten years' imprisonment and by a fine of €500,000 where they are committed by an organised gang.

The provisions of the present article also apply to the pornographic images of a person whose physical appearance is that of a minor unless it is proved that the person was over eighteen on the day his picture was taken or recorded.

ARTICLE 227-24

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The manufacture, transport, distribution by whatever means and however supported, of a message bearing a pornographic or violent character or a character seriously violating human dignity, or the trafficking in such a message, is punished by three years' imprisonment and a fine of €75,000, where the message may be seen or perceived by a minor.

Where the offences under the present article are committed through the press or by broadcasting, the specific legal provisions governing those matters are applicable to define the persons who are responsible.

ARTICLE 227-25

(Act no. 98-468 of 17th June 1998 Article 18 Official Journal of 18th June 1998)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The commission without violence, constraint, threat or surprise of a sexual offence by an adult on the person of a minor under fifteen years of age is punished by five years' imprisonment and a fine of €75,000.

ARTICLE 227-26

(Act no. 94-89 of 1 February 1994 Article 15 Official Journal of 2 February 1994 in force 1 March 1994)
(Act no. 95-116 of 4 February 1995 Article 121 Official Journal of 5 February 1995)
(Act no. 98-468 of 17 June 1998 Article 13, Article 19 Official Journal of 18 June 1998)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)
(Act no. 2002-305 of 4 March 2002 Article 13 Official Journal of 5 March 2002)

The offence set out under article 227-25 is punished by ten years' imprisonment and a fine of €150,000:

1° when it was committed by a legitimate, natural or adoptive ascendant or by any other person having authority

over the victim;

2° when it was committed by a person abusing the authority conferred by his position;

3° when it was committed by two or more persons acting as perpetrators or accomplices;

4° when the minor was put in contact with the offender by using a telecommunications network for the dissemination of messages to an unrestricted public.

ARTICLE 227-27

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Sexual acts committed without violence, constraint, threat or surprise on a minor aged over fifteen and not emancipated by marriage are punished by two years' imprisonment and a fine of €30,000:

1° where they are committed by a legitimate, natural or adoptive ascendant or by any other person having authority over the victim;

2° where they are committed by a person abusing the authority conferred by his functions.

ARTICLE 227-27-1

(Inserted by Act no. 98-468 of 17th June 1998 Article 19 Official Journal of 18th June 1998)

Where the misdemeanours under articles 227-22, 227-23 or 227-25 to 227-27 are committed abroad by a French national or a person habitually residing on French territory, French law shall apply notwithstanding the second paragraph of article 113-6 and the provisions of the second sentence of article 113-8 do not apply.

ARTICLE 227-28

Where the incitement was committed through the press or by broadcasting, the specific legal provisions governing those matters are applicable to define the persons who are responsible.

ARTICLE 227-28-1

(Act no. 98-468 of 17 June 1998 Article 20 Official Journal of 18 June 1998)
(Act no. 2002-305 of 4 March 2002 Article 13 Official Journal of 5 March 2002)

Legal persons may incur criminal liability in the manner prescribed by article 121-2 for the offences provided for under articles 227-18 to 227-26.

The penalties incurred by legal persons are:

1° a fine in the manner provided under article 131-38;

2° the penalties referred to under 2°, 3°, 4°, 5°, 7°, 8°, and 9° of article 131-39.

The prohibition referred to under 2° of article 131-39 applies to the activity in course of which or on the occasion of the performance of which the offence was committed.

SECTION VI
ADDITIONAL PENALTIES APPLICABLE TO NATURAL PERSONS — Articles 227-29 to 227-31

ARTICLE 227-29

(Act no. 98-468 of 17th June 1998 Article 21 Official Journal of 18th June 1998)

Natural persons convicted of the offences provided for under the present chapter also incur the following additional penalties:

1° forfeiture of civic, civil and family rights, in accordance with the conditions laid down under Article 131-26;

2° suspension of the driving licence for a maximum period of five years; this suspension may be limited to driving other than in the course of professional activity;

3° cancellation of the driving licence together with the prohibition, for a maximum period of five years, to apply for the issue of a new one;

4° prohibition, for a maximum period of five years, to leave the territory of the French Republic.

5° confiscation of the object which was used or intended to commit the offence or the object which is the product of it;

6° prohibition, for a period of up to ten years or permanently, to undertake any professional or charitable activity involving regular contact with minors.

ARTICLE 227-30

Natural persons convicted of the offences referred to under Section IV of the present Chapter also incur the additional penalty of the public display or dissemination of the decision set out under article 131-35.

ARTICLE 227-31

(Act no. 98-468 of 17th June 1998 Article 4 Official Journal of 18th June 1998)

Persons guilty of the offences under articles 227-22 to 227-27 may in addition be sentenced to a social and judicial supervision in the manner prescribed by articles 131-36-1 to 131-36-8.

BOOK III
FELONIES AND MISDEMEANOURS AGAINST PROPERTY — **Articles 311-1 to 324-9**

TITLE I
FRAUDULENT APPROPRIATIONS — Articles 311-1 to 314-13

PENAL CODE

CHAPTER I
THEFT — Articles 311-1 to 311-16

SECTION I
SIMPLE AND AGGRAVATED THEFTS — Articles 311-1 to 311-4-1

ARTICLE 311-1
Theft is the fraudulent appropriation of a thing belonging to another person.

ARTICLE 311-2
Dishonest appropriation of energy to the prejudice of another person is assimilated to theft.

ARTICLE 311-3
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)
Theft is punished by three years' imprisonment and a fine of €45,000.

ARTICLE 311-4
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)
(Act no. 2004-204 of 9 March 2004 article 40 I Official Journal of 10 March 2004)
Theft is punished by five years' imprisonment and a fine of €75,000:
1° where it is committed by two or more acting as perpetrators or accomplices although they do not form an organised gang;
2° by a person holding public authority or discharging a public service mission, in the exercise or at the occasion of the exercise of the functions or mission;
3° where it is committed by a person unlawfully assuming the capecity of a person holding public authority or discharging a public service mission;
4° where it is preceded, accompanied or followed by acts of violence on other persons which have not caused any total incapacity to work;
5° where it is facilitated by the state of a person whose particular vulnerability, due to age, sickness, infirmity, a physical of psychological disability or to pregnancy, is apparent or known to the perpetrator;;
6° where it is committed within premises used as residence or within premises used or intended for the safekeeping of funds, securities, goods or equipment, by gaining access to such premises by deceit, breaking in or climbing in;
7° where it is committed in a vehicle used for the public transport or on premises designed for access to a means of public transport;
8° where it is preceded, accompanied or followed by an act of destruction, defacement or damage;
9° where it is committed because of the victim's membership or non-membership, true or supposed, of a given ethnic group, nation, race or religion, or his true or supposed sexual orientation.
The penalty is increased to seven years' imprisonment and to a fine of €100,000 where the theft is committed in two of the circumstances set out under the present article. It is increased to ten years' imprisonment and a fine of €150,000 where the theft is committed in three of those circumstances.

ARTICLE 311-5
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)
Theft is punished by seven years' imprisonment and a fine of €100,000 where it is preceded, accompanied or followed by acts of violence upon other persons, causing a maximum total incapacity to work of eight days.

ARTICLE 311-6
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)
Theft is punished by ten years' imprisonment and a fine of €150,000 where it is preceded, accompanied or followed by acts of violence upon other persons causing a total incapacity to work of more than eight days.
The first two paragraphs of article 132-23 governing tha safety period are applicable to the offence referred to under the present article.

ARTICLE 311-7
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)
Theft is punished by fifteen years' criminal imprisonment and a fine of €150,000 where it is preceded, accompanied or followed by acts of violence upon other persons causing mutilation or permanent disability.
The first two paragraphs of article 132-23 governing the safety period are applicable to the offence referred to under the present Article.

ARTICLE 311-8
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Theft is punished by twenty years' criminal imprisonment and a fine of €150,000 where it is committed either with the use or threatened use of a weapon, or by a person carrying a weapon requiring a licence or the carrying of which is prohibited.

The first two paragraphs of article 132-3 governing the safety period are applicable to the offence set out under the present article.

ARTICLE 311-9

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Theft committed by an organised gang is punished by fifteen years' criminal imprisonment and a fine of €150,000.

It is punished by twenty years' criminal imprisonment and a fine of €150,000 where it is preceded, accompanied or followed by violence committed against other persons.

It is punished by thirty years' criminal imprisonment and a fine of €150,000 where it is committed either with the use or threatened use of a weapon, or by a person carrying a weapon requiring a licence or the carrying of which is prohibited.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offences referred to under the present article.

ARTICLE 311-9-1

(Inserted by Act no. 2004-204 of 9 March 2004 article 12 XII Official Journal of 10 March 2004)

Any person who has attempted to commit a theft acting in an organised gang, as set out under article 311-9, is exempted from punishment if, by alerting the legal or administrative authorities, he has prevented the commission of the offence, and where relevant, has identified the other perpetrators or accomplices.

The custodial sentence incurred by a perpetrator or accomplice to a theft acting in an organised gang is reduced by half if, by alerting the legal or administrative authorities, he has allowed the offence which is underway to be stopped, or has prevented it from resulting in loss of life or permanent disability, and, where relevant, has identified any other perpetrators or accomplices.

ARTICLE 311-10

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Theft is punished by criminal imprisonment for life and a fine of €150,000 where it is preceded, accompanied or followed either by violence causing death, or acts of torture or barbarity.

The first two paragraphs of article 132-3 governing the safety period are applicable to the offence referred to under the present article.

ARTICLE 311-11

For the purpose of articles 311-4, 311-5, 311-6, 311-7, 311-9 and 311-10 theft followed by acts of violence committed to assist an escape or to ensure the impunity of a perpetrator or an accomplice constitutes theft followed by violence.

ARTICLE 311-4-1

(Inserted by Act no. 2002-1138 of 9 September 2002 Article 26 Official Journal of 10 September 2002)

Where it is committed by an adult with the assistance of one of more minors acting as perpetrators or accomplices, theft is punished by seven years' imprisonment and by a fine of €100,000.

Where the adult offender is assisted by one or more minors aged under than thirteen years old, the penalties are increased to ten years' imprisonment and a fine of €150,000.

SECTION II
GENERAL PROVISIONS — Articles 311-12 to 311-13

ARTICLE 311-12

No prosecution may be initiated where a theft is committed by a person:

1° to the prejudice of his or her ascendant or his or her descendant;

2° to the prejudice of a spouse, except where the spouses are separated or authorised to reside separately.

ARTICLE 311-13

Attempt to commit the misdemeanours provided for under this chapter is similarly punishable.

SECTION III
ADDITIONAL PENALTIES APPLICABLE TO NATURAL PERSONS AND LIABILITY OF LEGAL PERSONS — Articles 311-14 to 311-16

ARTICLE 311-14

(Act no. 2004-204 of 9 March 2004 article 44 XII Official Journal of 10 March 2004)

Natural persons convicted of any of the offences provided for under this chapter are also subject to the following additional penalties:

1° forfeiture of their civic, civil and family rights, pursuant to the conditions set out under article 131-26;

2° *prohibition, pursuant* to the conditions set out under article 131-27, to hold public office or to undertake the social or professional activity in the course of which or on the occasion of the performance of which the offence was committed, this prohibition being permanent or *temporary in the cases* set out under articles 311-6 to 311-10 and being imposed for a maximum period of five years in the cases set out under articles 311-3 to 311-5;

3° prohibition to hold or carry a weapon requiring a licence for a maximum period of five years;

4° confiscation *of the thing which* was used or intended for the commission of the offence, or of the thing which is the product of it, with the exception of articles subject to restitution;

5° area banishment pursuant to the conditions set out under *article 131-31, in the cases set out under articles 311-6 to 311-10;*

6° the obligation to complete a citizenship course, pursuant to the conditions set out under article 131-5-1.

ARTICLE 311-15

Any alien convicted of any of the offences referred to uncer articles 311-6 to 311-10 may be banished from French territory either permanently or for a *maximum period of ten years*, pursuent to the conditions set out under article 131-30.

ARTICLE 311-16

Legal persons may incur criminal liability for the offences defined by the present chepter in accordance with the conditions set out under article 121-2.

The penalties *incurred by legal persons are*:

1° a fine, pursuant to the conditions set out under article 131-38;

2° the penalty referred to under 2° of article 131-39, either *permanently or temporarily* in the cases provided for *under articles* 311-6 to 311-10, or for a maximum period of five years in the cases set out under articles 311-3 to 311-5;

3° the penalty referred to in 8° of article 131-39.

The prohibition referred to under *2° of article 131-39 applies to the activity* in the course of which or on the occasion of the performance of which the offence was committed.

CHAPTER II
EXTORTION — Articles 312-1 to 312-15

SECTION I
EXTORTION — Articles 312-1 to 312-9

ARTICLE 312-1

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Extortion is the act of obtaining by violence, by the threat of violence or constraint either a signature, a commitment or a renunciation, or the revelation of a secret, or the handing over of funds, securities or of any asset.

Extortion is punished by seven years' *imprisonment and a fine* of €100,000.

ARTICLE 312-2

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Extortion is punished by ten years' imprisonment and a fine of €150,000:

1° when it is preceded, *accompanied* or followed by acts of violence upon other persons and which have caused a total incapacity to work for eight days or less;

2° when it is committed to the prejudice of a person whose particular *vulnerability, due* to age, sickness, infirmity, *a physical or psychological* disability or to pregnancy, is apparent or known to the perpetrator;

3° when it is committed because of the victim's membership or non-membership, true or supposed, of a given ethnic group, nation, race or religion, or his true or *supposed sexual orientation.*

ARTICLE 312-3

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Extortion is punished by fifteen years' criminal imprisonment and a fine of €150,000 when it is preceded, accompanied or followed by *acts of violence upon* other persons causing a total incapacity to work in excess of eight days.

The first two paragraphs of article 132-23 governing the safety period are *applicable to the offence* set out under the *present article.*

ARTICLE 312-4

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Extortion is punished by twenty years' criminal *imprisonment and a fine* of €150,000 when it is preceded, accompanied or followed by acts of violence upon other persons causing mutilation or permanent disability.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offence set out under the present article.

ARTICLE 312-5

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Extortion is punished by thirty years' criminal imprisonment and a fine of €150,000 where it was committed either with the use or threat to use[threatened use of] a weapon, or by a person carrying a weapon requiring a licence or the carrying of which is prohibited.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offence set out under the present article.

ARTICLE 312-6

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Extortion committed by an organised gang is punished by twenty years' criminal imprisonment and a fine of €150,000.

It is punished by thirty years' criminal imprisonment and a fine of €150,000 when it is preceded, accompanied or followed by violence upon other persons causing mutilation or permanent disability.

It is punished by criminal imprisonment for life where it was committed either with the use or threatened use of a weapon, or by a person carrying a weapon requiring a licence or the carrying of which is prohibited.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offences set out under the present article.

ARTICLE 312-6-1

(Inserted by Act no. 2004-204 of 9 March 2004 article 12 XIII Official Journal of 10 March 2004)

Any person who has attempted to commit extortion acting in an organised gang, as provided for by article 312-6, is exempted from punishment if, by alerting the legal or administrative authorities, he has prevented the commission of the offence, and, if applicable, has identified any other perpetrators or accomplices.

The custodial sentence incurred by e perpetrator or accomplice to the offence of extortion acting in an organised gang is reduced by half if, by alerting the legal or administrative authorities, he has allowed the offence to be stopped or has prevented it from resulting in loss of life or permanent disability, and, where relevant, has identified any other perpetrators or accomplices. Where the sentence incurred is life criminal imprisonment, this is reduced to twenty years' criminal imprisonment.

ARTICLE 312-7

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Extortion is punished by criminal imprisonment for life and a fine of €150,000 when it is preceded, accompanied or followed either by acts of violence causing death, or acts of torture or barbarity.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offence set out under the present article.

ARTICLE 312-7-1

(Inserted by Act no. 2004-204 of 9 March 2004 article 6 IX Official Journal of 10 March 2004)

Being unable to account for resources corresponding to one's lifestyle when habitually in close contact with one or more persons who have committed the offences provided for by articles 312-6 and 312-7, or facilitating the justification of fictitious resources for the same people, is punished by ten years' imprisonment and a fine of €150,000.

ARTICLE 312-8

For the purpose of articles 312-2, 312-3, 312-4, 312-6 and 312-7 extortion followed by acts of violence committed to assist an escape or to ensure the impunity of a perpetrator or an accomplice constitutes extorsion followed by violence.

ARTICLE 312-9

Attempt to commit the misdemeanours set out under this Section of the present Code is subject to the same penalties.

The provisions of article 311-12 are applicable to offences defined by the present Section.

SECTION II
OF BLACKMAIL

Articles 312-10 to 312-12

ARTICLE 312-10

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Blackmail is the act of the obtaining either a signature, a commitment or a renunciation, the revelation of a secret, or the handing over of funds, valuables or any asset, by threatening to reveal or to impute facts liable to undermine a person's honour or reputation.

Blackmail is punished by five years' imprisonment and a fine of €75,000.

ARTICLE 312-11

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Where the blackmailer has put his threat into execution the penalty is increased to seven years' imprisonment and to a fine a €100,000.

ARTICLE 312-12

Attempt to commit the misdemeanours set out under this Section of the present Code is subject to the same penalties.

The provisions of article 311-12 are applicable to the offences defined in the present section.

SECTION IIbis
OFFENCES RELATING TO EXTORTION — Article 312-12-1

ARTICLE 312-12-1

(Inserted by Act no. 2003-239 of 18 March 2003 Art. 65 Official Journal of 19 March 2003)

To solicit others to hand over of money, valuables or any property on a public thoroughfare in a group in an aggressive manner, or with the threat of a dangerous animal, is punished by six months' imprisonment and by a fine of €3,750.

SECTION III
ADDITIONAL PENALTIES APPLICABLE TO NATURAL PERSONS AND LIABILITY OF LEGAL PERSONS — Articles 312-13 to 312-15

ARTICLE 312-13

(Act no. 2004-204 of 9 March 2004 article 44 XIII Official Journal of 10 March 2004)

Natural persons convicted of any of the offences providad for by the present chapter also incur the following additional penalties:

1° forfeiture of civic, civil and family rights, pursuant to the conditions set out under article 131-26;

2° prohibition, in the manner prescribed by article 131-27, to hold public office or to undertake the social or professional activity in the course of which or on the occasion of the performance of which the offence was committed, this prohibition being permanent or temporary in the cases set out under articles 312-3 to 312-7, and imposed for a maximum period of five years in the cases set out under articles 312-1, 312-2 and 312-10;

3° prohibition to hold or carry a weapon requiring a licence for a maximum period of five years;

4° confiscation of the thing which was used or was intended for the commission of the offence, or of the thing which is the product of it, with the exception of articles subject to restitution;

5° area banishment pursuant to the conditions under article 131-31;

6° the obligation to complete a citizenship course pursuant to the conditions set out under article 131-5-1.

ARTICLE 312-14

Any alien convicted of one of the offences referred to under articles 312-2 to 312-7 may be banished from French territory either permanently or for a maximum period of ten years in accordance with the conditions laid down under article 131-10.

ARTICLE 312-15

Legal persons may incur criminal liability for the offences set out under the present Chapter pursuant to the conditions set out under article 121-2.

The penalties incurred by legal persons are:

1° a fine, pursuant to the conditions set out under article 131-38;

2° the penalties referred to under article 131-39.

The prohibition referred to in 2° of article 131-39 applies to the activity in the course of which or on the occasion of the performance of which the offence was committed.

CHAPTER III
FRAUDULENT OBTAINING AND SIMILAR OFFENCES — Articles 313-1 to 313-9

SECTION I
OF FRAUDULENT OBTAINING — Articles 313-1 to 313-4

ARTICLE 313-1

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Fraudulent obtaining is the act of deceiving a natural or legal person by the use of a false name or a fictitious capacity, by the abuse of a genuine capacity, or by means of unlawful manoeuvres, thereby to lead such a person, to his prejudice or to the prejudice of a third party, to transfer funds, valuables or any property, to provide a service or to consent to an act incurring or discharging an obligation.

Fraudulent obtaining is punished by five years' imprisonment and a fine of €375,000.

ARTICLE 313-2

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

(Act no. 2004-204 of 9 March 2004 article 6 X Official Journal of 10 March 2004)

The penalty is increased to seven years' imprisonment and a fine of €750,000 where the fraudulent obtaining was committed:

1° by a person holding public authority or discharging a public service mission, in the exercise or at the occasion of the exercise of the functions or mission;

2° by a person unlawfully assuming the capacity of a person holding a public office or vested with a public service mission;

3° by a person making a public appeal with a view to issuing securities or raising funds for humanitarian or social assistance;

4° to the prejudice of a person whose particular vulnerability, due to age, sickness, infirmity, a physical of psychological disability or to pregnancy, is apparent or known to the perpetrator;

The penalties are increased to ten years' imprisonment and to a fine of €100,000 where the fraud is committed by an organised gang.

ARTICLE 313-3

Attempt to commit the offences set out under this section of the present code is subject to the same penalties.

The provisions of article 311-12 are applicable to the misdemeanour of fraudulent obtaining.

ARTICLE 313-4

[Repealed by Act no. 2001-504 of 12 June 2001, Article 21,I]

SECTION II

OFFENCES SIMILAR TO FRAUDULENT OBTAINING — Articles 313-5 to 313-6-1

ARTICLE 313-5

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Swindling is when a person, knowing himself to be wholly unable to meet payment or being determined not to pay:

1° orders food or drink in premises where food or drink are sold;

2° books and effectively occupies one or more bedrooms in an establishment letting rooms, where the occupation does not exceed ten days;

3° orders fuel or lubricents with which he has the tanks of a vehicle partly or completely filled by a professional distributor;

4° causes himself to be transported by a taxi or rental vehicle.

Swindling is punished by six months' imprisonment and a fine of €7,500.

ARTICLE 313-6

(Act no. 2000-642 of 10 July 2000 Article 16 Official Journal of 11 July 2000)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

In a public sale or tendering process, the rejection of a bid or tender, or the restriction of bids or tenders, by gifts, promises, understandings or any other fraudulent means, is punished by six months' imprisonment and a fine of €22,500. Accepting such gifts or promises is subject to the same penalties.

The same penalties apply to:

1° obstructing or hindering the freedom to make bids or tenders, during a public sale or tendering process, by violence, assaults or threats;

2° carrying out or participating in re-auction after a public adjudication, without the participation of a competent legal official, or of a recognised firm carrying out the voluntary sale of movables at public auction.

Attempt to commit the offences set out under the present article is subject to the same penalties.

ARTICLE 313-6-1

(Inserted by Act no. 2003-239 of 18 March 2003 Art. 57 1° Official Journal of 19 March 2003)

A person who makes land belonging to someone else available to a third party, with a view to his taking up residence there in return for payment or any benefit in kind, without being able to prove the permission of the owner or the person with the right to use it is punished by a year's imprisonment and by a fine of €15,000.

SECTION III

ADDITIONAL PENALTIES APPLICABLE TO NATURAL PERSONS AND LIABILITY OF LEGAL PERSONS — Articles 313-7 to 313-9

ARTICLE 313-7

(Act no. 2001-504 of 12 June 2001 Article 21 Official Journal of 13 June 2001)
(Act no. 2003-239 of 18 March 2003 Art. 57 2° Official Journal of 19 March 2003)

Natural persons convicted of any of the offences provided for under articles 313-1, 313-2, 313-6 and 313-6-1 also incur the following additional penalties:

1° forfeiture of civic, civil and family rights, pursuant to the conditions set out under article 131-26;

2° prohibition, pursuant to the conditions set out under article 131-27, to hold public office or to undertake the social or professional activity in the course of which or on the occasion of the performance of which the offence was

committed, for a maximum period of five years;

3° closure, for a maximum period of five years, of the business premises or of one or more of the premises of the enterprise used to carry out the criminal behaviour;

4° confiscation of the thing which was used or was intended for use in the commission of the offence or of the thing which is the product of it, with the exception of articles subject to restitution;

5° area banishment pursuant to the conditions set out under article 131-31;

6° prohibition to draw cheques, except those allowing the withdrawal of funds by the drawer from the drawee or certified cheques, for a maximum period of five years;

7° public display or dissemination of the decision in accordance with the conditions set out under article 131-35.

ARTICLE 313-8

(Act no. 2003-239 of 18 March 2003 Art. 57 3° Official Journal of 19 March 2003)

Natural persons convicted of any of the misdemeanours referred to under articles 313-1, 313-2, 313-6 and 313-6-1 also incur disqualification from public tenders for a maximum period of five years.

ARTICLE 313-9

(Act no. 2001-504 of 12 June 2001 Article 21 Official Journal of 13 June 2001)

(Act no. 2003-239 of 18 March 2003 Art. 57 4° Official Journal of 19 March 2003)

Legal persons may incur criminal liability for the offences set out under articles 313-1 to 313-3 and 313-6-1, in accordance with the conditions laid down under article 121-2.

The penalties incurred by legal persons are:

1° a fine in the manner prescribed under article 131-38;

2° the penalties referred to under article 131-39.

The prohibition referred to under 2° of article 131-39 applies to the activity in the course of which or on the occasion of the performance of which the offence was committed.

CHAPTER IV
OF MISAPPROPRIATION — Articles 314-1 to 314-13

SECTION I
FRAUDULENT BREACH OF TRUST — Articles 314-1 to 314-4

ARTICLE 314-1

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Breach of trust is committed when a person, to the prejudice of other persons, misappropriates funds, valuables or any property that were handed over to him and that he accepted subject to the condition of returning, redelivering or using them in a specified way.

Breach of trust is punished by three years' imprisonment and a fine of €375,000.

ARTICLE 314-2

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

(Act no. 2004-204 of 9 March 2004 article 51 Official Journal of 10 March 2004)

The penalty is increased to seven years' imprisonment and to a fine of €750,000 where the breach of trust was committed:

1° by a person making a public appeal with a view to obtaining the transfer of funds or securities, either in a personal capacity, or as the manager or legally employed or de facto employee of an industrial or commercial enterprise;

2° by any other person who habitually undertakes or assists, even in a minor role, in operations regarding the property of a third party on whose account he recovers funds or securities;

3° to the prejudice of a charity making a public appeal in order to raise funds to be used for humanitarian or social aid;

4° to the prejudice of a person whose particular vulnerability, due to age, sickness, infirmity, a physical of psychological disability or to pregnancy, is apparent or known to the perpetrator.

ARTICLE 314-3

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The penalty is increased to ten years' imprisonment and to a fine of €1,500,000 where the breach of trust is committed by a judicially appointed official or by a legal professional officer or by a public officer either in the course of or on the occasion of the performance of his duties, or by reason of his official capacity.

ARTICLE 314-4

The provisions of article 311-12 are applicable to the offence of breach of trust.

SECTION II
MISAPPROPRIATION OF PROPERTY PLEDGED OR ATTACHED — Articles 314-5 to 314-6

ARTICLE 314-5

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The destruction or misappropriation of an article pledged, committed by a debtor, a borrower or a third party furnishing security, is punished by three years' imprisonment and a fine of €375,000.

Attempt to commit the offence set out under the present article is subject to the same penalties.

ARTICLE 314-6

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The destruction or misappropriation, by a person whose property is attached, of an object attached while in his possession to secure the rights of a creditor and entrusted to his keeping or to the keeping of a third party, is punished by three years' imprisonment and a fine of €375,000.

Attempt to commit the offence referred to under the present article is subject to the same penalties.

SECTION III

FRAUDULENT ORGANISATION OF INSOLVENCY — Articles 314-7 to 314-9

ARTICLE 314-7

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

A debtor who, even before a judicial decision establishing his debt, procures or worsens a state of insolvency, by increasing the liabilities or reducing the assets of his estate, or by reducing or concealing all or part of his income, or by concealing part of his property, with a view to evading the execution of an award in relation to his property made by a criminal court, or a civil court in proceedings related to tort, restitution or alimony, is punished by three years' imprisonment and a fine of €45,000.

The legal or de facto manager of a legal person commits the same misdemeanour where he organises or worsens the insolvency of such a person in the conditions referred to in the previous paragraph, with a view to avoiding the financial obligations resulting from an award in a criminal, tortious or restitutionary matter.

ARTICLE 314-8

A court may decide that a person convicted as an accomplice to an offence under article 314-7 is jointly liable, within the limit of any funds or the market value of any property he received gratuitously or for consideration, for the financial obligations resulting from the award which the perpetrator sought to avoid.

Where a criminal court imposes a sentence in relation to property, it may decide that the penalty imposed shall not be concurrent with one previously imposed.

The limitation period for criminal liability runs from the date of the award the enforcement of which the debtor sought to avoid; however, it runs from the last act done to organise or to worsen the debtor's insolvency, where this last act is subsequent to the award.

ARTICLE 314-9

For the purpose of article 314-7, decisions of the courts and judicially affirmed agreements which carry a duty to pay benefits, maintenance or contributions to matrimonial expenses are assimilated to an order to pay alimony.

SECTION IV

ADDITIONAL PENALTIES APPLICABLE TO NATURAL PERSONS AND LIABILITY OF LEGAL PERSONS — Articles 314-10 to 314-13

ARTICLE 314-10

Natural persons convicted of any of the offences provided for under articles 314-1, 314-2 and 314-3 also incur the following additional penalties:

1° forfeiture of civic, civil and family rights in the manner prescribed under article 131-26;

2° prohibition for a maximum period of five years to hold public office or to undertake the social or professional activity in the course of which or on the occasion of the performance of which the offence was committed, pursuant to the conditions set out under article 131-27;

3° closure for a maximum period of five years of the business premises, or of one or more of the premises, of the enterprise used to commit the offence;

4° disqualification from public tenders for a maximum period of five years;

5° the prohibition to draw cheques, except those allowing the withdrawal of funds by the drawer from the drawee or certified cheques, for a maximum period of five years;

6° confiscation of the thing which was used or intended for the commission of the offence, or of the thing which is the product it, with the exception of articles subject to restitution;

7° The public display or dissemination of the decision, in accordance with the conditions set out under article 131-35.

ARTICLE 314-11

Natural persons convicted of one of the misdemeanours referred to under articles 314-5, 314-6 and 314-7 also incur the following additional penalties:

1° confiscation of the thing which was used or intended for the commission of the offence, or of the thing which is the product of it, with the exception of articles subject to restitution;

2° the public display or dissemination of the decision, in accordance with the conditions set out under article 131-35.

ARTICLE 314-12

Legal persons may incur criminal liability for the offences referred to under articles 3 14-1 and 314-2 pursuant to the conditions set out under article 121-2.

The penalties incurred by legal persons are:

1° a fine, in the manner prescribed under article 131-38;

2° the penalties referred to under article 131-39.

The prohibition referred to by 2° of article 131-39 applies to the activity in the course of which or on the occasion of the performance of which the offence was committed.

ARTICLE 314-13

Legal persons may incur criminal liability for the offences referred to under articles 314-5, 3l4-6 and 314-7, pursuant to the conditions set out under article 121-2.

The penalties incurred by legal persons are:

1° a fine, in the manner prescribed under article 131-38;

2° the penalties referred to under paragraphs 8 and 9 of article 131-39.

TITLE II
OTHER OFFENCES AGAINST PROPERTY — Articles 321-1 to 324-9

CHAPTER I
RECEIVING AND RELATED OFFENCES — Articles 321-1 to 321-12

SECTION I
OF RECEIVING — Articles 321-1 to 321-5

ARTICLE 321-1

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Receiving is the concealment, retention or transfer a thing, or acting as an intermediary in its transfer, knowing that that thing was obtained by a felony or misdemeanour.

Receiving is also the act of knowingly benefiting in any manner from the product of a felony or misdemeanour.

Receiving is punished by five years' imprisonment and a fine of €375,000.

ARTICLE 321-2

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Receiving is punished by ten years' imprisonment and a fine of €750,000:

1° where it is committed habitually or by using the facilities conferred by the exercise of trade or profession;

2° where it was committed by an organised gang.

ARTICLE 321-3

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The fines provided by articles 321-1 and 321-2 may be raised beyond €375,000 to reach half the value of the goods handled.

ARTICLE 321-4

Where an offence whence the goods in question came is punished by a custodial sentence higher than that incurred under articles 321-1 or 321-2, the receiver is punished by the penalties pertaining to the offence that he knew about, and if this offence was accompanied by aggravating circumstances, by such penalties as relate exclusively to the circumstances of which he was aware.

ARTICLE 321-5

Receiving is assimilated, in respect of recidivism, to the offence from which the goods in question came.

SECTION II
OFFENCES ASSIMILATED RELATED TO RECEIVING — Articles 321-6 to 321-8

ARTICLE 321-6

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The inability of a person to justify the income corresponding to his lifestyle, when he has authority over a minor who lives with him and who habitually commits felonies or misdemeanours against the property of others, is punished by five years' imprisonment and a fine of €375,000. The fine may be raised beyond €375,000 to reach half the value of the goods handled.

ARTICLE 321-7

(Act no. 92-1336 of 16 December 1992 Article 362 and 373 Official Journal of 23 December 1992 in force 1 March 1994) (Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

A penalty of six months' imprisonment and a fine of €30,000 applies to any omission, even through negligence, by a person whose professional activity involves the sale of second-hand moveable objects or those bought from persons other than manufacturers or retailers to complete a daily register as required by a decree of the Conseil d'Etat containing a description of the articles bought or held with a view to sale or exchange, and enabling such articles to be identified, as well as the person who sold them or brought them for exchange.

The same penalties apply to the omission, even by negligence, by any person other than a legal professional officer or public officer organising on public premises or premises open to the public an event to sell or exchange articles described in the previous paragraph, to keep a daily register enabling the sellers to be identified, as required by a decree of the Conseil d'Etat.

Where the professional activity defined by the first paragraph is carried on by a legal person or where the organiser of the event referred to under the second paragraph is a legal person, the duty to maintain the register falls upon the managers of this legal person.

ARTICLE 321-8

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

A penalty of six months' imprisonment and a fine of €30,000 is incurred by the recording of inaccurate information in the register required by the previous article, committed by a person referred to in that article.

The same penalties apply to the refusal committed by that person whose duty it is to present that register to a competent authority.

SECTION III

ADDITIONAL PENALTIES APPLICABLE TO NATURAL PERSONS AND LIABILITY OF LEGAL PERSONS — Articles 321-9 to 321-12

ARTICLE 321-9

Natural persons convicted of any of the offences provided for under the present chapter also incur the following additional penalties:

1° forfeiture of civic, civil and family rights pursuant to the conditions set out under article 131-26;

2° prohibition, pursuant to the conditions set out under article 131-27, to hold public office or to discharge the social or professional activity in the course of which or on the occasion of the performance of which the offence was committed; such prohibition being permanent or temporary in the cases set out under articles 321-2 and 321-4, and limited to five years in the cases set out under articles 321-1, 321-6, 321-7 and 321-8;

3° mandatory closure of the business premises or of one or more of the premises of the undertaking which were used to commit the offences; such prohibition being permanent or temporary in the cases set out under articles 321-2 and 321-4, and limited to longer than five years in the cases set out under articles 321-1, 321-6, 321-7 and 321-8;

4° temporary or permanent disqualification from public tenders in the cases set out under articles 321-2 and 321-4, and a disqualification not exceeding five years in the cases set out under articles 321-1, 321-6, 321-7 and 321-8;

5° prohibition to draw cheques except those allowing the withdrawal of funds by the drawer from the drawee or certified cheques, for a maximum period of five years;

6° confiscation of the thing which was used or intended for the commission of the offence or of the thing which is the product of it, with the exception of articles subject to restitution;

7° confiscation of one or more weapons which the convicted person owns or has freely available to him;

8° area banishment, pursuant to the conditions set out under article 131-31, in the cases referred to under articles 321-1 to 321-4;

9° public display of the decision or dissemination of the decision made, pursuant to the conditions set out under article 131-35.

ARTICLE 321-10

In the cases referred to under articles 321-1 to 321-4, the other additional penalties incurred for the felonies and misdemeanours from which the stolen goods originated may also be imposed.

ARTICLE 321-11

Any alien convicted of any of the offences referred to under article 321-2 may be banished from French territory either permanently or for a maximum period of ten years in accordance with the conditions laid down under article 131-30.

ARTICLE 321-12

Legal persons may incur criminal liability for the offences set out under articles 321-1 to 321-4, 321-7 and 321-8 pursuant to the conditions set out under article 121-2.

The penalties incurred by legal persons are:

1° a fine, pursuant to the conditions set out under Article 131-38;

2° in the cases set out by articles 321-1 to 321-4, the penalties referred to under article 131-39;

3° in the cases set out by articles 321-7 and 321-8, the penalties referred to under 2°, 4°, 5°, 6°, 7°, 8° and 9° of article 131-39.

The prohibition referred to under 1° of article 131-37 applies to the activity in the course of which or on the occasion of the performance of which the offence was committed.

CHAPTER II
DESTRUCTION, DAMAGE AND DEFACEMENT — Articles 322-1 to 322-17

SECTION I
OF DESTRUCTIONS, DEFACEMENT AND DAMAGE WHICH MAY NOT ENDANGER ANOTHER PERSON — Articles 322-1 to 322-4-1

ARTICLE 322-1

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000, in force 1 January 2002)

(Act no. 2002-1138 of 9 September 2002 Article 24 Official Journal of 10 September 2002)

Destroying, defacing or damaging property belonging to other persons is punished by two years' imprisonment and a fine of €30,000, except where only minor damage has ensued.

Drawing, without prior authorisation, inscriptions, signs or images on facades, vehicles, public highways or street furniture is punished by a fine of €3,750 and by community service where only minor damage has ensued.

ARTICLE 322-2

(Act no. 95-877 of 3 August 1995 Article 26 Official Journal of 4 August 1995)

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September in force 1 January 2002)

(Act no. 2002-5 of 4 January 2002 Article 27 Official Journal of 5 January 2002

(Act no. 2002-1138 of 9 September 2002 Article 24 (Official Journal of 10 September 2002)

(Act no. 2003-88 of 3 February 2003.Article 8 Official Journal of 4 February 2003)

The offence under the first paragraph of article 322-1 is punished by three years' imprisonment and a fine of €45,000, and the offence under the second paragraph of article 322-1 by a fine of €7,500 and community service where the property destroyed, defaced or damaged is:

1° intended for public use or decoration and belongs to a public body or a person discharging a public service mission;

2° a register, an original of a record or an original document of a public authority;

3° a classified building or movable object, en archaeological discovery made in the course of excavations or fortuitously, land containing archaeological remains, or an article preserved or deposited in a museum, library or archive belonging to the French nation or a public body discharging a public service mission or recognised as of public interest;

4° an article displayed as part of a historical, cultural or scientific exhibition, organised by a public body, a body charged with public servica or recognised as of public interest.

In the case set out under 3° of the present article, an offence is also committed whera the perpetrator is the owner of the property destroyed, defaced or damaged.

Where the offence defined in the first paragraph of article 322-1 is committed because of the owner or user of the property's membership or non-membership, true or supposed, of a given ethnic group, nation, race or religion, the penalties incurred are also increased to 3 years' imprisonment and by a fine of €45, 000.

ARTICLE 322-3

(Act no. 96-647 of 22 July 1996 Article 13 Official Journal of 23 July 1996)

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 came in force 1 January 2002)

(Act no. 2002-1138 of 9 September 2002 Article 24 Official Journal of 10 September 2002)

(Act no. 2003-88 of 3 February 2003 Article 9 Official Journal of 4 February 2003)

The offence set out in the first paragraph of article 322-1 is punished by five years' imprisonment and a fine of €75,000, and that set out in the second paragraph of the same article by a fine of €15,000 and community service:

1° where it is committed by two or more acting as perpetrators or accomplices;

2° where it is facilitated by the state of a person whose particular vulnerability, due to age, sickness, infirmity, a physical of psychological disability or to pregnancy, is apparent or known to the perpetrator;

3° where it is committed to the prejudice of a judge or prosecutor, an advocata, a legal professional officer, a member of the Gendarmerie, a civil servant of the national police, customs, penitentiary administration or of any other person holding public authority or discharging a public service mission, with a view to influencing his behaviour in tha discharge of his duties;

4° where it is committed to the prejudice of a witness, a victim or a civil party, either to prevent him from denouncing the act, from filing a complaint or making a statement before a court, or by reason of such a denunciation, complaint or statement;

5° where it is committed within premises used as a place of abode or on premises used or designed for the safekeeping of funds, securities, goods or equipment, by entering such premises by deceit, by breaking in or by climbing in;

Where the offence set out in the first paragraph of article 322-1 is committed against e place of worship, a school, or a place for educational or leisure activities, or a vehicle used to transport children, the penalties incurred are also

increased to five years' imprisonment and a fine of €75,000.

ARTICLE 322-4

Attempt to commit the offences referred to under the present section is subject to the same penalties.

ARTICLE 322-4-1

(Inserted by Act no. 2003-239 of 18 March 2003 Article 53 1° Official Journal of 19 March 2003)

The act of collectively settling with the aim of establishing residence, even temporarily, on land belonging either to a commune which has conformed to the obligations incumbent on it in accordance with the departmental plan provided for by article 2 of Act no. 2000-614 of 5 July 2000 relating to the reception and settlement of travellers or which is not included in this plan, or to any other owner apart from a commune, without being able to prove the owner's permission or the permission of whoever holds the right to use the land, is punished by six months' imprisonment and a fine of €3,750.

Where the settlement is comprised of motor vehicles, they may be seized, with the exception of vehicles designed for residential purposes, with a view to their confiscation by the criminal courts.

SECTION II

DESTRUCTION, DEFACEMENT AND DAMAGE DANGEROUS TO PERSONS — Articles 322-5 to 322-11

ARTICLE 322-5

(Act no. 2002-647 of 10 July 2000 Article 7 Official Journal of 5 July 2000)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)
(Act no. 2004-204 of 9 March 2004 article 31 Official Journal of 10 March 2004)

Involuntarily destroying, defacing or damaging property belonging to other persons by an explosion or fire caused by a failure to observe a duty of safety or care imposed by statute or regulation is punished by one year's imprisonment and a fine of €15,000.

In the event of a deliberate violation of a duty of safety or care imposed by statute or regulations, the penalties incurred are increased to two years' imprisonment and to a fine of €30,000.

Where this is a forest fire, or fire in woodland, heathland, bush, plantations, or land used for reforestation and belonging to another person, the penalties are increased to two years' imprisonment and a fine of €30,000 in cases provided for by the first paragraph, and to three years' imprisonment and a fine of €45,000 in cases provided for by the second paragraph.

If the fire takes place in such natural conditions as to expose people to bodily harm or to cause irreversible environmental damage, the penalties are increased to three years' imprisonment and to a fine of €45,000 in cases provided for by the first paragraph, and to five years' imprisonment and a fine of €100,000 in cases provided for by the second paragraph.

If the fire has caused another person a total incapacity for work not exceeding eight days, the penalties are increased to five years' imprisonment and a fine of €75,000 in cases provided for by the first paragraph, and to seven years' imprisonment and a fine of €100,000 in cases provided for by the second paragraph.

If the fire has caused the death of one or more persons, the penalties are increased to seven years' imprisonment and a fine of €150,000 in cases provided for by the second paragraph.

ARTICLE 322-6

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)
(Act no. 2004-204 of 9 March 2004 article 32 I Official Journal of 10 March 2004)

Destroying, defacing or damaging property belonging to other persons by an explosive substance, a fire or any other means liable to create a danger to other persons is punished by ten years' imprisonment and a fine of €150,000.

Where this is a forest fire, or fire in woodland, heathland, bush, plantations, or land used for reforestation and belonging to another person, and takes place in conditions so as to expose people to bodily harm or to cause irreversible environmental damage, the penalties are increased to fifteen years' criminal imprisonment and to a fine of €150,000.

ARTICLE 322-6-1

(inserted by Act no. 2004-204 of 9 March 2004 article 7 Official Journal of 10 March 2004

Publishing, by whatever means, except those intended for professionals, procedures for the manufacture of destructive devices made from gunpowder or explosive substances, nuclear, biological or chemical materials, or from any other product for domestic, industrial or agricultural use, is punished by a year's imprisonment and by a fine of €15,000.

The penalties are increased to three years' imprisonment and a fine of €45,000 where a telecommunications network for the distribution of messages to a non-specified audience has been used to publish these procedures.

ARTICLE 322-7

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The offence set out under article 322-6 is punished by fifteen years' criminal imprisonment and a fine of €150,000 where it causes another person a total incapacity for work not exceeding eight days.

Where the offence involves a forest fire, or fire in woodland, heathland, bush, plantations, or land used for reforestation and belonging to another person, the penalties are increased to twenty years' imprisonment and a fine of €200,000.

ARTICLE 322-8

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

(Act no. 2003-88 of 3 February 2003 Article 10 Official Journal of 4 February 2003)

(Act no. 2004-204 of 9 March 2004 article 32 III Official Journal of 10 March 2004)

The offence defined by article 322-6 is punished by twenty years' criminal imprisonment and a fine of €150,000:

1° where it is committed by an organised gang;

2° where it causes another person total incapacity for work in excess of eight days;

3° where it is committed because of the owner or user of the property's membership or non-membership, true or supposed, of a given ethnic group, nation, race or religion.

Where the offence involves a forest fire, or fire in woodland, heathland, bush, plantations, or land used for reforestation and belonging to another person, the penalties are increased to thirty years' imprisonment and a fine of €200,000.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offences set out under the present article.

ARTICLE 322-9

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

(Act no. 2004-204 of 9 March 2004 article 32 IV Official Journal of 10 March 2004)

The offence defined by article 322-6 is punished by thirty years' criminal imprisonment and a fine of €150,000 where it causes another person mutilation or permanent disability.

Where the offence involves a forest fire, or fire in woodland, heathland, bush, plantations, or land used for reforestation and belonging to another person, the penalties are increased to life imprisonment and a fine of €200,000.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offences set out under the present article.

ARTICLE 322-10

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The offence defined by article 322-6 is punished by criminal imprisonment for life and a fine of €150,000 where it causes the death of another person.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offence set out under the present article.

ARTICLE 322-11

Attempt to commit the misdemeanour referred to under article 322-6 is subject to the same penalties.

SECTION III
THREATS OF DESTRUCTION, DEFACEMENT OR DAMAGE AND FALSE ALARMS

Articles 322-12 to 322-14

ARTICLE 322-12

(Act no. 92-1336 of 16 December 1992 Article 363 and 373 Official Journal of 23 December 1992 in force 1 March 1994)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The threat to carry out any destruction, defacement or damage dangerous to persons is punished by six months' imprisonment and a fine of €7,500 where it is repeated, or where it is put in material form by writing, pictures or other objects.

ARTICLE 322-13

(Act no. 92-1336 of 16 December 1992 Article 363 and 373 Official Journal of 23 December 1992 in force 1 September 1993)

(Ordinanca no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

A threat, however made, to commit any destruction, defacement or damage is punished by one year's imprisonment and a fine of €15,000 when it is made with the order to fulfil a condition.

The penalty is increased to three years' imprisonment and a fine of €45,000 where the threat is to cause any destruction, defacement or damage dangerous to others.

ARTICLE 322-14

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The communication or revelation of any false information with a view to inducing a belief that any destruction,

defacement or damage dangerous to other persons will be or has been committed is punished by two years' imprisonment and a fine of €30,000.

The same penalties apply to the communication or disclosure of false information creating the belief that an incident has occurred and which is liable to cause the needless intervention of the rescue services.

SECTION IV

ADDITIONAL PENALTIES APPLICABLE TO NATURAL PERSONS AND LIABILITY OF LEGAL PERSONS — Articles 322-15 to 322-17

ARTICLE 322-15

(Act no. 2004-204 of 9 March 2004 article 44 XIV Official Journal of 10 March 2004, in force 1 October 2004)

Natural persons convicted of any of the offences provided for under the present Chapter also incur the following additional penalties:

1° forfeiture of civic, civil and family rights pursuant to the conditions set out under article 131-26;

2° the prohibition, pursuant to the conditions set out under article 131-27, to hold public office or to undertake the social or professional activity in the course of which or on the occasion of the performance of which the offence was committed, this prohibition being permanent or temporary in the cases set out under articles 322-6 to 322-10 and limited to a maximum of five years in the cases set out under articles 322-1, 322-2, 322-3, 322-5, 322-12, 322-13 and 322-14;

3° prohibition to hold or carry a weapon requiring a licence for a maximum period of five years;

4° area banishment, pursuant to the conditions set out under article 131-31, in the cases referred to under articles 322-7 to 322-10;

5°the obligation to complete a citizenship course, subject to the conditions set out under article 131-5-1.

ARTICLE 322-15-1

(Inserted by Act no. 2003-239 of 18 March 2003 Art. 53 2° Official Journal of 19 March 2003)

Natural persons who are convicted of the offence provided for by article 322-4-1 incur the following additional penalties:

1° the suspension of their driving licence for a maximum period of three years;

2° the confiscation of the motor vehicles used to commit the offence, other than those which are inhabited.

ARTICLE 322-16

Any alien convicted of any of the offences referred to under articles 322-7 to 322-10 may be banished from French territory either permanently or for a maximum period of ten years, pursuant to the conditions set out under article 131-10.

ARTICLE 322-17

Legal persons may incur criminal liability for the offences set out under the present Chapter pursuant to the conditions set out under article 121-2.

The penalties incurred by legal persons are:

1° a fine, pursuant to the conditions set out under article 131-38;

2° the penalty referred to under point 2 of article 131-39 for a maximum period of five years in the cases referred to under articles 322-1, 322-3, 322-5, 322-12, 322-13 and 322-14, and without restriction of time in the cases set out under articles 322-6 to 322-10.

The prohibition referred to under 2° of article 131-39 applies to the activity in the course of which or on the occasion of the performance of which the offence was committed.

CHAPTER III

UNAUTHORISED ACCESS TO AUTOMATED DATA PROCESSING SYSTEMS — Articles 323-1 to 323-7

ARTICLE 323-1

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

(Act no. 2004-575 of 21 June 2004 article 45 I Official Journal of 22 June 2004)

Fraudulently accessing or remaining within all or part of an automated data processing system is punished by two year's imprisonment and a fine of €30,000.

Where this behaviour causes the suppression or modification of data contained in that system, or any alteration of the functioning of that system, the sentence is three years' imprisonment and a fine of €45,000.

ARTICLE 323-2

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

(Act no. 2004-575 of 21 June 2004 article 45 II Official Journal of 22 June 2004)

Obstructing or interfering with the functioning of an automated data processing system is punished by five years' imprisonment and a fine of €75,000.

ARTICLE 323-3

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January

2002)

(Act no. 2004-575 of 21 June 2004 article 45 III Official Journal of 22 June 2004)

The fraudulent introduction of data into an automated data processing system or the fraudulent deletion or modification of the data that it contains is punished by five years' imprisonment and a fine of €75,000.

ARTICLE 323-3-1

(Inserted by Act no. 2004-575 of 21 June 2004 article 46 II Official Journal of 22 June)

A person who, without lawful authority, imports, possesses, offers, transfers or makes available any equipment, instrument, computer programme or information created or specially adapted to commit one or more of the offences prohibited by articles 323-1 to 323-3, is punished by the penalties prescribed for the offence itself, or the one that carries the heaviest penalty.

ARTICLE 323-4

(Act no. 2004-575 of 21 June 2004 article 46 II Official Journal of 22 June 2004)

Participating in a group or conspiracy established with a view to the preparation of one or more offences set out under articles 323-1 to 323-3-1, and demonstrated by one or more material actions, is punished by the penalties prescribed for offence in preparation, or the one that carries the heaviest penalty.

ARTICLE 323-5

Natural persons convicted of any of the offences provided for under the present Chapter also incur the following additional penalties:

1° forfeiture of civic, civil and family rights, pursuant to the conditions set out under article 131-26;

2° prohibition to hold public office or to undertake the social or professional activity in the course of which or on the occasion of the performance of which the offence was committed, for a maximum period of five years;

3° confiscation of the thing which was used or intended for the commission of the offence, or of the thing which is the product of it, with the exception of articles subject to restitution;

4° mandatory closure, for a maximum period of five years of the business premises or of one or more of the premises of the undertaking used to commit the offences;

5° disqualification from public tenders for a maximum period of five years;

6° prohibition to draw cheques, except those allowing the withdrawal of funds by the drawer from the drawee or certified cheques, for a maximum period of five years;

7° public display or dissemination of the decision, in accordance with the conditions set out under article 131-35.

ARTICLE 323-6

Legal persons may incur criminal liability for the offences referred to under the present chapter pursuant to the conditions set out under article 121-2.

The penalties incurred by legal persons are:

1° a fine, pursuant to tha conditions set out under article 131-38;

2° the penalties referred to under article 131-39.

The prohibition referred to under 2° of article 131-39 applies to the activity in the course of which or on the occasion of the performance of which the offence was committed.

ARTICLE 323-7

(Act no. 2004-575 of 21 June 2004 article 46 II Official Journal of 22 June 2004)

Attempt to commit the misdemeanours referred to under articles 323-1 to 323-3-1 is subject to the same penalties.

CHAPTER IV
MONEY LAUNDERING — Articles 324-1 to 324-9

SECTION I
SIMPLE AND AGGRAVATED LAUNDERING — Articles 324-1 to 324-6

ARTICLE 324-1

(Act no. 96-392 of 13th May 1996 Article 1 Official Journal of 14th May 1996)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Money laundering is facilitating by any means the false justification of the origin of the property or income of the perpetrator of a felony or misdemeanour which has brought him a direct or indirect benefit.

Money laundering also comprises assistance in investing, concealing or converting the direct or indirect products of a felony or misdemeanour.

Money laundering is punished by five years' imprisonment and a fine of €375,000.

ARTICLE 324-2

(Act no. 96-392 of 13th May 1996 Article 1 Official Journal of 14th May 1996)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Money laundering is punished by ten years' imprisonment and a fine of €750,000:

1° where it was committed habitually or by using the facilities offered by the exercise of a professional activity;

2° where it was committed by an organised gang.

ARTICLE 324-3

(Inserted by Act no. 96-392 of 13th May 1996 Article 1 Official Journal of 14th May 1996)

The fines referred to under articles 324-1 and 324-2 may be raised to amount to half the value of the property or funds in respect of which the money laundering operations were carried out.

ARTICLE 324-4

(Inserted by Act no. 96-392 of 13th May 1996 Article 1 Official Journal of 14th May 1996)

Where the felony or misdemeanour which produced the property or funds for which the money-laundering operations were carried out is punishable by a custodial sentence higher than that incurred under articles 324-1 or 324-2, the offence of money-laundering is punished by the penalties applicable to the offence the money-launderer knew about, and if this offence was accompanied by aggravating circumstances, by such penalties as relate exclusively to the circumstances of which he was aware.

ARTICLE 324-5

(Inserted by Act no. 96-392 of 13th May 1996 Article 1 Official Journal of 14th May 1996)

As regards recidivism, money laundering is assimilated to the offence for which the money laundering operations were performed.

ARTICLE 324-6

(Inserted by Act no. 96-392 of 13th May 1996 Article 1 Official Journal of 14th May 1996)

Attempt to commit the misdemeanours referred to under the present Section is subject to the same penalties.

SECTION II

ADDITIONAL PENALTIES APPLICABLE TO NATURAL PERSONS AND LIABILITY OF LEGAL PERSONS — Articles 324-7 to 324-9

ARTICLE 324-7

(Act no. 96-392 of 13th May 1996 Article 1 Official Journal of 14th May 1996)
(Act no. 2001-420 of 15th May 2001 Article 47 Official Journal of 16th May 2001)

Natural persons convicted of any of the offences provided for under articles 324-1 and 324-2 also incur the following additional penalties:

1° prohibition, pursuant to the conditions set out under article 131-27, to hold public office or to undertake the social or professional activity in the course of which or on the occasion of the performance of which the offence was committed, this prohibition being permanent or temporary in the case referred to under article 324-2, and limited to five years in the case referred to under article 324-1.

2° prohibition to hold or carry a weapon requiring a licence, for a maximum period of five years;

3° prohibition to draw cheques, except those allowing the withdrawal of funds by the drawer from the drawee or certified cheques, and the prohibition to use payment cards, for a maximum period of five years;

4° suspension of the driving licence for a maximum period of five years; this suspension may be limited to driving outside professional activity;

5° cancellation of the driving licence accompanied by a prohibition, for a maximum period of five years, to apply for the issue of a new licence;

6° confiscation of one or more vehicles belonging to the person convicted;

7° confiscation of one or more weapons belonging to tha convicted person or which he has freely available to him;

8° confiscation of the thing which was used or intended for the commission of the offence, or of the thing which is the product of it, with the exception of articles subject to restitution;

9° forfeiture of civic, civil and family rights, pursuant to the conditions set out under article 131-26;

10° area banishment, pursuant to the conditions set out under article 131-31;

11° prohibition to leave the territory of the Republic for a maximum period of five years;

12° confiscation of some or all of the property of the convicted person, of whatever type, movable or immovable, whether jointly or separately owned.

ARTICLE 324-8

(Inserted by Act no. 96-392 of 13th May 1996 Article 1 Official Journal of 14th May 1996)

Any alien convicted of any of the offences referred to under articles 324-1 to 324-2 may be banished from French territory either permanently or for a maximum period of ten years, in accordance with the conditions laid down under article 131-10.

ARTICLE 324-9

(Inserted by Act no. 96-392 of 13th May 1996 Article 1 Official Journal of 14th May 1996)

Legal persons may incur criminal liability for the offences set out under articles 324-1 and 324-2, pursuant to the conditions set out under article 121-2.

The penalties incurred by legal persons are:

1° a fine, pursuant to the conditions set out under article 131-38;

2° the penalties referred to under article 131-39.

The prohibition referred to under 2° of article 131-39 applies to the activity in the course of which or on the occasion of the performance of which the offence was committed.

PENAL CODE

BOOK IV

FELONIES AND MISDEMEANOURS AGAINST THE NATION, THE STATE AND THE PUBLIC PEACE **Articles 411-2 to 450-5**

TITLE I

VIOLATIONS OF THE FUNDAMENTAL INTERESTS OF THE NATION Articles 411-2 to 410-1

ARTICLE 410-1

The "fundamental interests of the Nation" in the sense of the present title covers its independence, the integrity of its territory, its security, the republican form of its institutions, its means of defence and diplomacy, the safeguarding of its population in France and abroad, the balance of its natural surroundings and environment, and the essential elements of its scientific and economic potential and cultural heritage.

CHAPTER I

TREASON AND ESPIONAGE Articles 411-2 to 411-1

ARTICLE 411-1

The acts defined by articles 411-2 to 411-11 constitute treason where they are committed by a French national or a soldier in the service of France, and constitute espionage where they are committed by any other person.

SECTION I

HANDING OVER OF ALL OR ANY PART OF THE NATIONAL TERRITORY, THE ARMED FORCES OR EQUIPMENT TO A FOREIGN POWER Articles 411-2 to 411-3

ARTICLE 411-2

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Handing over troops belonging to the French armed forces, or all or part of the national territory, to a foreign power, to a foreign organisation or to an organisation under foreign control, or to their agents, is punished by life criminal detention and a fine of €750,000.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offence set out under the present article.

ARTICLE 411-3

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Handing over equipment, constructions, installations, or apparatus assigned to the national defence to a foreign power, to a foreign undertaking or organisation or to an enterprise or organisation under foreign control, or to their agents, is punished by thirty years' criminal detention and a fine of €450,000.

SECTION II

INTELLIGENCE WITH A FOREIGN POWER Articles 411-4 to 411-5

ARTICLE 411-4

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Intelligence with a foreign power, a foreign undertaking or organisation or an enterprise or organisation under foreign control, or their agents, with a view to fomenting hostilities or acts of aggression against France, is punished by thirty years' criminal detention and a fine of €450,000.

The same penalties apply to furnishing a foreign power, a foreign undertaking or organisation, or an undertaking or organisation under foreign control, or their agents, with the means to start hostilities or commit acts of aggression against France.

ARTICLE 411-5

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Intelligence with a foreign power, with a foreign undertaking or organisation or an undertaking or organisation under foreign control, or with their agents where it is liable to prejudice the fundamental interests of the nation, is punished by ten years' imprisonment and a fine of €150,000.

SECTION III

OF SUPPLYING INFORMATION TO A FOREIGN POWER Articles 411-6 to 411-8

ARTICLE 411-6

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Supplying or making accessible to a foreign power, to a foreign undertaking or organisation or to an undertaking or organisation under foreign control, or to their agents, information, processes, articles, documents, computerised data or files, the use, disclosure or collection of which are liable to prejudice the fundamental interests of the nation is punished

by fifteen years' criminal detention and a fine of €225,000.

ARTICLE 411-7

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Collecting or gathering information, processes, articles, documents, computerised data or files, with a view to supplying them to a foreign power, to a foreign undertaking or organisation or to an undertaking or organisation under foreign control, or to their agents, the use, disclosure or gathering of which is liable to prejudice the fundamental interests of the nation is punished by ten years' imprisonment and a fine of €150,000.

ARTICLE 411-8

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The exercise on account of a foreign power, a foreign undertaking or organisation or an undertaking or organisation under foreign control, or their agents, of an activity aimed at obtaining or supplying devices, information, processes, articles, documents, computerised data or files, the use, disclosure or gathering of which is liable prejudice the fundamental interests of the nation is punished by ten years' imprisonment and a fine of €150,000.

SECTION IV
SABOTAGE — Article 411-9

ARTICLE 411-9

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Destroying, defacing or misappropriating any document, equipment, construction, equipment, installation, apparatus, technical device or computerised system, or rendering them defective, where this is liable to prejudice the fundamental interests of the nation is punished by fifteen years' criminal detention and a 225,000 €fine.

Where it is committed with a view to serving the interests of a foreign power, a foreign undertaking or organisation or an undertaking or organisation under foreign control, or that of their agents, this offence is punished by twenty years' criminal detention and a fine of €300,000.

SECTION V
SUPPLYING FALSE INFORMATION — Article 411-10

ARTICLE 411-10

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Supplying the French civilian or military authorities with false information liable to mislead them and damage the fundamental interests of the nation, in order to serve the interests of a foreign undertaking or organisation or an undertaking or organisation under foreign control is punished by seven years' imprisonment and a fine of €100,000.

SECTION VI
INCITEMENT TO COMMIT THE FELONIES SET OUT IN THE PRESENT CHAPTER — Article 411-11

ARTICLE 411-11

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Direct incitement by promises, offers, pressure, threats or violence, to commit any of the felonies set out in the present Chapter, where the incitement was ineffective because of circumstances independent of the offender's will, is punished by seven years' imprisonment and a fine of €100,000.

CHAPTER II
OTHER OFFENCES AGAINST THE INSTITUTIONS OF THE REPUBLIC OR THE INTEGRITY OF THE NATIONAL TERRITORY — Articles 412-1 to 412-8

SECTION I
ATTACK AND PLOTTING — Articles 412-1 to 412-2

ARTICLE 412-1

(Act no. 92-1336 of 16th December 1992 Article 364 and 373 Official Journal of 23rd December 1992 in force 1 March 1994)

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

An attack consists of the commission of one or more acts of violence liable to endanger the institutions of the Republic or violate the integrity of the national territory.

Attack is punished by thirty years' criminal detention and a fine of €450,000.

The penalty is increased to life criminal detention and a fine of €750,000 where the attack was committed by a person holding public authority.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offences set out in the present article.

ARTICLE 412-2

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Plotting consists of a resolution agreed upon by two or more to commit an attack where the resolution was put into effect by one or more material actions.

Plotting is punished by ten years' imprisonment and a fine of €150,000.

The penalty is increased to twenty years' criminal detention and a fine of €300,000 where the offence was committed by a person holding public authority.

SECTION II

INSURRECTIONAL MOVEMENTS — Articles 412-3 to 412-6

ARTICLE 412-3

An insurrectional movement consists of any collective violence liable to endanger the institutions of the Republic or violate the integrity of the national territory.

ARTICLE 412-4

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Officiel Journal of 22 September 2000 in force 1 January 2002)

Participating in an insurrectional movement:

1° by building barricades, fortifications or by any construction whose objective is to prevent or obstruct the action of the forces or order;

2° by occupying with open force or by deceit any building or installation, or by destroying it;

3° by assuring the transport, feeding or communications of the insurgents;

4° by inciting the insurgents to gather, by whatever means;

5° by personally carrying a weapon;

6° by usurping a lawful authority;

is punished by fifteen years' criminal detention and a fine of €225,000.

ARTICLE 412-5

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Participating in an insurrectional movement:

1° by securing weapons, munitions, explosive or dangerous substances or any kind of equipment, by violence or threats, by plunder, or by the disarming the forces of order;

2° by providing the insurgents with weapons, munitions, or explosive or dangerous substances;

is punished by twenty years' criminal detention and a fine of €300,000.

ARTICLE 412-6

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Leading or organising an insurrectional movement is punished by life criminal detention and a fine of €750,000.

SECTION III

USURPATION OF COMMAND, RAISING ARMED FORCES AND INCITEMENT TO TAKE UP ARMS UNLAWFULLY — Articles 412-7 to 412-8

ARTICLE 412-7

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The following are punishable by thirty years' criminal detention and fine of €450,000.

1° the unlawful or unauthorised assumption of any military command or of the keeping of such command against orders by the lawful authorities;

2° the raising of armed forces without the order or authorisation of the lawful authorities.

ARTICLE 412-8

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Incitement to arm against the authority of the State or against a part of the population is punished by five years' imprisonment and a fine of €75,000.

Where the incitement was effective, the penalty is increased to thirty years' criminal detention and a fine of €450,000.

Where the incitement was committed through the press or by broadcasting, the specific legal provisions governing those matters are applicable to define the persons who are responsible.

CHAPTER III

OTHER OFFENCES AGAINST NATIONAL DEFENCE Articles 413-1 to 413-12

SECTION I

OFFENCES AGAINST THE SECURITY OF ARMED FORCES AND PROTECTED ZONES OF INTEREST TO NATIONAL DEFENCE Articles 413-1 to 413-8

ARTICLE 413-1

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 Januery 2002)

The incitement of soldiers belonging to the French armed forces to enter the service of a foreign power, designed to harm national defence, is punished by ten years' imprisonment and a fine of €150,000.

ARTICLE 413-2

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Obstructing the normal operations of military equipment, designed to harm national defence, is punished by five years' imprisonment and a fine of €75,000.

The same penalties apply to obstructing the movement of military personnel or equipment, designed to harm national defence.

ARTICLE 413-3

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The incitement to disobedience, by any means, of soldiers or persons subject to any form of national service to disobedience, designed to harm national defence, is punished by five years' imprisonment and a fine of €75,000.

Where the incitement is committed through the press or by broadcasting, the specific legal provisions governing those matters are applicable to define the persons who are responsible.

ARTICLE 413-4

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Participating in an operation to demoralise the army, designed to harm national defence, is punished by five years' imprisonment and a fine of €75,000.

Where the incitement is committed through the press or by broadcasting, the specific legal provisions governing those matters are applicable to define the persons who are responsible.

ARTICLE 413-5

(Ordinance no. 2000-916 of 19 September 2000 Anicle 3 Official Journal of 22 September 2000 in force 1 January 2002)

Fraudulently gaining access, without the authorisation of the competent authority, to any land or building, or any type of vehicle or craft assigned to the military authority or placed under its control is punished by one year's imprisonment and a fine of €15,000.

ARTICLE 413-6

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Any obstruction to the normal operations of public or private services, establishments or undertakings of importance to the national defence, designed to harm national defence, is punished by three years' imprisonment and a fine of €45,000.

ARTICLE 413-7

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

A penalty of six months' imprisonment and a fine of €7,500 applies to the unauthorised entry into enclosed premises or land, within public or private services, corporations or undertakings of importance to national defence, where free movement is prohibited and which is marked out to ensure the protection of installations, of equipment or the confidentiality of any research, study or production.

A Decree of the Conseil d'Etat shall determine, first, the conditions for setting the boundaries of premises and land referred to in the previous paragraph, and, secondly, the conditions for the granting of authorisations to enter.

ARTICLE 413-8

Attempt to commit the misdemeanours referred to under articles 413-2 and 413-5 to 413-7 is subject to the same penalties.

SECTION II

VIOLATIONS OF NATIONAL DEFENCE SECRETS Articles 413-9 to 413-12

ARTICLE 413-9

(Act no. 94-89 of 1st February 1994 Article 9 Official Journal of 2nd February 1994 in force 1st March 1994)

The quality of national defence secrets, for the purposes of this section, attaches to information, processes, articles, documents, and computerised data or files which are of importance to national defence and which are subject to protective orders intended to restrict their circulation.

The object of such orders may be information, processes, articles, documents, computerised data or files the disclosure of which is liable to prejudice national defence or could lead to the disclosure of a national defence secret.

A Decree of the Conseil d'Etat shall provide for the levels of classification of information, processes, articles, documents, and computerised data or files which are in the nature of national defence secrets and the authorities in charge for the specification of the means to ensure their protection.

ARTICLE 413-10

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

A penalty of seven years' imprisonment and a fine of €100,000 applies to the destruction, misappropriation, theft or duplication, as well as to the communication to the public or to an unauthorised person, by any person holding such a confidential information because of his position or occupation or any permanent or temporary mission, of any information, process, article, document, or computerised data or file which is a national defence secret.

The same penalties apply to the holder who permits the destruction, misappropriation, removal, duplication or revelation of any information, process, article, document, computerised data or file referred to under the previous paragraph.

Where the holder has behaved negligently or recklessly, the offence is punished by three years' imprisonment and a fine of €45,000.

ARTICLE 413-11

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

A penalty of five years' imprisonment and a fine of €75,000 applies to any person not covered by article 413-10 who:

1° acquires possession of any information, process, article, document, computerised data or file which is in the nature of a national defence secret;

2° destroys, removes or duplicates in any manner any such information, process, article, document, computerised data or file;

3° brings to the knowledge of the public or of an unauthorised person any such information, process, article, document, computerised data or file;

ARTICLE 413-12

Attempt to commit the misdemeanours referred to under the first paragraph of Article 413-10 and Article 413-11 is subject to the same penalties.

CHAPTER IV

SPECIAL PROVISIONS — Articles 414-1 to 414-9

ARTICLE 414-1

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Where martial law or a state of emergency has been declared, or in the event of a general mobilisation or alert decided by the Government, the offences referred to under articles 413-1 to 413-3 are punished by thirty years' criminal detention and a fine of €450,000 and the offence referred to under article 413-6 is punished by seven years' detention and a fine of €100,000.

In the cases referred to under the previous paragraph, incitement, where done with the intent to harm national defence, to commit the offences set out under article 413-2 is punished by ten years' imprisonment and a fine of €150,000 and incitement to commit the offence referred to under article 413-6 is punished by five years' imprisonment and a fine of €75,000.

ARTICLE 414-2

Any person who has attempted to commit any of the offences set out under articles 411-2, 411-3, 411-6, 411-9 and 412-1 is exempted from punishment if, having informed the judicial or administrative authorities, he makes it possible to prevent the offence taking place and, where relevant, to identify the other offenders.

ARTICLE 414-3

Any person who has participated in the conspiracy defined by article 412-2 is exempted from punishment if, before prosecution, he has disclosed the existence of the conspiracy to the competent authorities and enabled the identification of the other participants.

ARTICLE 414-4

The custodial sentence incurred by the perpetrator or the accomplice to the offences set out under articles 411-4, 411-5, 411-7, 411-8 and 412-6 is reduced by half if, having informed the judicial or administrative authorities, he has made it possible for the criminal behaviour to be stopped or for human fatalities or permanent injuries resulting from the offence to be avoided, and, where relevant, the other offenders to be identified.

Where the penalty incurred is criminal imprisonment for life, this penalty is reduced to twenty years' criminal detention.

ARTICLE 414-5

Natural persons convicted of one of the felonies or misdemeanours referred to under the present title also incur the following additional penalties:

1° forfeiture of civic, civil and family rights pursuant to the conditions set out under article 131-26;

2° prohibition to hold public office or to undertake the social or professional activity in the course of which or on the occasion of the performance of which the offence was committed, pursuant to the conditions set out under article 131-27;

3° confiscation of the thing which was used or intended for the commission of the offence, or of the thing which is the product of it, with the exception of articles subject to restitution;

4° area banishment, pursuant to the conditions set out under article 131-31.

ARTICLE 414-6

(Act no. 98-348 of 11 May 1998 Article 37 Official Journal 12 May 1998; Act no. 2003-119 of 26 November 2003, Article 78)

Any alien convicted of any of the offences referred to under chapters I, II and IV of the present title, and articles 413-1 to 413-4, 413-10 and 413-11 may be banished from French territory either permanently or for a maximum period of ten years in accordance with the conditions laid down under article 131-10.

ARTICLE 414-7

Legal persons may incur criminal liability for the offences referred to under the present title pursuant to the conditions set out under article 121-2.

The penalties incurred by legal persons are:

1° a fine, pursuant to the conditions set out under article 131-38;

2° the penalties referred to under article 131-39.

The prohibition referred to in 2° of article 131-39 applies to the activity in the course of which or on the occasion of the performance of which the offence was committed.

ARTICLE 414-8

The provisions of articles 411-1 to 411-11 and 413-1 to 413-12 are applicable to the actions referred to under those provisions when committed to the prejudice of the signatory powers of the North Atlantic Treaty.

ARTICLE 414-9

The provisions of articles 411-6 to 411-8 and 413-10 to 413-12 are applicable to information covered by the security agreement governing certain exchanges of confidential information between the Government of the French Republic and the Government of the Kingdom of Sweden, signed in Stockholm on 22 October 1973.

TITLE II
OF TERRORISM — Articles 421-1 to 422-7

CHAPTER I
OF ACTS OF TERRORISM — Articles 421-1 to 421-5

ARTICLE 421-1

(Act no. 96-647 of 22 July 1996 Article 1 Official Journal 23 July 1996; Act no. 98-348 of 11 May 1998 Article 37 Official Journal 12 May 1998)

(Act no. 2001-1062 of 15 November 2001 Article 33 Official Journal 16 November 2001)

The following offences constitute acts of terrorism where they are committed intentionally in connection with an individual or collective undertaking the purpose of which is seriously to disturb public order through intimidation or terror:

1° wilful attacks on life, wilful attacks on the physical integrity of persons, abduction and unlawful detention and also as the hijacking of planes, vessels or any other means of transport, defined by Book II of the present Code;

2° theft, extortion, destruction, defacement and damage, and also computer offences, as defined under Book III of the present Code;

3° offences committed by combat organisations and disbanded movements as defined under articles 431-13 to 431-17, and the offences set out under articles 434-6, 441-2 to 441-5;

4° the production or keeping of machines, dangerous or explosive devices, set out under article 3 of the Act of 19 June 1871 which repealed the Decree of 4 September 1870 on the production of military grade weapons;

- the production, sale, import or export of explosive substances as defined by article 6 of the Act no. 70-575 of 3 July 1970 amending the regulations governing explosive powders and substances;

- the purchase, keeping, transport or unlawful carrying of explosive substances or of devices made with such explosive substances, as defined by article 38 of the Ordinance of 18 April 1939 defining the regulations governing military equipment, weapons and ammunition;

- the detention, carrying, and transport of weapons and ammunition falling under the first and fourth categories defined by articles 4, 26, 31 and 32 of the aforementioned Ordinance;

- the offences defined by articles 1 and 4 of the Act no. 72-467 of 9 June 1972 forbidding the designing, production, keeping, stocking, purchase or sale of biological or toxin-based weapons;

- the offences referred to under articles 58 to 63 of the Act no. 98-467 of 17 June 1998 on the application of the Convention of the 13 January 1993 on the prohibition of developing, producing, stocking and use of chemical weapons and on their destruction;

5° receiving the product of one of the offences set out in paragraphs 1 to 4 above;
6° the money laundering offences set out in Chapter IV of title II of Book III of the present Code;
7° the insider trading offences set out in article L.465-1 of the Financial and Monetary Code.

ARTICLE 421-2

(Act no. 1996-647 of 22 July 1996 Article 2 Official Journal 23 July 1996)
(Act no. 2004-204 of 9 March 2004 article 8 Official Journal of 10 March 2004)

The introduction into the atmosphere, on the ground, in the soil, in foodstuff or its ingredients, or in waters, including territorial waters, of any substance liable to imperil human or animal health or the natural environment is an act of terrorism where it is committed intentionally in connection with an individual or collective undertaking whose aim is to seriously disturb public order through intimidation or terror.

ARTICLE 421-2-1

(Inserted by Act no. 96-647 of 22 July 1996 Article 2 Official Journal 23 July 1996)

The participation in any group formed or association established with a view to the preparation, marked by one or more material actions, of any of the acts of terrorism provided for under the previous articles shall in addition be an act of terrorism.

ARTICLE 421-2-2

(Inserted by Act no. 2001-1062 of 15 November 2001 art. 33 Official Journal 16 November 2001)

It also constitutes an act of terrorism to finance a terrorist organisation by providing, collecting or managing funds, securities or property of any kind, or by giving advice for this purpose, intending that such funds, security or property be used, or knowing that they are intended to be used, in whole or in part, for the commission of any of the acts of terrorism listed in the present chapter, irrespective of whether such an act takes place.

ARTICLE 421-2-3

(Inserted by Act no. 2003-239 of 18 March 2003 Art. 45 Official Journal of 19 March 2003)

Being unable to account for resources corresponding to one's lifestyle when habitually in close contact with a person or persons who engage in one or more of the activities provided for by articles 421-1 to 421-2-2 is punishable by 7 years' imprisonment and by a fine of €100,000.

ARTICLE 421-3

The maximum custodial sentence incurred for the offences provided for under article 421-1 is increased as follows where those offences constitute acts of terrorism:

1° it is raised to criminal imprisonment for life where the offence is punished by thirty years' criminal imprisonment;
2° it is raised to thirty years' criminal imprisonment where the offence is punished by twenty years' criminal imprisonment;
3° it is raised to twenty years' criminal imprisonment where the offence is punished by fifteen years' criminal imprisonment;
4° it is raised to fifteen years' criminal imprisonment where the offence is punished by ten years' imprisonment;
5° it is raised to ten years' imprisonment where the offence is punished by seven years' imprisonment;
6° it is raised to seven years' imprisonment where the offence is punished by five years' imprisonment;
7° it is raised to twice the sentence incurred where the offence is punished by a maximum of three years' imprisonment.

The first two paragraphs of article 132-23 governing the safety period are applicable to the felonies referred to under the present article, and also to the misdemeanours punished by ten years' imprisonment

ARTICLE 421-4

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)
(Act no. 2002-1138 of 9 September 2002 Article 46 Official Journal of 10 September 2002)

The act of terrorism set out under article 421-2 is punished by twenty years' criminal imprisonment and a fine of €350,000.

Where this offence causes the death of one or more persons, it is punished by criminal imprisonment for life and a fine of €750,000.

The first two paragraphs of article 132-23 governing tha safety period are applicable to the felony referred to under the present article.

ARTICLE 421-5

(Act no. 96-647 of 22 July 1996 Article 5 Official Journal 23 July)
(Act no. 2001-1062 of 15 November 2001 Article 33 Official Journal of 16 November 2001)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)
(Act no. 2004-204 of 9 March 2004 article 6 XI Official Journal of 10 March 2004)

The acts of terrorism defined by articles 421-2-1 and 421-2-2 are punished by ten years' imprisonment and a fine of €225,000.

Leading or organising [the type of] group or association provided for under article 421-2-1 is punished by twenty years' imprisonment and a fine of €500,000.

Attempt to commit the misdemeanour set out under article 421-2-2 is subject to the same penalties.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offences referred to under the present article.

CHAPTER II

SPECIAL PROVISIONS — Articles 422-1 to 422-7

ARTICLE 422-1

Any person who has attempted to commit an act of terrorism is exempted from punishment where, having informed the judicial or administrative authorities, he makes it possible to prevent the offence taking place and, where relevant, to identify the other offenders.

ARTICLE 422-2

The custodial sentence incurred by the perpetrator or the accomplice to an act of terrorism is reduced by half where, having informed the judicial or administrative authorities, he has made it possible for the criminal behaviour to be stopped or for loss of life or permanent injuries resulting from the offence to be avoided, and, where relevant, the other offenders to be identified.

Where the penalty incurred is criminal imprisonment for life, this penalty is reduced to twenty years' imprisonment.

ARTICLE 422-3

Natural persons convicted of any of the offences provided for under the present title also incur the following additional penalties:

1° forfeiture of civic, civil and family rights, pursuant to the conditions set out under article 131-26. However, the maximum period of the forfeiture is raised to fifteen years in the event of a felony, and to ten years in the event of a misdemeanour;

2° prohibition, pursuant to the conditions set out under article 131-27, to hold public office or to undertake the social or professional activity in the course of which or on the occasion of the performance of which the offence was committed. However, the maximum temporary prohibition is increased to ten years;

3° area banishment, pursuant to the conditions set out under article 131-31. However, the maximum period of the banishment is raised to fifteen years in the event of a felony, and to ten years in the event of a misdemeanour.

ARTICLE 422-4

(Act no. 93-1027 of 24 August 93 Article 33 Official Journal 29 August 1993)
(Act no. 98-468 of 17 July 1998 Article 37 Official Journal 12 May 1998)
(Act no. 2003-1119 of 26 November 2003 Article 78 III Official Journal of 27 November 2003)

Any alien convicted of any of the offences referred to under the present title may be banished from French territory either permanently or for a maximum of ten years in accordance with the conditions laid down under article 131-30.

ARTICLE 422-5

Legal persons may incur criminal liability for acts of terrorisms set out under under the present title, pursuant to the conditions set out under article 121-2.

The penalties incurred by legal persons are:

1° a fine, pursuant to the conditions set out under article 131-38;

2° the penalties referred to under article 131-39.

The prohibition referred to under 2° of article 131-39 applies to the activity in the course of which or on the occasion of the performance of which the offence was committed.

ARTICLE 422-6

(Inserted by Act no. 2001-1062 of 15 November 2001 Article 33 Official Journal of 16 November 2001)

Natural and legal persons convicted of act of terrorism shall in addition incur the complementary penalty of confiscation of all or part of their property, whatever its nature, movable or immovable, severally or jointly owned.

ARTICLE 422-7

(Inserted by Act no. 2001-1062 of 15 November 2001 Article 33 Official Journal of 16 November 2001)

The product of a financial or property sanction imposed on a person convicted of an act of terrorism is allocated to the contingency fund for victims of acts of terrorism and other offences.

TITLE III

VIOLATION OF THE AUTHORITY OF THE STATE — Articles 431-1 to 436-5

CHAPTER I

BREACHES OF THE PUBLIC PEACE — Articles 431-1 to 431-21

SECTION I

IMPEDING THE FREEDOM OF EXPRESSION, LABOUR, ASSOCIATION, ASSEMBLY OR DEMONSTRATION — Articles 431-1 to 431-2

ARTICLE 431-1

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Concerted obstruction, with the use of threats, to the exercise of the freedom of expression, labour, association, assembly or demonstration is punished by one year's imprisonment and a fine of €15,000.

Concerted obstruction to the exercise of one of the freedoms referred to under the previous paragraph with the use of blows, acts of violence, or acts of destruction or damage within the meaning of the present Code is punished by three years' imprisonment and a fine of €45,000.

ARTICLE 431-2

Natural persons convicted of any of the offences provided for under article 431-1 also incur the following additional penalties:

1° forfeiture of civic, civil and family rights pursuant to the conditions set out under article 131-26;

2° prohibition, pursuant to the conditions set out under article 131-27, to hold public office or to undertake the social or professional activity in the course of which or on the occasion of the performance of which the offence was committed;

3° prohibition to hold or carry a weapon requiring a licence for a maximum period of five years.

SECTION II

PARTICIPATION IN AN UNLAWFUL ASSEMBLY — Articles 431-3 to 431-8

ARTICLE 431-3

An unlawful assembly is any gathering of persons on the public highway or in any place open to the public where it is liable to breach the public peace.

An unlawful assembly may be dispersed by the forces of public order after two orders to disperse have been issued without success by the prefect, the sub-prefect, the mayor or one of his deputies, any judicial police officer in charge of public safety, or any other judicial police officer, bearing the insignia of their office.

These orders are made in a manner appropriate to inform the persons taking part in the unlawful assembly of the obligation to disperse without delay; the manner shall be specified by a Decree of the Conseil d'Etat, which shall also determine the insignia to be borne by the persons referred to under the previous paragraph.

However, the representatives of the forces of order called to disperse an unlawful assembly may directly resort to the use of force where acts of violence are carried out against themselves or if they are not in a position otherwise to protect the place they are occupying.

ARTICLE 431-4

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Wilful participation in an unlawful assembly, after the orders have been issued, committed by a person not carrying a weapon is punished by one year's imprisonment and a fine of €15,000.

ARTICLE 431-5

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Wilful participation in an unlawful assembly whilst carrying a weapon is punished by three years' imprisonment and a fine of €45,000.

Where the person carrying a weapon has wilfully continued to participate in an unlawful assembly after the orders have been issued, the penalty is increased to five yeers' imprisonment and to a fine of €75,000.

ARTICLE 431-6

Directly inciting an armed, unlawful assembly, either through shouting or public speeches, or through writings, whether displayed or distributed, or through writings, words or pictures broadcast in any way, is punished by one year's imprisonment and a fine of €15,000.

Where the incitement is acted upon, the penalty is increased to seven years' imprisonment and to a fine of €100,000.

ARTICLE 431-7

Natural persons convicted of any of the offances provided for under articles 431-5 and 431-6 also incur the following additional penalties:

1° forfeiture of civic, civil and family rights, pursuant to the conditions set out under article 131-26;

2° prohibition to hold or carry a weapon requiring a licence, for a maximum period of five years;

3° confiscation of one or more weapons belonging to the convicted person or which are freely available to him;

4° area banishment pursuant to the conditions under article 131-31.

ARTICLE 431-8

Any alien convicted of any of the offences referred to under articles 431-5 and 431-6 may be banished from French territory either permanently or for a maximum period of ten years, pursuant to the conditions set out under article 131-30.

SECTION III

UNLAWFUL DEMONSTRATIONS AND UNLAWFUL PARTICIPATION TO A DEMONSTRATION OR TO A PUBLIC MEETING — Articles 431-9 to 431-12

ARTICLE 431-9

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The following offences are punished by six months' imprisonment and a fine of €7,500:

1° the organisation of a demonstration on the public highway without filing a prior notice pursuant to the conditions laid down by law;

2° the organisation of a demonstration on the public highway which has been prohibited pursuant to the conditions laid down by the law;

3° drawing up an inaccurate or incomplete notice liable to mislaad about the objective or conditions of the proposed demonstration.

ARTICLE 431-10

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Participating in a demonstration or public meeting while carrying a weapon is punished by thrae years' imprisonment and a fine of €45,000.

ARTICLE 431-11

Natural persons convicted of any of the offences provided for under article 431-10 also incur the following additional penalties:

1° forfeiture of civic, civil and family rights, pursuant to the conditions set out under article 131-26;

2° prohibition to hold or carry a weapon requiring a licence for a maximum period of five years;

3° confiscation of one or more weapons which belonged to the convicted person or which are freely available to him;

4° area banishment pursuant to the conditions under article 131-31.

ARTICLE 431-12

Any alien convicted of any of the offences referred to under article 431-10 may be banished from French territory either permanently or for a maximum period of ten years in accordance with the conditions laid down under article 131-30.

SECTION iV
COMBAT GROUPS AND DISBANDED MOVEMENTS — Articles 431-13 to 431-21

ARTICLE 431-13

Unless otherwise provided by the law, a combat group is any group of persons holding or having access to weapons, which has an organised hiararchy and is liable to breach the public peace.

ARTICLE 431-14

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Participating in a combat group is punished by three years' imprisonment and a fine of €45,000.

ARTICLE 431-15

Participating in the maintenance or re-establishment, whether secret or open, of an association or group disbanded by the Act of 10 January 1936 on Combat Groups and Private Militias is punished by three years' imprisonment and a fine of €45,000.

Where the association or the re-established or maintainad group is a combat group wilhin the meaning of article 431-14, the penalty is increased to five years' imprisonment and a fine of €75,000.

ARTICLE 431-16

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Organising a combat group is punished by five years' imprisonment and a fine of €75,000.

ARTICLE 431-17

The maintenance or re-establishment, whether secret or open, of a combat group disbanded under the aforementioned Act of 10 January 1936 is punished by seven years' imprisonment and a fine of €100,000.

ARTICLE 431-18

Natural persons convicted of any of the offences provided for under the present section also incur the following additional penalties:

1° forfeiture of civic, civil and family rights, pursuant to the conditions set out under article 131-26;

2° the complete or partial dissemination of the decision, or of an official statemant informing the public of the reasons and the contents of the decision, pursuant to the conditions set out under article 221-10;

3° area banishment, pursuant to the conditions set out under article 131-31.

ARTICLE 431-19

(Act no. 93-1027 of 24 August 1993 Article 33 Official Journal 29 August 1993)

Any alien convicted of any of the offences referred to under the present section may be banished from French territory either permanently or for a maximum of ten years, pursuant to the conditions set out under article 131-30.

ARTICLE 431-20

Legal persons may incur criminal liability for the offences set out under the present Section, pursuant to the conditions set out under article 121-2.

The penalties incurred by legal persons are:

1° a fine, pursuant to the conditions set out under article 131-38;

2° the penalties referred to under article 131-39.

The prohibition referred to under 2° of article 131-39 applies to the activity in the course of which or on the occasion of the performance of which the offence was committed.

ARTICLE 431-21

Natural or legal persons convicted of the offences set out under the present Section also incur the following sentences:

1° confiscation of movable or immovable property belonging to or used by the combat group or association or by the maintained or re-established group;

2° confiscation of uniforms, insignia, emblems, weapons and any equipment used or designed to be used by the combat group or association or by the maintained or re-established group.

CHAPTER II
OFFENCES AGAINST THE GOVERNMENT COMMITTED BY CIVIL SERVANTS — Articles 432-1 to 432-17

SECTION I
ABUSE OF AUTHORITY DIRECTED AGAINST THE PUBLIC ADMINISTRATION — Articles 432-1 to 432-3

ARTICLE 432-1

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The taking of measures designed to obstruct the implementation of a law, committed by a person holding public authority in the discharge of his office, is punished by five years' imprisonment and a fine of €75,000.

ARTICLE 432-2

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The offence set out under article 432-1 is punished by ten years' imprisonment and a fine of €150,000 where it was successful.

ARTICLE 432-3

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The continued exercise of an office by a person holding public authority or discharging a public service mission, or by a person holding a public electoral mandate, after having been officially informed of the decision or the circumstance putting an end to his functions, is punished by two years' imprisonment and a fine of €30,000.

SECTION II
OF ABUSE OF AUTHORITY COMMITTED AGAINST INDIVIDUALS — Articles 432-4 to 432-9

Paragraph 1
Of offences against personal liberty — Articles 432-4 to 432-6

ARTICLE 432-4

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The arbitrary ordering or carrying out a violation of personal freedom committed by a person holding public authority or discharging a public service mission, acting in the exercise or on the occasion of his office or mission, is punished by seven years' imprisonment and a fine of €100,000.

Where the violation consists of a detention or a restraint exceeding seven days, the penalty is increased to thirty years' criminal imprisonment and to a fine of €450,000.

ARTICLE 432-5

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The unlawful deprivation of liberty, the wilful failure either to put an end to such deprivation when he has the power, or, alternatively, the wilful failure to bring about the intervention of a competent authority, by a person holding public authority or discharging a public service mission who has knowledge of such deprivation in the course of or on the occasion of his office or mission, is punished by three years' imprisonment and a fine of €45,000

A person referred to under the previous paragraph who, having learnt of an allegedly unlawful deprivation of liberty in the course of or on the occasion of the discharge of his office or mission, wilfully abstains either from making such necessary verifications as he is empowered to make, or, alternatively, from transmitting the complaint to a competent authority, is punished by one year's imprisonment and a fine of €15,000 where the deprivation of liberty, later found to be unlawful, continued.

ARTICLE 432-6

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The reception or retention of a person by an agent of the prison administration, without a warrant, a judgment or a detention order drafted in conformity with the law, or the undue extension of a detention, is punished by two years' imprisonment and a fine of €30,000.

Paragraph 2
Discrimination — Article 432-7

ARTICLE 432-7

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Discrimination defined by article 225-1, committed in respect of a natural or legal person, by a person holding public authority or discharging a public service mission, in the discharge or on the occasion of that office or mission, is punished by five years' imprisonment and a fine of €75,000 where it consists:

1° of refusing the benefit of a right conferred by the law;

2° of hindering the normal exercise of any given economic activity.

Paragraph 3
Of offences against the inviolability of the domicile — Article 432-8

ARTICLE 432-8

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Entering or attempting to enter another person's residence against his will, except in cases where the law provides, by a person holding public authority or discharging a public service mission, acting in the exercise or on the occasion of his office or mission, is punished by two years' imprisonment and a fine of €30,000.

Paragraph 4
Violating the confidentiality of correspondence — Article 432-9

ARTICLE 432-9

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002; Act n. 2004-669 of 9 July 2004 Article 121, Official Journal 10 July 2004)

Except where provided for by law, the ordering, committing or facilitation of the misappropriation, suppression or opening of correspondence, and the disclosure of the contents of such correspondence, by a person holding public authority or discharging a public service mission acting in the course of or on the occasion of his office or duty, is punished by three years' imprisonment and a fine of €45,000.

The same penalties apply to the persons referred to under the previous paragraph, or to employees of electronic communication networks open to the public, or to employees of a supplier of telecommunication services, who, acting in the performing of their office, order, commit or facilitate, except where provided for by law, any interception or misappropriation of correspondence sent, transmitted or received by a means of telecommunication, or the use or the disclosure of its contents.

SECTION III
BREACHES OF THE DUTY OF HONESTY — Articles 432-10 to 432-16

Paragraph 1
Improper demands or exemptions in relation to taxes — Article 432-10

ARTICLE 432-10

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Any acceptance, request or order to pay as public duties, contributions, taxes or impositions of any sum known not to be due, or known to exceed what is due, committed by a person holding public authority or discharging a public service mission is punished by five years' imprisonment and a fine of €75,000.

The same penalties apply to the granting by such persons, in any form and for any reason, of any exoneration or exemption from dues, contributions taxes or impositions in breach of statutory or regulatory rules.

Attempt to commit the misdemeanours referred to under the present article is subject to the same penalties.

Paragraph 2

PENAL CODE

Passive corruption and trafficking influence by person holding public office — Article 432-11

ARTICLE 432-11

(Act no. 2000-593 of 30 June 2000 Article 1 Official Journal 1 July 2000)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The direct or indirect request or acceptance without right and at any time of offers, promises, donations, gifts or advantages, when done by a person holding public authority or discharging a public service mission, or by a person holding a public electoral mandate, is punished by ten years' imprisonment and a fine of €150,000 fine where it is committed:

1° to carry out or abstain from carrying out an act relating to his office, duty, or mandate, or facilitated by his office, duty or mandate;

2° or to abuse his real or alleged influence with a view to obtaining from any public body or administration any distinction, employment, contract or any other favourable decision.

Paragraph 3
Unlawfull taking of interest — Articles 432-12 to 432-13

ARTICLE 432-12

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The taking, receiving or keeping of any interest in a business or business operation, either directly or indirectly, by a person holding public authority or discharging a public service mission, or by a person holding a public electoral mandate who at the time in question has the duty of ensuring, in whole or in part, its supervision, management, liquidation or payment, is punished by five years' imprisonment and a fine of €75,000.

However, in municipalities of no more than 3,500 inhabitants, mayors, their deputies or municipal counsellors acting by delegation from or in substitution for the mayor, may contract with the municipality of which they are the elected representatives for the transfer of movable or immovable property or for the supply of services within the limit of an annual sum of €16,000.

Furthermore, in those municipalities, mayors, their deputies or the municipal counsellors acting by delegation from or in substitution for the mayor may acquire a plot in a municipal housing development to build their personal dwelling, or enter into a residential tenancy agreement with the municipality for their personal accommodation. These contracts must be authorised by a reasoned decision from the municipal council after a valuation of the property concerned has been made by the public domain service.

In the same municipalities, the same elected officials may acquire property belonging to the municipality for the establishment or development of their business. The price may not be lower than the valuation made by the public domain service. The contract must be authorised by a reasoned decision from the municipal council, whatever the value of the property concerned.

For the application of the three previous paragraphs, the municipality is represented in accordance with the conditions laid down under article L. 122-12 of the Municipalities Code and the mayor, deputy or the municipal counsellor concerned must abstain from participating in the deliberation of the municipal council regarding the completion or approval of the contract. Furthermore, notwithstanding the second paragraph of article L. 121-15 of the Municipalities Code, the municipal council may not decide to meet in camera.

ARTICLE 432-13

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

An offence punished by two years' imprisonment and a fine of €30,000 is committed by any person who, in his capacity as a civil servant or agent or official of a public administration, and specifically by reason of his office, is entrusted with the supervision or control of any private undertaking, or with the conclusion of contracts of any type with a private enterprise, or who by services, advice or investment takes or receives any part in such an enterprise, before the expiry of a period of five years following the end of his office.

The same penalties apply to any participation through work, advice or investment in a private undertaking which owns 30 per cent or more of the capital in one of the undertakings referred to in the previous paragraph, or which has concluded a contract carrying legal or de facto exclusivity with such an enterprise.

For the purpose of the present article, any public enterprise exercising its activity in a compatitive sector and in accordance with the rules of private law counts as a private enterprise.

These provisions are applicable to the employees of public corporations, nationalised enterprises, mixed economy companies in which the State or public bodies holding directly or indirectly more than 50 per cent of the capital, and the employees of the public operators enumerated by the Act no. 90-568 of 2 July 1990 governing the organisation of the public postal and telecommunications service.

The offence is not committed by investment in the capital of companies listed on the stock market or where the capital is received by devolution under a succession.

ARTICLE 432-14

(Act no. 95-127 of 8 February 1995 Article 10 Official Journal 9 February 1995) (Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

An offence punished by two years' imprisonment and a fine of €30,000 is committed by any person holding public authority or discharging a public service mission or holding a public electoral mandate or acting as a representative, administrator or agent of the State, territorial bodies, public corporations, mixed economy companies of national interest discharging a public service mission and local mixed economy companies, or any person acting on behalf of any of the above-mentioned bodies, who obtains or attempts to obtain for others an unjustified advantage by an act breaching the statutory or regulatory provisions designed to ensure freedom of access and equality for candidates in respect of tenders for public service and delegated public services.

ARTICLE 432-15

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The destruction, misappropriation or purloining of a document or security, of private or public funds, papers, documents or securities representing such funds, or of any other object entrusted to him, committed by person holding public authority or discharging a public service mission, a public accountant, a public depositary or any of his subordinates, is punished by ten years' imprisonment and a fine of €150,000.

Attempt to commit the misdemeanour referred to under the previous paragraph is subject to the same penalties.

ARTICLE 432-16

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Where the destruction, misappropriation or purloining of assets referred to under article 432-15 was committed by a third party as a result of the negligence of a person holding public authority or discharging a public service mission, a public accountant or a public depositary, the latter is punished by one year's imprisonment and a fine of €15,000.

ARTICLE 432-17

(Act no. 92-1336 of 16 December 1992 Article 365 and 373 Official Journal of 23 December 1992 in force 1 March 1994)

The following additional penalties may be pronounced in the cases referred to under the present chapter:

1° forfeiture of civic, civil and family rights, pursuant to the conditions set out under article 131-26;

2° prohibition, pursuant to the conditions set out under article 131-27, to exercise a public office or to undertake the social or professional activity in the course of which or on the occasion of which the offence was committed;

3° confiscation, pursuant to the conditions set out under article 131-21, of the sums or objects unlawfully received by the offender, with the exception of objects subject to restitution;

4° in the case referred to in article 432-7, public display or dissemination of the decision, pursuant to the conditions set out by article 131-35.

ARTICLE 433-1

(Act no. 2000-595 of 30 June 2000 Article 1 Official Journal 1 July 2000)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Unlawfully proffering, at any time, directly or indirectly, any offer, promise, donation, gift or reward, in order to induce a person holding public authority, discharging a public service mission, or vested with a public electoral mandate:

1° to carry out or abstain from carrying out an act pertaining to his office, duty, or mandate, or facilitated by his office, duty or mandate;

2° or to abuse his real or alleged influence with a view to obtaining distinctions, employments, contracts or any other favourable decision from a public authority or the government;

is punished by ten years' imprisonment and a fine of €150,000.

The same penalties apply to yielding before any person holding public authority, discharging a public service mission, or vested with a public electoral mandate who, unlawfully, at any time, directly or indirectly solicits offers, promises, donations, gifts or rewards to carry out or to abstain from carrying out any act specified under 1°, or to abuse his influence under the conditions specified under 2°.

ARTICLE 433-2

The direct or indirect request or accaptance of offers, promises, donations, gifts or rewards made to abuse one's real or supposad influance with a view to obtaining distinctions, employments, contracts or any other favourable decision from a public authority or administration, is punished by five years' imprisonment and a fine of €75,000

The same penalties apply to yielding to the demands set out under the previous paragraph, or unlawfully proffering, directly or indirectly any offer, promise, donation, gift or reward so that a person may unlawfully use his real or supposed influence with a view to obtaining distinctions, employments, contracts or any other favourable decision from a public authority or administration.

SECTION II

THREATS AND INTIMIDATION AGAINST PERSONS HOLDING PUBLIC OFFICE Article 433-3

ARTICLE 433-3

(Act no. 96-647 of 22 July 1996 Article 16 Official Journal 23 July 1996)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The threat to commit a felony or a misdemeanour against persons or property made against a person holding elected public office, a judge or prosecutor, a juror, an advocate, a legal professional officer or a public officer, a member of the Gendarmerie or national police, customs, the penitentiary administration, or any other person holding public authority or discharging a public service mission, a fireman (whether professional or volunteer), the accredited warden of a building or group of buildings or an agent carrying out on behalf of the tenant the duty of caring for or watching an inhabited building in pursuance of articla L. 127.1 of the Code of Construction and Habitation, in the exercise or on account of his functions or mission, when the capacity of the victim is known or apparent to the perpetrator, is punished by two years' imprisonment and a fine of €30,000. These provisions also apply to threats made against the spouse, the ascendants and direct descendants of these persons or against any other person who habitually resides in their home, because of the duties carried out by these persons .

The threat to commit a felony or a misdemeanour against persons or property made against a person employed by a public transport network or any other person carrying out e public service mission or against a health professional in the exercise of his duties, where the status of the victim is apparent or known to the perpetrator, is subject to the same penalties.

The penalty is increased to five years' imprisonment and to a fine of €75,000 where this is a death threat or a threat to attack property in a manner involving danger to other persons.

The use of threats, violence or the commission of any other intimidating act to obtain, from a person referred to under the first or second paragraph or who holds a public electoral mandate, either the performance or the abstention from performance of any act pertaining to his office, duty or mandate, or facilitated by his office, duty or mandate, or the misuse of his real or supposed authority with a view to obtaining distinctions, employments, contracts or any other favourable decision from a public authority or administration, is punished by ten years' imprisonment and a fine of €150,000.

SECTION III

PURLOINING AND MISAPPROPRIATING PROPERTY FROM A PUBLIC DEPOSIT Article 433-4

ARTICLE 433-4

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The destruction, misappropriation or purloining of a document or security, of privato or public funds, of papers, documents or securities representing such funds, or of any other object handed over to a person holding public authority or discharging a public service mission, or to a public accountant, to a public depositary, or to one of his subordinates, by reason of his office or duty, is punished by seven years' imprisonment and a fine of €100,000.

Attempt to commit the misdemeanour under the previous paragraph is subject to the same penalties.

SECTION IV

CONTEMPT Articles 433-5 to 433-5-1

ARTICLE 433-5

(Act no. 96-647 of 22 July 1996 Article 19 Official Journal 23 July 1996)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

(Act no. 2002-1138 of 9 September 2002 Article 45 Official Journal of 10 September 2002)

Contempt is punished by a fine of €7,500. It consists of words, gestures or threats, written documents or pictures of any type not released to the public, or the sending of any article addressed to a person discharging a public service mission, acting in the discharge or on the occasion of his office, and liable to undermine his dignity or the respect owed to the office that he holds.

When it is addressed to a person holding public authority, contempt is punished by six months' imprisonment and a fine of €7,500.

When it is addressed to a person discharging a public service mission and the offence is committed inside a school or an educational establishment, or in the surroundings of such an establishment at a time when the pupils are arriving or leaving the premises, contempt is punished by six months' imprisonment and by a fine for €7,500.

When committed during a meeting, contempt under the first paragraph is punished by six months' imprisonment and a fine of €7,500, and the contempt set out in the second paragraph is punished by one year's imprisonment and a fine of €15,000.

ARTICLE 433-5-1

(Inserted by Act no. 2003-239 of 18 March 2003. Art.113 Official Journal of 19 March 2003)

The act of publicly insulting the national anthem or tricolour flag at a demonstration organised or regulated by the public authorities is punished by a fine of €7,500.

Where it is committed as a group action, the insult is punished by six months' imprisonment and a fine of €7,500.

SECTION V
OF OBSTRUCTION — Articles 433-6 to 433-10

ARTICLE 433-6

Obstruction consists of opposing violent resistance to a person holding public authority or discharging a public service mission acting in the discharge of his office for the enforcement of laws, orders from a public authority, judicial decisions or warrants.

ARTICLE 433-7

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Obstruction is punished by six months' imprisonment and a fine of €7,500.

Obstruction committed as a group action is punished by one year's imprisonment and a fine of €15,000.

ARTICLE 433-8

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Armed obstruction is punished by three years' imprisonment and a fine of €45,000.

Armed obstruction committed as a group action is punished by seven years' imprisonment and a fine of €100,000.

ARTICLE 433-9

Notwithstanding articles 132-2 to 132-5, where the person guilty of obstruction is imprisoned, the penalties imposed for the misdemeanour of obstruction are consecutive to, and may not run concurrently with, any currently being served by the person concerned, or imposed for a connected offence for which he is detained.

ARTICLE 433-10

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Direct incitement to obstruction, whether demonstrated by shouting or public speeches, or by the circulation or display or communication in any other way of writings, or by words or pictures, is punished by a fine of €7,500.

When the misdemeanour under the previous paragraph is committed through the press or by broadcasting, the specific legal provisions governing those matters are applicable to define the persons who are responsible.

SECTION VI
OBSTRUCTION TO THE EXECUTION OF PUBLIC WORKS — Article 433-11

ARTICLE 433-11

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Obstructing, by acts of violence, the execution of public works or works of public utility is punished by one year's imprisonment and a fine of €15,000.

SECTION VII
USURPATION OF OFFICE — Articles 433-12 to 433-13

ARTICLE 433-12

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Any person acting without authority who interferes in the discharge of a public service by performing an act reserved for the holder of this office is punished by three years' imprisonment and a fine of €45,000.

ARTICLE 433-13

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

A penalty of one year's imprisonment and a fine of €15,000 is incurred by any person who:

1° exercises an activity in conditions liable to create in the mind of the public a confusion with the discharge of a public service or an activity reserved to legal professional officers or public officers;

2° uses papers or written documents presenting a similarity to judicial or extra-judiciel documents or a similarity to administrative documents, liable to cause misapprehension in the mind of the public.

SECTION VIII

OF USURPATION OF INSIGNIA RESERVED TO A PUBLIC AUTHORITY Articles 433-14 to 433-16

ARTICLE 433-14

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

A penalty of one year's imprisonment and a fine of €15,000 is incurred by any person who publicly and unlawfully:

1° wears a costume, uniform or decoration regulated by public authority;

2° uses a document establishing an official capacity or an insignia regulated by public authority;

3° uses a vehicle displaying outwardly visible insignias identical to those used by the national police or army.

ARTICLE 433-15

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Wearing a costume or uniform in public, using a vehicle, or using an insignia or a document which bear a resemblance to costumes, uniforms, vehicles, insignia badges or distinctive documents reserved for the national police or army, and thus is liable to mislead the public, is punished by six months' imprisonment and a fine of €7,500.

ARTICLE 433-16

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The offences defined by articles 433-14 and 433-15 are punished by three years' imprisonment and a fine of €45,000 where their object is to prepare or facilitate the commission of a felony or a misdemeanour.

SECTION IX

OF USURPATION OF TITLES Article 433-17

ARTICLE 433-17

The unlawful use of a title attached to a profession regulated by public authority or of an official certificate or capacity of which the conditions of attribution are fixed by public authority is punished by one year's imprisonment and a fine of €15,000.

SECTION X

THE UNLAWFUL USE OF A POSITION Article 433-18

ARTICLE 433-18

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

A penalty of sentence of six months' imprisonment and a fine of €7,500 is incurred by the founder or the lawful or de facto manager of a profit-making enterprise, who inscribes or causes to appear in an advertisement made for the enterprise that he manages or intends to create:

1° the name, with indication of his capacity, of a member or a former member of the Government, the Parliament, the European Parliament, the deliberating body of a local assembly, the Constitutional Council, the Conseil d'Etat, the Social and Economic Council, the High Council for the Judiciary, the Cour de cassation, the Court of Public Auditors, the Institute of France, the executive board of the Bank of France or of a collegiate body having the duty to supervise or to give advice;

2° the name, with indication of his capacity, of a judge or prosecutor or former judge or prosecutor, of a civil servant or former civil servant, or of a legal professional officer or a public officer;

3° the name of a person with the indication of any decoration, regulated by the public authority, awarded to him.

A banker or salesman who uses the advertising referred to under the previous paragraph is subject to the same penalties.

SECTION XI

ARTICLE 433-19

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

A penalty of six months' imprisonment and a fine of €7,500 is incurred by:

1° using a name or part of a name other than that assigned by civil status;

2° changing, altering or modifying a name or part of a name assigned by civil status;

in an authentic or public document or in an administrative document drafted for public authority, other than where regulations in force permit the drafting of such documents under an assumed civil status.

ARTICLE 433-20

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

A person bound by marriage who contracts another marriage before the dissolution of the existing marriage is punished by one year's imprisonment and a fine of €45,000.

The same penalties apply to any public officer who solemnises the marriage having knowledge of the existence of the previous marriage.

ARTICLE 433-21

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Any minister of religion who habitually conducts religious ceremonies of marriages without being presented beforehand with the marriage certificate received by officials responsible for civil status is punished by six months' imprisonment and a fine of €7,500.

ARTICLE 433-21-1

(Act no. 92-1336 of 16 December 1992 Article 366 and 373 Official Journal of 23 December 1992 in force 1 March 1994) (Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Any person conducting a funeral in a manner contrary to the wishes of the deceased or to a judicial decision, this being a wish or decision of which he is aware, is punished by six months' imprisonment and a fine of €7,500.

SECTION XII

ADDITIONAL PENALTIES APPLICABLE TO NATURAL PERSONS AND LIABILITY OF LEGAL PERSONS Articles 433-22 to 433-25

ARTICLE 433-22

Natural persons convicted of any of the offences provided for under the present Chapter also incur the following additional penalties:

1° forfeiture of civic, civil and family rights, pursuant to the conditions set out under article 131-26;

2° prohibition to hold public office or to undertake the social or professional activity in the course of which or on the occasion of the performance of which the offence was committed, for a maximum period of five yeers;

3° the public display or dissemination of the decision, pursuant to the conditions set out under article 131-35.

ARTICLE 433-23

In the cases referred to under articles 433-1, 433-2 and 433-4, the confiscation of the funds or articles unlawfully received by the offender may also be imposed, with the exception of articles subject to restitution.

ARTICLE 433-24

Natural persons convicted of any of the offences provided for under article 433-8 also incur the following additional penalties:

1° prohibition to hold or carry a weapon requiring a licence, for a maximum period of five years;

2° confiscation of one or more weapons which belonged to the convicted person or which are freely available to him.

ARTICLE 433-25

Legal persons may incur criminal liability for the offences referred to under Sections 1, 6, 7, 9 and 10, pursuant to the conditions set out under article 121-2.

The penalties incurred by legal persons are:

1° a fine, pursuant to the conditions set out under article 131-38;

2° for a maximum period of five years, the penalties referred to under points 2°, 3°, 4°, 5°, 6° and 7° of article 131-39;

3° confiscation provided for by article 131-21;

4° the public display or dissemination of the decision, pursuant to the conditions set out under article 131-35.

The prohibition referred to under 2° of Article 131-39 applies to the activity in the course of which or on the occasion of the performance of which the offence was committed.

PENAL CODE

CHAPTER IV

PERVERTING THE COURSE OF JUSTICE — Articles 434-1 to 434-47

SECTION I

OBSTRUCTING THE INTERVENTION OF JUSTICE — Articles 434-1 to 434-7

ARTICLE 434-1

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Any person who, having knowledge of a felony the consequences of which it is still possible to prevent or limit, or the perpetrators of which are liable to commit new felonies that could be prevented, omits to inform the administrative or judicial authorities, is punished by three years' imprisonment and a fine of €45,000.

Except where felonies committed against minors under fifteen years of age are concerned, the following are exempted from the provisions above:

1° the relatives in a direct line and their spouses, and the brothers and sisters and their spouses, of the perpetrator or accomplice to the felony;

2° the spouse of the offender or accomplice to the felony, or the person who openly cohabits with him.

Also exempted from the provisions of the first paragraph are persons bound by an obligation of secrecy pursuant to the conditions laid down under article 226-13.

ARTICLE 434-2

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Where the felony referred to under the first paragraph of article 434-1 consists of a violation of a fundamental interest of the nation as defined by title I of the present Book or an act of terrorism referred to under title II of the present Book, the penalty is increased to five years' imprisonment and to a fine of €75,000.

ARTICLE 434-3

(Act no. 98-468 of 17th June 1998 Article 15 Official Journal 18 June 1998; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Any person who, having knowledge of maltreatment, deprivations, or sexual assaults inflicted upon a minor under fifteen years of age or upon a person incapable of self-protection by reason of age, sickness, infirmity, psychical or psychological disability or pregnancy, omits to report this to the administrative or judicial authorities is punished by three years' imprisonment and a fine of €45,000.

Except where the law otherwise provides, persons bound by an obligation of secrecy pursuant to the conditions set out under article 226-13 are exempted from the above provisions.

ARTICLE 434-4

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Where it is done in order to obstruct the discovery of the truth, a penalty of three years' imprisonment and a fine of €45,000 applies to:

1° modifying the scene of a felony or a misdemeanour either by the alteration, falsification or obliteration of clues or evidence, or by bringing, removing or suppressing any given article;

2° destroying, purloining, concealing or altering a private or public document or an article liable to facilitate the discovery of a felony or a misdemeanour, the search for evidence or the conviction of the guilty party.

Where the acts provided for under the present article are committed by a person who, because of his position, is called to take part in the discovery of the truth, the penalty is increased to five years' imprisonment and to a fine of €75,000.

ARTICLE 434-5

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Any threat or any other intimidation made against any person with a view to persuading the victim of a felony or a misdemeanour not to file a complaint or to retract is punished by three years' imprisonment and a fine of €45,000.

ARTICLE 434-6

(Act no. 96-647 of 22nd July 1996 Article 7 Official Journal 23 July 1996; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Providing the perpetrator or accomplice to a felony or an act of terrorism punished by at least ten years' imprisonment with accommodation, a hiding-place, funds, the means of existence or any other means of evading searches or arrest, is punished by three years' imprisonment and a fine of €45,000. The penalty is increased to five years' imprisonment and a fine of €75,000 where the offence is committed habitually.

Exempted from the above provisions are:

1° the relatives in a direct line and their spouses, and the brothers and sisters and their spouses, of the perpetrator or accomplice to the felony or terrorist offence;

2° the spouse of the perpetrator or accomplice to the felony or act of terrorism, or the person who openly cohabits with him.

ARTICLE 434-7

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The concealment or hiding of the dead body of a victim of a homicide or of a person who has died as a result of acts of violence is punished by two years' imprisonment and a fine of €30,000.

SECTION II
OBSTRUCTING THE COURSE OF JUSTICE — Articles 434-7-1 to 434-23

ARTICLE 434-7-1

(Act no. 92-1336 of 16 December 1992 Articles 213, 367 and 373 Official Journal of 23 December 1992 in force 1 March 1994)

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The refusal by a judge or other member of a court or administrative authority to render justice after being required to do so and which continues despite a warning or injunction from his superiors, is punished by a fine of €7,500 and prohibition to hold a public position for a period of five to twenty years.

ARTICLE 434-7-2

(Inserted by Act no. 2004-204 of 9 March 2004 article 13 Official Journal of 10 March 2004)

Without prejudice to the rights of the defence, any person who by reason of his office, has knowledge, in accordance with the provisions of the Code of Criminal Procedure, of information that has come out of an enquiry or an investigation that is being carried out into a felony or a misdemeanour, and who directly or indirectly reveals this information to persons who may be implicated in the commission of these offences, either as perpetrators, accomplices or receivers of stolen goods, in circumstances where this revelation is liable to impede the course of the investigation or the discovery of the truth, is punished by five years' imprisonment and by a fine of €75,000.

ARTICLE 434-8

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Any threat or any intimidation directed against a judge or prosecutor, a juror or any other member of a court, an arbitrator, an interpreter, an expert or the lawyer of a party, with a view to influencing his behaviour in the discharge of his office, is punished by three years' imprisonment and a fine of €45,000.

ARTICLE 434-9

(Act no. 2000-595 of 30 June 2000 Article 1 Official Journal 1 July 2000)

The direct or indirect request or unlawful acceptance of offers, promises, donations, gifts or advantages, at any time, by a judge or prosecutor, a juror or any other member of court of law, an arbitrator or an expert appointed either by a court or by the parties, or by a person appointed by a judicial authority to carry out conciliation or mediation, in return for performing or abstaining from performing an act of his office, is punished by ten years' imprisonment and a fine of €150,000.

Yielding to the solicitations of a person described in the previous paragraph, or to a proposal of any offer, promise, donation, gift or reward with a view to obtaining from such a person the performance or non-performance of an act pertaining to his office at any time, is subject to the same penalties.

Where the offence referred to under the first paragraph is committed by a judge or prosecutor in favour or against a person who is being criminally prosecuted, the penalty is increased to fifteen years' criminal imprisonment and a fine of €225,000.

ARTICLE 434-10

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

(Act no. 2003-495 of 12 June 2003 art. 3 I Official Journal of 13 June 2003)

The driver of a terrestrial vehicle, or a river or sea-going craft who, knowing that he has just caused or brought about an accident, fails to stop and thereby attempts to evade any civil or criminal liability that he may have incurred, is punished by two years' imprisonment and a fine of €30,000.

Where articles 221-6 and 222-19 are applicable, the penalties applicable under those articles are doubled, except in cases provided for by articles 221-6-1, 222-19-1 and 222-20-1.

ARTICLE 434-11

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Any person who, having evidence that a person provisionally detained or sentenced for a felony or misdemeanour is innocent, wilfully abstains from presenting the evidence before the administrative or judicial authorities is punished by three years' imprisonment and a fine of €45,000.

However, any person who is late in bringing his testimony but does so spontaneously is exempt from penalty.

Also exempted from the provisions of the first paragraph are:

1° the perpetrator or accomplice to the offence that led to the prosecution, their direct relatives and their spouses,

their brothers and sisters and their spouses;

2° the spouse of the perpetrator or the accomplice to the offence that led to the prosecution, or any person who openly cohabits with him.

Also exempted from the provisions of the first paragraph are persons bound by an obligation of secrecy under the conditions specified by article 226-13.

ARTICLE 434-12

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

A person who, having publicly declared that he knows the perpetrators of felony or a misdemeanour, refuses to reply to questions put to him in this respect by a judge is punished by one year's imprisonment and a fine of €15,000.

ARTICLE 434-13

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

False testimony made under oath before any court of law or before a judicial police officer acting in the exercise of a rogatory commission is punished by five years' imprisonment and a fine of €75,000.

However, the false witness is exempt from penalty where he retracts his testimony spontaneously before the decision terminating the procedure has been made by the judicial investigating authority or the court of trial.

ARTICLE 434-14

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

False testimony is punished by seven years' imprisonment and a fine of €100,000:

1° where it is procured by the handing over of a gift or a reward;

2° where the person against whom or in favour of whom the false testimony was committed is liable to a penalty applicable to a felony.

ARTICLE 434-15

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 Jenuery 2002)

The use of promises, offers, presents, pressures, threats, acts of violence, manoeuvres or tricks in the course of proceedings or in respect of a claim or defence in court to persuade others to make or deliver a statement, declaration or false affidavit, or to abstain from making a statement, declaration or affidavit, is punished by three years' imprisonment and a fine of €45,000, even where the subornation of perjury was ineffective.

ARTICLE 434-15-1

(Act no. 2000-516 of 15 June 2000 Article 32 Official Journal 16 June 2000 in force 1 January 2001)
(Act no. 2000-1354 of 30 December 2000 Article 11 Official Journal of 31 December 2000)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 Januery 2002)
(Act no. 2002-1138 of 9 September 2002 Article 39 Official Journal of 10 September 2002)

Any person, summoned by an investigating judge or a judicial police officer acting in the exercise of a rogatory commission in order to be heard as a witness, who refuses to appear, to take the oath or to make a deposition without justification or excuse, is punished by a fine of €3,750.

ARTICLE 434-15-2

(Inserted by Act no. 2001-1062 of 15 November 2001 Article 31 16 November 2001)

A penalty of three years' imprisonment and a fine of €45,000 are incurred by anyone who, having the key to decipher an encrypted message which may have been used to prepare, facilitate or commit a felony or a misdemeanour, refuses to disclose that key to the judicial authorities or to operate it following instructions issued by the judicial authorities under of title II and III of Book I of the Code of Criminal Procedure.

Where the refusal was made where the disclosure of the key or its operation would have prevented the commission of a felony or a misdemeanour or would have limited its consequences, he penalty is increased to five years' imprisonment and a fine of €75,000.

ARTICLE 434-16

The publication, prior to the pronouncement of the final judicial decision, of commentaries by pressure to influence the statements of witnesses or the decision of the judicial investigating authority or trial court is punished by six months' imprisonment and a fine of €7,500.

When the offence is committed through the press or by broadcasting, the specific legal provisions governing these matters are applicable to define the persons who are responsible.

ARTICLE 434-17

Perjury in civil matters is punished by three years' imprisonment and a fine of €45,000.

ARTICLE 434-18

The misrepresentation of the substance of the translated words or documents committed in any matter by an interpreter is punished in accordance with the distinctions referred to in articles 434-13 and 434-14 by five years'

imprisonment and a fine of €75,000 or by seven years' imprisonment and a fine of €100,000.

ARTICLE 434-19

The subornation of an interpreter is punished in accordance with the conditions set out under Article 434-15.

ARTICLE 434-20

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The falsification of any data or findings by a judicial expert in his written or oral presentation is punished, in accordance with the distinctions set out under articles 434-13 and 434-14, by five years' imprisonment and a fine of €75,000 or by seven years' imprisonment and a fine of €100,000.

ARTICLE 434-21

The subornation an expert is punished pursuant to the conditions laid down under article 434-15.

ARTICLE 434-22

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The breaking of seals affixed by the public authority is punished by two years' imprisonment and a fine of €30,000. Attempt to break the seals is subject to the same penalties.

The same penalties apply to any misappropriation of articles placed under seals or under judicial safekeeping.

ARTICLE 434-23

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Assuming the name of another person in circumstances that lead or could have led to the initiation of a criminal prosecution against such a person is punished by five years' imprisonment and a fine of €75,000.

Notwithstanding the provisions of articles 132-2 to 132-5, sentences imposed for this misdemeanour are cumulated, and may not run concurrently with any imposed for the offence in the context of which the name was usurped.

The penalties set out under the first paragraph apply to a false statement in respect of the civil status of a person which has led or could have led to the initiation of a criminal prosecution against another person.

SECTION III
OFFENCES AGAINST THE AUTHORITY OF JUSTICE — Articles 434-24 to 434-43

Paragraph 1
Violation of the respect due to justice — Articles 434-24 to 434-26

ARTICLE 434-24

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Abuse by words, gestures or threats, written documents or pictures of any type not publicly available, or the sending of any article to a judge or prosecutor, a juror or any other member of a court acting in the course of or on the occasion of the discharge of his office and liable to undermine his dignity or the respect owed to the office which he holds is punished by one year's imprisonment and a fine of €15,000.

If the abuse occurs at a hearing by a court, tribunal or any judicial forum, the penalty is increased to two years' imprisonment and to a fine of €30,000.

ARTICLE 434-25

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The attempt to publicly discredit a court's act or decision by actions, words, documents or pictures of any type, in circumstances liable to undermine the authority of justice or its independence, is punished by six months' imprisonment and a fine of €7,500.

The provisions of the previous paragraph are not applicable to technical commentaries or to acts, words, documents or pictures of any type oriented towards the amendment, cassation or revision of a decision.

When the offence is committed through the press or by broadcasting, the specific legal provisions governing those matters are applicable to define the persons who are responsible.

Criminal proceedings are time barred after three months from the day on which the offence defined by the present article was committed, if in the meantime no act of investigation or prosecution has taken place.

ARTICLE 434-26

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

A false complaint made to a judicial or administrative authority detailing the facts of a felony or a misdemeanour which causes the judicial authorities to make needless enquiries is punished by six months' imprisonment and a fine of €7,500.

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ARTICLE 434-27

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

(Act no. 2004-204 of 9 March 2004 article 194 I Official Journal of 10 March 2004)

Punishable escape occurs when a person who is detained absconds from custody.

Escape is punished by three years' imprisonment and a fine of €45,000.

Where this escape is carried out through violence, breaking out, or corruption, even if this was committed by a third party acting in conjunction with the detainee, the penalties are increased to five years' imprisonment and to a fine of €75,000.

ARTICLE 434-28

For the purpose of the present paragraph, a person is considered as being detained:

1° who is in police custody;

2° who is about to be or is being brought before a judicial authority at the end of police custody or pursuant to a bench warrant;

3° who has been served a detention warrant or of arrest warrant which remains in force;

4° who is serving a custodial sentence or who has been arrested to serve that sentence;

5° who is placed in custody pending extradition.

ARTICLE 434-29

(Act no. 92-1336 of 16 December 1992 Article 368 and 373 Official Journal of 23 December 1992 in force 1 March 1994)
(Act no. 97-1159 of 19 December 1997 Article 1 Official Journal 31 December 97)

An escape is subject to the same penalties where:

1° a detainee placed in a hospital or health institution absconds from the supervision to which he is subjected;

2° a convicted person evades the control to which he is subjected whilst posted to a non-custodial assignment, or under electronic supervision, or whilst enjoying partial or temporary leave;

3° a convicted person fails to return to the penitentiary institution at the end of an order suspending or dividing a sentence of imprisonment, of a non-custodial assignment, semi-detention or temporary leave;

4° a convicted person placed under electronic supervision neutralises by any means the apparatus permitting the detection from a distance of either his presence in or his absence from any premises designated by the penalty enforcement judge.

ARTICLE 434-30

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

(Act no. 2004-204 of 9 March 2004 article 6 XII, article 194 II Official Journal of 10 March 2004)

The offences defined by article 434-27 and 1° of article 434-29 are punished by seven years' imprisonment and a fine of €100,000 where they are committed using the threat of a weapon or an explosive, incendiary or toxic substance.

The penalties are increased to ten years' imprisonment and to a fine of €150,000 where use was made of a weapon or an explosive, incendiary or toxic substance or where the offences were carried out by an organised gang, whether or not the members of this gang were detainees.

ARTICLE 434-31

Notwithstanding the provisions of articles 132-2 to 132-5, the penalties imposed for the misdemeanour of escape are cumulative, and may not run concurrently with those that the escapee was serving or those imposed for the offence for which was detained.

ARTICLE 434-32

A penalty of three years' imprisonment and a fine of €45,000 is incurred by any person who procures a detained person with any means of absconding from the custody he was subjected to is punished by a sentence.

If the support so given was accompanied by acts of violence, a break-out or corruption, the offence is punished by five years' imprisonment and a fine of €75,000.

If the support consists of the supply or use of a weapon or explosive, incendiary or toxic substance the offence is punished by seven years' imprisonment and a fine of €100,000.

ARTICLE 434-33

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

A penalty of ten years' imprisonment and a fine of €150,000 is incurred by any person exercising the supervision of a detainee who facilitates or prepares the escape of the detained person, even by deliberate omission.

These provisions are also applicable to any person authorised by his position to enter a penitentiary institution or to approach detained persons in whatever capacity.

In the cases set out under the present article, where the support provided consists of the supply or use of a weapon or explosive, incendiary or toxic substance the offence is punished by fifteen years' imprisonment and a fine of

€225,000.

ARTICLE 434-34

The persons referred to under articles 434-32 and 434-33 may be jointly sentenced to pay any damages that the victim is entitled to obtain from the detainee as a civil party in the prosecution for the offence for which latter was detained.

ARTICLE 434-35

(Ordinance no. 2000-916 of 19 September 2000 Art. 3 Official Journal of 22 September 2000 in force on 1 January 2002)

(Act no. 2003-239 of 18 March 2003. Art. 73 I Official Journal of 19 March 2003)

A penalty of one year's imprisonment and a fine of €15,000 is incurred by anyone who, in any place whatever, delivers to a detained person or procures for or receives from him any money, correspondence, articles or substances other than those permitted by regulations, or who communicates with a detainee in circumstances other than those permitted by regulations.

The penalty is increased to three years' imprisonment and to a fine of €45,000 where the convicted person was entrusted with the supervision of detained persons or where he was authorised by his position to enter a penitentiary institution or to approach detainees in any capacity.

ARTICLE 434-35-1

(Inserted by Act no. 2003-239 of 18 March 2003. Art. 73 II Official Journal of 19 March 2003)

To enter a prison institution or to climb its perimeter fence without authorisation under the legislative or statutory provisions, or the permission of the competent authorities, is punished by a year's imprisonment and by a fine of €15,000.

ARTICLE 434-36

Attempt to commit the misdemeanours referred to under the present paragraph is subject to the same penalties.

ARTICLE 434-37

Any person who has attempted to commit, either as a principal or as an accomplice, any of the offences set out under the present paragraph is exempted from punishment if, having informed the judicial authorities or the penitentiary administration, he has enabled the escape to be prevented.

Paragraph 3	
Other offences against the authority of criminal justice	Articles 438-38 to 434-43

ARTICLE 438-38

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The appearance in a prohibited place by any person subject to area banishment is punished by two years' imprisonment and a fine of €30,000.

The same penalties apply to any person subject to area banishment who evades any supervision measures ordered by a judge.

ARTICLE 434-39

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Where a judgment has ordered as a penalty the public display of the sentence, the suppression, concealing or tearing, in whole or in part, of the posters displayed is punished by six months' imprisonment and a fine of €7,500.

The judgment will order the renewed enforcement of the public display at the expense of the convicted person.

ARTICLE 434-40

Where a prohibition to undertake a social or professional activity referred to under articles 131-27 to 131-29 has been ordered as a penalty, any breach of the prohibition is punished by two years' imprisonment and a fine of €30,000.

ARTICLE 434-41

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journel of 22 September 2000 in force on 1 January 2002)

(Act n° 2003-495 of 12 June 2003 art. 3 I Official Journal of 13 June 2003)

A penalty of two years' imprisonment and a fine of €30,000 applies to any breach by the convicted person of any obligations or prohibitions arising from the suspension or cancellation of a driving licence, the prohibition to drive certain motor vehicles, the prohibition to appear in certain places or to associate with certain persons, the obligation to complete a course, the prohibition to hold or to carry a weapon, the withdrawal of a hunting licence, the prohibition to draw cheques or to use payment cards, the mandatory closure of premises or the disqualification from public tenders imposed by application of articles 131-5-1, 131-6, 131-10, 131-14, 131-16 or 131-17.

The same penalty applies to the destruction, misappropriation or attempt to destroy or misappropriate a vehicle that has been immobilised, or a vehicle, weapon or other article confiscated by virtue of articles 131-6 131-10, 131-14 or 131-16.

The same penalties also apply to the refusal, by a person receiving notification of a decision imposing on him, under the aforementioned articles, the suspension or the cancellation of a driving licence, the withdrawal of a hunting licence or the confiscation of a vehicle, a weapon or any other article, to hand over the licences suspended, cancelled or withdrawn or the article confiscated, to the representative of the authority enforcing the decision.

ARTICLE 434-42

(Act no. 92-1336 of 16th December 1992 Article 369 and 373 Official Journal of 23rd December 1992 in force 1st March 1994; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Breach by the convicted person of the obligations derived from community service imposed whether as a principal or an additional sentence is punished by two years' imprisonment and a fine of €30,000.

ARTICLE 434-43

(Act no. 2001-504 of 12 June 2001 Article 17 Official Journal of 13 June 2001; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Where any of the penalties referred to under article 131-29 has been imposed upon a legal person, breach by a natural person of the obligations arising from the sentence is punished by two years' imprisonment and a fine of €30,000.

A natural person who takes part in the maintenance or reconstruction, overt or clandestine, of a legal person of which the dissolution has been ordered in accordance with the provisions of 1° of article 131-9 is punished by three years' imprisonment and a fine of €45,000.

Where the dissolution was ordered for an offence committed repeatedly, or for the offence referred to under the previous paragraph, the penalty is increased to five years' imprisonment and a fine of €75,000.

SECTION IV
ADDITIONAL PENALTIES AND LIABILITY OF LEGAL PERSONS — Articles 434-44 to 434-47

ARTICLE 434-44

Natural persons convicted of any of the offences provided for under articles 434-4 to 434-8, 434-11, 434-13 to 434-15, 434-17 to 434-23, 434-27, 434-29, 434-30, 434-32, 434-33, 434-35, 434-36 and 434-40 to 434-43 are also liable to forfeiture of civic, civil and family rights pursuant to the conditions set out under article 131-26.

In the cases set out under articles 434-16 and 434-25, the public display or dissemination of the decision pronounced may also be ordered, pursuant to the conditions set out in article 131-35.

In the cases referred to under article 434-33 and in the second paragraph of article 434-35, prohibition to hold public office or to undertake the social or professional activity in the course of which or on the occasion of the performance of which the offence was committed may also be ordered, pursuant to the conditions set out under article 131-27.

In all the cases set out under the present Chapter, the confiscation of the thing which was used or intended for the commission of the offence is also applicable, with the exception of articles subject to restitution.

ARTICLE 434-45

(Act no. 2003-495 of 12 June 2003 art. 3 I Official Journal of 13 June 2003)

Natural persons convicted of the offence referred to under article 434-10 are also liable to incur the suspension of their driving licence for a maximum period of five years. This suspension may not be restricted to the driving of a vehicle outside professional activities.

ARTICLE 434-46

Any alien convicted of any of the offences referred to under the second paragraph of article 434-9, under article 434-30, under the last paragraph of article 434-32 or article 434-33 may be banished from French territory either permanently or for a maximum period of ten years, pursuant to the conditions set out under article 131-30.

ARTICLE 434-47

(Act no. 2001-504 of 12 June 2001 Article 18 Official Journal 13 June 2001)

Legal persons may incur criminal liability for the offences referred to under articles 434-39 and 434-43, pursuant to the conditions set out under article 121-2.

The penalties incurred by legal persons are:

1° a fine, pursuant to the conditions set out under article 131-38;

2° for a maximum period of five years, the penalties referred to under 2°, 3°, 4°, 5°, 6° and 7° of article 131-39;

3° confiscation set out by article 131-21;

4° the public display or dissemination of the decision, pursuant to the conditions set out under article 131-35.

5° for the offences of the second and third paragraphs of article 434-43, the penalty of dissolution referred to under 1° of article 131-39.

The prohibition referred to under 2° of article 131-39 applies to the activity in the course of which or on the occasion of the performance of which the offence was committed.

CHAPTER V

PENAL CODE

OFFENCES AGAINST THE PUBLIC ADMINISTRATION OF THE EUROPEAN COMMUNITIES, MEMBER STATES OF THE EUROPEAN UNION, OTHER FOREIGN STATES AND PUBLIC INTERNATIONAL ORGANISATIONS Articles 435-1 to 435-6

SECTION I
PASSIVE CORRUPTION Article 435-1

ARTICLE 435-1
(Act no. 200-595 of 30th June 2000 Article 2 Official Journal 1 July 2000; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

For the implementation of the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union signed at Brussels on the 26th May 1997, the unjustified request or acceptance at any time, directly or indirectly, by a community civil servant or national civil servant of another member State of the European Union or by a member of the Commission of the European Community, the European Parliament, the Court of Justice or the Court of Auditors of the European Community of any offer, promise, donation, gift or reward of any kind, to carry out or abstain from carrying out an act of his office, mission or mandate, or facilitated by his office, duty or mandate, is punished by ten years' imprisonment and a fine of €150,000.

SECTION II
ACTIVE CORRUPTION Articles 435-2 to 435-4

SUBSECTION 1
ACTIVE CORRUPTION OF CIVIL SERVANTS OF THE EUROPEAN COMMUNITY, CIVIL SERVANTS OF MEMBER STATES OF THE EUROPEAN UNION, MEMBERS OF THE INSTITUTIONS OF THE EUROPEAN COMMUNITY Article 435-2

ARTICLE 435-2

For the implementation of the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union signed at Brussels on the 26th May 1997, the unlawful proffering, at any time, directly or indirectly, of any offer, promise, gift, present or advantage of any kind to a community civil servant or national civil servant of another Member State of the European Union or to a member of the Commission of the European Community, the European Parliament, the Court of Justice or the Court of Auditors of the European Community to carry out or abstain from carrying out an act of his office, mission or mandate, or facilitated by his office, duty or mandate, is punished by ten years' imprisonment and a fine of €150,000.

The same penalties apply to yielding to any person specified in the previous paragraph who unlawfully solicits, at any time, directly or indirectly, any offer, promise, gift, present or advantage of any kind to carry out or abstain from carrying out an act specified in the previous paragraph.

SUBSECTION 2
OF ACTIVE CORRUPTION BY PERSONS ACTING UNDER THE AUTHORITY OF FOREIGN STATES OTHER THAN THE MEMBER STATES OF THE EUROPEAN UNION AND PUBLIC INTERNATIONAL ORGANISATIONS OTHER THAN THE INSTITUTIONS OF TH Articles 435-3 to 435-4

ARTICLE 435-3
(Act no. 200-595 of 30th June 2000 Article 2 Official Journal 1 July 2000; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

For the implementation of Convention on Combating Bribery of Foreign Public Officials in International Business Transactions signed in Paris the 17th December 1997, the unlawful proffering, at any time, directly or indirectly, of any offer, promise, gift, present or advantage of any kind to a person holding public office or discharging a public service mission, or an electoral mandate in a foreign State, or within a public international organisation, to carry out or abstain from carrying out an act of his function, duty or mandate or facilitated by his function, duty or mandate, with a view to obtaining or keeping a market or other improper advantage in international commerce is punished by ten years' imprisonment and a fine of €150,000.

The same penalties apply to yielding to any person specified in the previous paragraph who unlawfully solicits, at any time, directly or indirectly, any offer, promise, gift, present or advantage of any kind to carry out or abstain from carrying out an act specified in the previous paragraph.

Prosecution of the misdemeanours referred to under the present article may only be initiated on the orders of the public prosecutor.

ARTICLE 435-4
(Act no. 200-595 of 30th June 2000 Article 2 Official Journal 1 July 2000; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

For the implementation of Convention on Combating Bribery of Foreign Public Officials in International Business Transactions signed in Paris the 17 December 1997, the unlawful proffering, at any time, directly or indirectly, of any offer, promise, gift, present or advantage of any kind to obtain from any judge or prosecutor, juror or any other person

holding judicial office, arbitrator or expert (whether nominated by the court or by the parties) or a person entrusted by judicial authority with a duty of conciliation or mediation, in a foreign State or within a public international organisation, to carry out an act or abstain from carrying out an act of his office, duty or mandate or facilitated by his office, duty or mandate, with a view to obtaining or keeping any market or other unjustified advantage in international commerce is punished by ten years' imprisonment and a fine of €150,000.

The same penalties apply to yielding to any person specified in the previous paragraph who unlawfully solicits, at any time, directly or indirectly, any offer, promise, gift, present or advantage of any kind to carry out or abstain from carrying out an act specified in the previous paragraph.

Prosecution of the misdemeanours referred to under the present article may only be initiated on the orders of the public prosecutor.

SECTION III

ADDITIONAL PENALTIES AND LIABILITY OF LEGAL PERSONS — Articles 435-5 to 435-6

ARTICLE 435-5

(Act no. 200-595 of 30th June 2000 Article 2 Official Journal 1 July 2000)

Legal persons convicted of any of the offences set out under the present Chapter incur the following additional penalties;

1° forfeiture of civic, civil and family rights in accordance with the conditions laid down under article 131-26;

2° prohibition to hold, for a maximum period of five years, a public office or to undertake the professional or social activity in the course of which or on the occasion of the performance of which the offences was committed;

3° public display or dissemination of the decision in accordance with the conditions set out under article 131-35;

4° confiscation, in accordance with the conditions laid down under article 131-21, of the object which was used or intended to commit the offence or the object which is the product of it, except for articles liable to restitution.

Banishment from French territory, either permanent or for a period of up to ten years, may be imposed under conditions set out in article 131-30, may additionally be imposed on any foreigner who is guilty of one of the offences mentioned in the first paragraph.

ARTICLE 435-6

(Act no. 200-595 of 30th June 2000 Article 2 Official Journal 1 July 2000)

Legal persons may incur criminal liability pursuant to the conditions set out under article 121-2 for the offences set out under articles 435-2, 435-3 and 435-4.

The penalties incurred by legal persons are:

1° a fine, in the manner prescribed to under article 131-38;

2° for a maximum period of five years:

- prohibition to undertake directly or indirectly the professional or social activity in which or on the occasion of which the offence was committed;
- placement under judicial supervision;
- closure of the establishment or one of the establishments of the enterprise which was used to commit the offence;
- disqualification from public tenders;
- prohibition to draw cheques, except those allowing the withdrawal of funds by the drawer from the drawee or certified cheques, or to use payment cards;

3° confiscation, in accordance with the conditions laid down under article 131-21, of the thing which was used or intended for the commission of the offence, or of the thing which is the product of it, except for articles liable to restitution;

4° The public display or dissemination of the decision, in accordance with the conditions set out under article 131-35.

CHAPTER VI

TAKING PART IN MERCENARY ACTIVITY — Articles 436-1 to 436-5

ARTICLE 436-1

(Inserted by Act no. 2003-340 of 14 April 2003. Art. 1 Official Journal of 15 April 2003)

The following are punished by five years' imprisonment and by a fine of €75,000:

1° For any person who has been specially recruited to participate in an armed conflict, and who is neither a citizen of a State involved in the aforesaid conflict, nor a member of the armed forces of the State, and has not been sent on a mission by another State not involved in the conflict as a member of the armed forces of this State, to directly participate or to attempt to directly participate in the hostilities, with a view to obtaining personal advantage or remuneration considerably in excess of what is paid or promised to the combatants of the same rank and with the same duties in the armed forces fighting on the same side;

2° For any person who has been specially recruited to take part in a concerted violent act designed to overthrow institutions or to attack the territorial integrity of a State, and who is not a citizen of the State against which the attack is planned, nor a member of the aforesaid State's armed forces, and who has not been sent on such a mission by another State, to take part in such an act with a view to obtaining a personal advantage or a significant payment.

ARTICLE 436-2

(Inserted by Act no. 2003-340 of 14 April 2003. Art. 1 Official Journal of 15 April 2003)

Directing or setting up an organisation for the purpose of recruiting, employing, financing, equipping or providing military training for a person described in article 436-1 is punished by seven years' imprisonment and by a fine of €100,000.

ARTICLE 436-3

(Inserted by Act no. 2003-340 of 14 April 2003. Art. 1 Official Journal of 15 April 2003)

Where the acts detailed in the present chapter are committed abroad by a French citizen or someone who generally resides in French territory, French law applies notwithstanding the second paragraph of article 113-6, and the provisions of the second sentence of article 113-8 do not apply.

ARTICLE 436-4

(Inserted by Act no. 2003-340 of 14 April 2003. Art. 1 Official Journal of 15 April 2003)

Natural persons convicted of the offences set out in the present chapter also incur the following additional penalties:

1° prohibition of civic, civil and family rights, pursuant to the conditions set out under article 131-26;

2° full or partial dissemination of the decision pronounced or of a communiqué informing the public of the grounds for this pronouncement in accordance with the conditions set out under article 131-35;

3° area banishment, pursuant to the conditions set out under article 131-31.

ARTICLE 436-5

(Inserted by Act no. 2003-340 of 14 April 2003. Art. 1 Official Journal of 15 April 2003)

Legal persons may incur criminal liability, pursuant to the conditions set out under article 121-2, for the offence outlined in article 436-2.

The penalties applicable to legal persons are:

1° a fine, pursuant to the conditions set out under article 131-38;

2° the penalties enumerated under article 131-39.

The prohibition determined under 2° of article 131-39 applies to the activity in the exercise of which or on the occasion of the exercise of which tha offence was committed.

TITLE IV
UNDERMINING PUBLIC TRUST — Articles 441-1 to 445-4

CHAPTER I
FORGERY — Articles 441-1 to 441-12

ARTICLE 441-1

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Forgery consists of any fraudulent alteration of the truth liable to cause harm and made by any means in a document or other medium of expression of which the object is, or effect may be, to provide evidence of a right or of a situation carrying legal consequences.

Forgery and the use of forgeries is punished by three years' imprisonment and a fine of €45,000.

ARTICLE 441-2

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Forgery committed in a document delivered by a public body for the purpose of establishing a right, an identity or a capacity, or to grant an authorisation is punished by five years' imprisonment and a fine of €75,000.

The use of a forgery specified in the previous paragraph is subject to the same penalties.

The penalty is increased to seven years' imprisonment and to a fine of €100,000 where the forgery or the use of the forgery is committed:

1° by a person holding public authority or discharging a public service mission acting in the exercise of his office;

2° habitually;

3° or with the intent to facilitate the commission of a felony or to gain impunity for the perpetrator.

ARTICLE 441-3

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The dishonest possession of any of the forged documents defined by article 441-2 is punished by two years' imprisonment and a fine of €30,000.

The penalty is increased to five years' imprisonment and to a fine of €75,000 where more than one forged documents ere unlawfully possessed.

ARTICLE 441-4

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Forgery in an authentic or public document or a record prescribed by a public authority is punished by ten years' imprisonment and a fine of €150,000.

The use of a forgery as described in the previous paragraph is subject to the same penalties.

The penalty is increased to fifteen years' criminal imprisonment and to a fine of €225,000 where the forgery or the

use of forgery was committed by a person holding public authority or to discharge a public service mission whilst acting in the exercise of his office or mission.

ARTICLE 441-5

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Unlawfully procuring for another person a document delivered by a public body for the purpose of establishing a right, an identity or capacity, or the grant of an authorisation is punished by five years' imprisonment and a fine of €75,000.

The penalty is increased to seven years' imprisonment and to a fine of €100,000 where the offence is committed:

1° by a person holding public authority or to discharge a public service mission whilst acting in the exercise of his office;

2° habitually;

3° or with the intent to facilitate the commission of a felony or to gain impunity for the perpetrator.

ARTICLE 441-6

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Unlawfully obtaining from a public administration or from an institution discharging a public service mission, by any fraudulent means, any document intended to establish a right, an identity or a capacity, or to grant an authorisation is punished by two years' imprisonment and a fine of €30,000.

The same penalties apply to the submission of a false statement so as to obtain from a public administration or from an institution discharging a public service mission an allowance, a cash payment or benefit that is not dua.

ARTICLE 441-7

Except as otherwise provided in the present Chapter, a penalty of one year's imprisonment and a fine of €15,000 is incurred by:

1° drafting an attestation or certificate stating materially inaccurate facts;

2° forging an attestation or certificate which was originally genuine;

3° using an inaccurate or forged written attestation or certificate;

The penalty is increased to three years' imprisonment and a fine of €45,000 where the offence was committed with a view to prejudice the Public Treasury or the estate of another person.

ARTICLE 441-8

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

A penalty of two years' imprisonment and a fine of €30,000 is incurred by any person who, acting in the exercise of his profession, directly or indirectly makes offers, promises, gifts, donations or advantages of any kind to produce an attestation or a certificate stating facts that are materially inaccurate.

The same penalties apply to yielding to the solicitations described in the previous paragraph, or the use of acts of violence or threats, or the direct or indirect proposal of offers, promises, gifts, donations or advantages of any kind to obtain from a person acting in the exercise of his profession an attestation or certificate stating facts that are materially inaccurate.

The penalty is increased to five years' imprisonment and to a fine of €75,000 where the person described in the first two paragraphs is a medical or health practitioner and the written statement containing inaccurate facts conceals or untruthfully certifies the existence of a sickness, disability or a state of pregnancy, or provides wrongful indications as to the origin of a sickness or a disability or as to the cause of e death.

ARTICLE 441-9

Attempt to commit the misdemeanours referred to under articles 441-1, 441-2 and 441-4 to 441-8 is subject to the same penalties.

ARTICLE 441-10

Natural persons convicted of the felonies or misdemeanours referred to under the present Chapter also incur the following additional penalties:

1° forfeiture of civic, civil and family rights, pursuant to the conditions set out under article 131-26;

2° prohibition to hold public office or to undertake a social or professional activity pursuant to the conditions set out under article 131-27;

3° disqualification from public tenders;

4° confiscation of the thing which was used or intended for the commission of the offence, or of the thing which is the product of it, except for articles subject to restitution.

ARTICLE 441-11

Any alien convicted of any of the offences referred to under the present Chapter may be banished from French territory either permanently or for a maximum period of ten years pursuant to the conditions set out under article 131-10.

ARTICLE 441-12

Legal persons may incur criminal liability for the offences referred to under the present Chapter pursuant to the conditions set out under article 121-2.

The penalties incurred by legal persons are:

1° a fine, pursuant to the conditions set out under article 131-38;

2° the penalties referred to under article 131-39.

The prohibition referred to under 2° of article 131-39 applies to the activity in the course of which or on the occasion of the performance of which the offence was committed.

CHAPTER II

COUNTERFEITING — Articles 442-1 to 442-15

ARTICLE 442-1

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

(Act no. 2004-204 of 9 March 2004 article 6 XIII Official Journal of 10 March 2004)

The counterfeiting or the forging of coins or banknotes which are legal tender in France or are issued by authorised international or foreign institutions for that purpose is punished by thirty years' criminal imprisonment and a fine of €450,000.

The same penalties apply to the manufacture of any coins and banknotes mentioned in the previous paragraph by making use of equipment or material authorised and designated for this purpose, where this is done in breach of the rules made by the institutions authorised to issue this money and without their agreement.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offences referred to under the present article.

ARTICLE 442-2

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

(Act no. 2004-204 of 9 March 2004 article 6 XIV Official Journal of 10 March 2004)

Transporting, putting into circulation or holding with a view to putting into circulation any forged or counterfeited money referred to under article 442-1, or money that has been illegally produced in breach of the second paragraph of that article, is punished by ten years' imprisonment and a fine of €150,000.

Where committed by an organised gang, the same offences are punished by thirty years' criminal imprisonment and a fine of €450,000.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offence referred to under the second paragraph the present article.

ARTICLE 442-3

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The counterfeiting or forging of French or foreign coins or banknotes which are no longer legal tender or are no longer authorised is punished by five years' imprisonment and a fine of €75,000.

ARTICLE 442-4

Putting into circulation any unauthorised money designed to replace coins or banknotes that are legal tender in France is punished by five years' imprisonment and a fine of €75,000.

ARTICLE 442-5

(Act no. 2001-1168 of 11 December 2001 art. 17 Official Journal 12 December 2001)

The unauthorised manufacture, use or possession of raw materials, equipment, computer programs or any other object specially designed for the manufacture of coins and banknotes, or for the protection of banknotes or coins against counterfeiting, is punished by two years' imprisonment and a fine of €30,000.

ARTICLE 442-6

A penalty of one year's imprisonment and a fine of €15,000 applies to the manufacture, sale or circulation of any articles, printed documents or forms which resemble the instruments referred to in article 442-1 so as to facilitate their acceptance in lieu of the tender they resemble.

ARTICLE 442-7

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Any person who, having received forged or counterfeited money referred to under article 442-1 believing them to be genuine, returns them to circulation after discovering their falsity is punished by a fine of €7,500.

ARTICLE 442-8

Attempt to commit the misdemeanours referred to under the first paragraph of article 442-2 and under articles 442-3 to 442-7 is subject to the same penalties.

ARTICLE 442-9

Any person having attempted to commit one of the offences set out under the present Chapter is exempt from penalty if, having informed the judicial or administrative authorities, he has made it possible to prevent the offence and, where relevant, to identify the other offenders.

ARTICLE 442-10

The custodial sentence incurred by the perpetrator or accomplice to the offences set out under articles 442-1 to 442-4 is reduced by half where, having informed the judicial or administrative authorities, he has made it possible to prevent the offence and, where relevant, to identify the other offenders.

ARTICLE 442-11

Natural persons convicted of the felonies or misdemeanours set out under articles 442-1 to 442-6 also incur the following additional penalties:

1° forfeiture of civic, civil and family rights, pursuant to the conditions set out under article 131-26;

2° prohibition to hold public office or to undertake a social or professional activity in the manner prescribed under article 131-27;

3° area banishment pursuant to the conditions under article 131-31.

ARTICLE 442-12

(Act no. 93-1027 of 24 August 1993 Article 33 Official Journal 29 August 1993)
(Act no. 98-349 of 11 May 1998 Article 37 Official Journal 12 May 1998)
(Act no. 2003-1119 of 26 November 2003 Article 78 III Official Journal of 27 November 2003)

Any alien convicted of any of the offences referred to under articles 442-1 to 442-4 may be banished from French territory either permanently or for a maximum period of ten years, pursuant to the conditions set out under article 131-30.

ARTICLE 442-13

In all the cases set out under the present Chapter the court may also order confiscation of the thing which was used or intended for the commission of the offence or the thing which is the product of it, with the exception of articles which may be subject to restitution.

The confiscation of counterfeit or forged coins and banknotes, as well as of the raw materials and equipment designed for their manufacture, is mandatory.

The counterfeit or forged coins or banknotes are respectively returned to either the Coins and Medal Administration or to the Bank of France, for the purpose of eventual destruction. To these bodies are also given, for the same purpose, any confiscated raw materials or equipment that they select.

The confiscation of the articles, printed documents or forms referred to under article 442-6 is also mandatory. It entails the transfer of the thing confiscated, for the purpose of destruction, to the Coins and Medals Administration or to the Bank of France, in accordance with the distinction made in the previous paragraph.

ARTICLE 442-14

Legal persons may incur criminal liability for the offences referred to under the present chapter, pursuant to the conditions set out under article 121-2.

The penalties incurred by legal persons are:

1° a fine, pursuant to the conditions set out under article 131-38;

2° the penalties referred to under article 131-39.;

3° confiscation, pursuant to the conditions set out under article 442-13.

The prohibition mentioned in 2° of article 131-39 applies to the activity in the exercise of which or on the occasion of the exercise of which the offence was committed.

ARTICLE 442-15

(Inserted by Act no. 2001-1168 of 11 December 2001 Article 17 Official Journal 12 December 2001)

The provisions of articles 442-1, 442-2 and 442-5 to 442-14 as regards banknotes and coins intended to be put into circulation, but have not yet been issued by the authorised institutions and are not yet legal tender.

CHAPTER III
FORGERY OF SECURITIES ISSUED BY PUBLIC AUTHORITIES

Articles 443-1 to 443-8

ARTICLE 443-1

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The counterfeiting or the forgery of papers issued by the Public Treasury with its stamp or mark or of papers issued by foreign States with their stamp or mark, as well as the

use or transport of such forged or counterfeited papers, is punished by seven years' imprisonment and a fine of €100,000.

ARTICLE 443-2

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The counterfeiting or forging of stamps or other postal fiduciary securities, and also of stamps issued by the public finance administration, and the sale, transport, circulation or use of such counterfeited or forged stamps or securities is punished by five years' imprisonment and a fine of €75,000.

ARTICLE 443-3

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January

2002)

A penalty of one year's imprisonment and a fine of €15,000 is incurred by manufacturing, selling, transporting or distributing any articles, printed documents or forms which resemble documents of title or other fiduciary securities issued by the State, local councils, public corporation, or the public operators referred to by Act n° 90-568 of 2 July 1990 governing the organisation of the postal and telecommunications public service so as to facilitate the acceptance of such articles, printed documents or forms in lieu of the securities they resemble.

ARTICLE 434-4

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

A penalty of six months' imprisonment and a fine of €7,500 is incurred by counterfeiting or forging foreign stamps or other postal securities issued by the postal service of a foreign country, and also the selling, transport, distribution or use of those counterfeited or forged stamps or securities.

ARTICLE 443-5

Attempt to commit the misdemeanours referred to under the present Chapter is subject to the same penalties.

ARTICLE 443-6

Natural persons convicted of the felonies or misdemeanours referred to under the present Chapter also incur the following additional penalties:

1° forfeiture of civic, civil and family rights pursuant to the conditions set out under article 131-26;

2° prohibition to hold public office or to exercise a social or professional activity, pursuant to the conditions set out under article 131-27;

3° confiscation of the thing which was used or intended for the commission of the offence or of the thing which is the product of it, except for articles subject to restitution .

The confiscation of the corpus delicti is mandatory in every case. It entails handing over the thing seized to the public administration for the purpose of eventual destruction.

ARTICLE 443-7

Any alien convicted of any of the offences referred to under articles 443-1 and 443-2 may be banished from French territory either permanently or for a maximum period of ten years in accordance with the conditions laid down under article 131-10.

ARTICLE 443-8

Legal persons may incur criminal liability for the offences set out under the present Chapter pursuant to the conditions set out under article 121-2.

The penalties incurred by legal persons are:

1° a fine in the manner prescribed under article 131-38;

2° the penalties referred to under article 131-39;

3° confiscation, pursuant to the conditions set out under article 443-6.

The prohibition referred to under 2° of article 131-39 applies to the activity in the course of which or on the occasion of the performance of which the offence was committed.

CHAPTER IV
FORGERY OF THE GOVERNMENT'S OFFICIAL MARKS — Articles 444-1 to 444-9

ARTICLE 444-1

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The counterfeiting or forgery of the seal of the State, of national stamps, or of hallmarks used to mark gold, silver or platinum, and the use of such counterfeit or forged seals stamps or hallmarks is punished by ten years' imprisonment and a fine of €150,000.

ARTICLE 444-2

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The unlawful use of the seal of the State, or of national stamps or hallmarks used to mark gold, silver or platinum is punished by seven years' imprisonment and a fine of €100,000.

ARTICLE 444-3

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002; Act no. 99-574 of 9th July 1999 Article 101 Official Journal 10 July 1999)

A penalty of five years' imprisonment and a fine of €75,000 is incurred by:

1° counterfeiting or forging seals stamps or marks of a public body, or the use of such counterfeit or forged seals stamps or marks;

2° counterfeiting or forging headed papers or official forms used in the assemblies instituted by the Constitution, by public bodies or courts, as well as the sale or circulation, and also the use of such counterfeit or forged papers or forms;

3° counterfeiting or forging identification marks or marks certifying the intervention of inspectorate or sanitary supervision services of France or of a foreign country.

ARTICLE 444-4

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002; Act no. 99-574 of 9 July 1999)

The unlawful use of seals, marks, stamps papers or forms showing the intervention of the inspectorate or sanitary supervisions services referred to in article 444-3 is punished by three years' imprisonment and a fine of €45,000.

ARTICLE 444-5

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The manufacture, sale, distribution or use of printed documents which so closely resemble papers carrying a heading or with official forms used in the assemblies instituted by the Constitution, public bodies or courts of law as to be liable to cause a mistake in tha mind of the public is punished by one year's imprisonment and a fine of €15,000.

ARTICLE 444-6

Attempt to commit the misdemeanours referred to under the present Chapter is subject to the same penalties.

ARTICLE 444-7

Natural persons convicted of the felonies or misdemeanours referred to under the present Chapter also incur the following additional penalties:

1° forfeiture of civic, civil and family rights pursuant to the conditions set out under article 131-26

2° prohibition to hold public office or to undertake a social or professional activity pursuant to the conditions set out under article 131-27;

3° disqualification from public tenders;

4° confiscation of the thing which was used or intended for the commission of the offence or of the thing which is the product of it, except for articles which may be subject to restitution.

The confiscation of the corpus delicti is mandatory in every case. It entails handing over the thing seized to the public administration for the purpose of a possible destruction.

ARTICLE 444-8

Any alien convicted of any of the offences referred to under the present Chapter may be banished from French territory either permanently or for a maximum period of ten years, pursuant to the conditions laid down under article 131-10.

ARTICLE 444-9

Legal persons may incur criminal liability for the offences referred to under the present Chapter pursuant to the conditions set out under article 121-2.

The penalties incurred by legal persons are:

1° a fine, pursuant to the conditions set out under article 131-38;

2° the penalties referred to under article 131-39;

3° confiscation, pursuant to the conditions set out under article 444-7.

The prohibition referred to under 2° of article 131-39 applies to the activity in the course of which or on the occasion of the performance of which the offence was committed.

CHAPTER V

CORRUPTION OF PERSONS NOT HOLDING A PUBLIC FUNCTION. Articles 445-1 to 445-4

SECTION I

Passive and active corruption of persons not holding a public function Articles 445-1 to 445-4

ARTICLE 445-1

(Inserted by Act no. 2005-750 of 4th July 2005 Article 3 Official Journal of 6th July 2005)

Making or tendering, at any time, directly or indirectly, offers, promises, gifts, presents or any other advantages, to obtain from a person who, not being a public official or charged with a public service mission, holds or occupies, within the scope of his professional or social activity, a management position or any occupation for any person, whether natural or legal, or any other body, the performance or non-performance of any act within his occupation or position or facilitated by his occupation or position, in violation of his legal, contractual and professional obligations, is punished by five years' imprisonment and a fine of €75,000.

The same penalties apply to giving in to any person referred to in the above paragraph who solicits, at any time, directly or indirectly, offers, promises, gifts, presents or any other advantages, to carry out or refrain from carrying out any act referred to in the above paragraph, in violation of his legal, contractual or professional obligations.

ARTICLE 445-2

(Inserted by Act no. 2005-750 of 4th July 2005 Article 3 Official Journal of 6th July 2005)

Any person who, not being a public official or carrying on a public service mission, but holding or carrying on, in the context of a professional or social activity, any management position or any occupation for any person, whether natural or legal, or any other body, solicits or accepts, at any time, directly or indirectly, promises, gifts, presents or any advantages in order to carry out or refrain from carrying any act within his occupation or position or facilitated by his occupation or position, in violation of his legal, contractual and professional obligations, is punished by five years' imprisonment and a fine of €75,000.

ARTICLE 445-3

(Inserted by Act no. 2005-750 of 4th July 2005 Article 3 Official Journal of 6th July 2005)

Natural persons found guilty of the offences set out in article 445-1 and 445-2 also incur the following additional penalties:

1°: Forfeiture of civic, civil and family rights as set out in article 131-26;

2°: the prohibition to carry on the professional or social activity in the exercise or the context of which the offence was committed, for a maximum of five years.

3°: the confiscation, according to the conditions set out in article 131-21, of the thing which was used or intended for the commission of the offence or of the thing which is its product, except for articles subject to restitution;

4°: the display or dissemination of the decision according to the conditions set out in article 131-35.

ARTICLE 445-4

(Inserted by Act no. 2005-750 of 4th July 2005 Article 3 Official Journal of 6th July 2005)

Legal persons can be held criminally liable, according to the conditions set out in article 121-2, for offences defined by article 445-1 and 445-2.

The penalties incurred by legal persons are:

1°: a fine according to the conditions set out in article 131-38;

2°: the penalties referred to in 2°, 3°, 4°, 5°, 6° and 7° of article 131-39 for e maximum of five years.

The prohibition referred to in 2° of article 131-39 concerns the activity in the exercise or the context of which the offence was committed;

3°: the confiscation, according to the conditions set out in article 131-21, of the thing which was used or intended for the commission of the offence or of the thing which is its product, except for articles subject to restitution;

4°: the display or the dissemination of the decision according to the conditions set out in article 131-35.

SECTION II

additional penalties applicable to natural persons and criminal responsibility of legal persons

TITLE V

PARTICIPATION IN A CRIMINAL ASSOCIATION — Articles 450-1 to 450-5

ARTICLE 450-1

(Act no. 2001-420 of 15th May 2001 Article 45 Official Journal 16 May 2001; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

A criminal association consists of any group formed or any conspiracy established with a view to the preparation, marked by one or more material actions, of one or more felonies, or of one or more misdemeanours punished by at least five years' imprisonment.

Where the offences contemplated are felonies or misdemeanours punished by ten years' imprisonment, the participation in a criminal association is punished by ten years' imprisonment and a fine of €150,000.

Where the offences contemplated are misdemeanours punished by at least five years' imprisonment, the participation in a criminal association is punished by five years' imprisonment and a fine of €75,000.

ARTICLE 450-2

Any person who has participated in the group or the conspiracy defined by article 450-1 is exempted from punishment if, before any prosecution is instituted, he discloses the existence of the group or conspiracy to the competent authorities and enables the other participants to be identified.

ARTICLE 450-2-1

(Act no. 2001-420 of 15th May 2001 Article 45 Official Journal 16 May 2001; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The inability by a person to justify an income corresponding to his way of life, while being habitually in contact with persons engaged in activities set out under article 450-1, is punished by five years' imprisonment and a fine of €75,000.

ARTICLE 450-3

Natural persons convicted of the offence referred to under articles 450-1 also incur the following additional penalties:

1° forfeiture of civic, civil and family rights, pursuant to the conditions set out under article 131-26

2° prohibition to hold public office or to undertake a social or professional activity in the course of which or on the occasion of the performance of which the offence was committed pursuant to the conditions set out under article 131-27;

3° area banishment pursuant to the conditions under article 131-31.

The other additional penalties incurred for the felonies or misdemeanours that the group or conspiracy was designed to commit may also be pronounced against such persons.

ARTICLE 450-4

(Act no. 98-468 of 17 June 1998 Article 22 Official Journal 18 June 1998)

Legal persons may incur criminal liability pursuant to the conditions set out under article 121-2 for the offence provided for under article 450-1.

The penalties incurred by legal persons are:

1° a fine, in the manner prescribed to under Article 131-38;

2° the penalties referred to under article 131-39.

The prohibition referred to under 2° of article 131-39 applies to the activities in the course of which or on the occasion of the performance of which the offence was committed.

ARTICLE 450-5

(Inserted by Act no. 2004-204 of 9 March 2004 article 6 XV Official Journal of 10 March 2004)

Natural and legal persons convicted of the offences set out under the second paragraph of article 450-1 and article 450-2-1 also incur the additional penalty of confiscation of all or part of their assets, whatever their nature, movable or immovable, severally or jointly owned.

ARTICLE 511-1

(Act no. 94-653 of 29 July 1994 Article 9 Official Journal 30 July 1994)
(Act no. 2004-800 of 6 August 2004 Article 28 II Official Journal of 7 August 2004)

The abstraction of cells with a view to causing the birth of a child genetically identical to another person living or deceasec is punished by ten years' imprisonment and a fine of €150,000.

ARTICLE 511-1-1

(Act no. 2004-800 of 6 August 2004 Article 28 II Official Journal of 7 August 2004)

Where the misdemeanour under article 511-1 is committed abroad by a French national or by a person who habitually resides on French territory, French law is applicable notwithstanding the second paragraph of article 113-6 and the provisions of the second paragraph of article 113-8 do not apply.

ARTICLE 511-1-2

(Act no. 2004-800 of 6 August 2004 Article 28 II Official Journal of 7 August 2004)

It is an offence punishable by three years imprisonment and a fine of €45,000 to incite another person, whether by gifts, promises, threats, orders or abuse of authority or power, to abstract cells or gametes with the eim of causing the birth of a child genetically identical to another person living or deceased.

The same penalties apply to propaganda or advertising, in whatever form, in favour of eugenic practices or reproductive cloning.

ARTICLE 511-2

(Act no. 94-653 of 29 July 1994 Article 9 Official Journal 30 July 1994; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Procuring from another person any of his organs in return for a payment, in whatever form, is punished by seven years' imprisonment and a fine of €100,000.

The same penalties apply to acting as an intermediary to facilitate the obtaining of an organ for payment, or the supply for payment of an organ belonging to another person's body.

The same penalty is applicable where the organ procured in the conditions referred to under the first paragraph comes from a foreign country.

ARTICLE 511-3

(Act no. 94-653 of 29 July 1994 Article 9 Official Journal 30 July 1994; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002; Act no. 2004-800 of 6 August 2004 Article 28 II Official Journal of 7 August 2004)

The removal of an organ from a living adult without obtaining the person's consent pursuant to the conditions set out by article L. 671-3 of the Public Health Code, or without authorisation being provided under paragraphs two and five of that provision, is punished by seven years' imprisonment and a fine of €100,000, even when done for therapeutic purposes,.

The same penalties apply to the removal of an organ from a living minor donor, or a living adult donor who is the subject of a protective guardianship order, without complying with the conditions referred to under articles L. 671-4 and L. 671-5 of the Public Health Code.

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ARTICLE 511-4

(Act no. 94-653 of 29 July 1994 Article 9 Official Journal 30 July 1994; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Procuring from another person human organic tissues, cells or body products in return for payment in whatever form is punished by five years' imprisonment and a fine of €75,000.

The same penalties apply to acting of as an intermediary to facilitate the procuring of human organic tissues, cells or human products in return for any form of payment, or supplying human organic tissues, cells or products of the body of others for payment.

ARTICLE 511-5

(Act no. 94-653 of 29 July 1994 Article 9 Official Journal 30 July 1994; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002; Act no. 2004-800 of 6 August 2004 Article 28 II Official Journal of 7 August 2004)

The removal of human organic tissues or cells, or the collection of a bodily product, from a living adult who has not expressed his consent as provided for by article L. 1241-1 of the Public Heath Code is punished by five years' imprisonment and a fine of €75,000.

The removal from a living minor or from a living adult who is the subject of a protective guardianship order of any red blood-producing cells from the bone marrow without complying with the conditions laid down by, as applicable, articles L. 1241-3 or L. 1241-4 of the Public Health Code, is punished by seven years' imprisonment and a fine of €100,000.

ARTICLE 511-5-1

(Inserted by Act no. 2004-800 of 6 August 2004 Article 28 II Official Journal of 7 August 2004)

The taking of samples for scientific purposes from a deceased person without having transmitted the protocol required by article L. 1232-3 of the Public Health Code is punished by two years' imprisonment and a fine of €30,000.

The same penalties apply to using a protocol that has been suspended or forbidden by the Minister responsible for research.

ARTICLE 511-5-2

(Inserted by Act no. 2004-800 of 6 August 2004 Article 28 II Official Journal of 7 August 2004 rectifying Official Journal of 27 november 1998)

I. It is an offence punishable by five year's imprisonment and a fine of €75,000 to keep and transform for scientific purposes, including purposes of genetic research, any organs, tissue, cells or blood, or its components or products derived from it:

1° without having made in respect of it the preliminary declaration required by article L. 1243-3 of the Public Health Code;

2° where the Minister responsible for research has objected to these activities, or has suspended them, or forbidden them.

II. The same penalties apply to keeping or transforming any organs, tissue, cells or blood, or its components or products derived from it, with a view to handing them over for scientific use, including purposes of genetic research, without having first obtained the authorisation required by article L. 1243-3 of the Public Health Code, or when this authorisation has been suspended or withdrawn.

ARTICLE 511-6

(Act no. 94-653 of 29 July 1994 Article 9 Official Journal 30 July 1994, Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force the 1 January 2002)

The collection or removal of gametes from a living person without his written consent is punished by five years' imprisonment and a fine of €75,000.

ARTICLE 511-7

(Act no. 94-653 of 29 July 1994 Article 9 Official Journal 30 July 1994; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002; Law no. 2004-800 of 6 August 2004 Article 15 4° Official Journal of 7 August 2004)

Taking samples from organs or grafts from organs, or taking samples of tissue or cells, grafting tissue or administering cellular therapy products, or keeping or transforming tissues or cellular therapy products, in an establishment that has not obtained the authorisation required by articles L. 1233-1, L. 1234-2, L. 1242-1, L. 1243-2 or L. 1243-6 of the Public Health Code, or after such authorisation has been suspended or withdrawn, is punished by two years' imprisonment and a fine of €30,000.

ARTICLE 511-8

(Act no. 98-535 of 1st July 1998 Article 19 Official Journal 2 July 1998; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002; Law no. 2004-800 of 6 August 2004 Article 15 5° Official Journal of 7 August 2004)

The distribution or transfer of organs, tissues, or cell therapy products for therapeutic purposes, or of human products with a view to donation, when the sanitary security rules imposed by the provisions of Article L. 1211-6 of the Public Health Code have not been complied with, is punished by two years' imprisonment and a fine of €30,000.

ARTICLE 511-8-1

(Act no. 98-535 of 1st July 1998 Article 19 Official Journal 2 July 1998; Ordinence no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002; Law no. 2004-800 of 6 August 2004 Article 15 6° Official Journal of 7 August 2004)

Distributing or transferring tissues or cell therapy products intended for cell therapy in breach article L. 1243-5 of the Public Health Code is punished by two years' imprisonment and a fine of €30,000.

ARTICLE 511-9

(Act no. 94-653 of 29 July 1994 Article 9 Officiel Journal 30 July 1994; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Obtaining gametes for payment in whatever form, other than payment for services rendered by institutions carrying out the preparation and the conservation of such gametes, is punished by five years' imprisonment and a fine of €75,000.

The same penalties apply to acting as an intermediary to facilitate the procuring of gametes for payment in whatever form, or the supplying to third parties, for payment, of gametes provided by donation.

ARTICLE 511-10

(Act no. 94-653 of 29 July 1994 Article 9 Official Journal 30 July 1994; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The disclosure of information making it possible to identify both the person or couple who have donated gametes, and the couple that have received them, is punished by two years' imprisonment and a fine of €30,000.

ARTICLE 511-11

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The collecting or removal of gametes from a living person with a view to carrying out a medically assisted procreation without testing for transmissible diseases as required by article L. 665-15 of the Public Health Code is punished by two years' imprisonment and a fine of €30,000.

ARTICLE 511-12

(Act no. 94-653 of 29 July 1994 Article 9 Official Journal 30 July 1994; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Carrying out artificial insemination using fresh sperm or a mixture of sperm supplied contrary to article L. 673-3 of the Public Health Code is punished by two years' imprisonment and a fine of €30,000.

ARTICLE 511-13

(Act no. 94-653 of 29 July 1994 Article 9 Official Journal 30 July 1994; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Conditioning the benefit of a donation of gametes to the designation by the receiving couple of a person who has voluntarily accepted to make such a donation in favour of a third-party couple in breach of article L. 673-7 of the Public Health Code is punished by two years' imprisonment and a fine of €30,000.

ARTICLE 511-14

(Act no. 94-653 of 29 July 1994 Article 9 Official Journal 30 July 1994; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Collecting, handling, preserving or transferring gametes supplied by way of donation without having obtained the necessary authorisation required by article L. 673-5 of the Public Health Code is punished by two years' imprisonment and a fine of €30,000.

ARTICLE 511-8-2

(Act no. 98-535 of 1st July 1998 Article 19 Official Journal 2 July 1998; Law no. 2004-800 of 6 August 2004 Article 15 7° Official Journal of 7 August 2004)

Importing or exporting organs, tissues, cells or cell therapy products in breach of the rules made for the application of articles L. 1235-1 and L. 1245 of the Public Health Code is punished by five ears' imprisonment and a fine of €30,000.

SECTION I'I

OF THE PROTECTION OF THE HUMAN EMBRYO — Articles 511-15 to 511-25

ARTICLE 511-15

(Act no. 94-653 of 29 July 1994 Article 9 Official Journal 30 July 1994; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Procuring human embryos in return for any form of payment is punished by seven years' imprisonment and a fine of €100,000.

The same penalties apply to acting of as an intermediary to facilitate the procuring of human embryos in return for any form of payment, and the supply, for consideration, of human embryos to third parties.

ARTICLE 511-16

(Act no. 94-653 of 29 July 1994 Article 9 Official Journal 30 July 1994; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002; Law no. 2004-800 of 6 August 2004 Article 28 II

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Official Journal of 7 August 2004)

Obtaining human embryos without complying with the conditions set out under articles L. 2141-5 and L. 2141-6 of the Public Health Code is punished by seven years' imprisonment and a fine of €100,000.

ARTICLE 511-17

(Act no. 94-653 of 29 July 1994 Article 9 Official Journal 30 July 1994; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002;(Law no. 2004-800 of 6 August 2004 Article 28 II Official Journal of 7 August 2004)

The in vitro conception or creation by cloning of human embryos for industrial or commercial purposes is punished by seven years' imprisonment and a fine of €100,000.

The same penalties apply to the use of human embryos for industrial or commercial purposes.

ARTICLE 511-18

(Act no. 94-653 of 29 July 1994 Article 9 Official Journal 30 July 1994; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002; Law no. 2004-800 of 6 August 2004 Article 28 II 5° Official Journal of 7 August 2004)

The in vitro conception or creation by cloning of human embryos for the purposes of research or experimentation is punished by seven years' imprisonment and a fine of €100,000.

ARTICLE 511-18-1

(Inserted by Law no. 2004-800 of 6 August 2004 Article 28 II 6° Official Journal of 7 August 2004)

The creation by cloning of human embryos for therapeutic purposes is punished by seven years' imprisonment and a fine of €100,000.

ARTICLE 511-19

(Act no. 94-653 of 29 July 1994 Article 9 Official Journal 30 July 1994; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002; Law no. 2004-800 of 6 August 2004 Article 28 II 7° Official Journal of 7 August 2004)

I. Carrying out studies or research on a human embryo:

1° without having previously obtained the written consent and authorisation mentioned in article L. 2151-5 of the Public Health Code, or when this authorisation has been withdrawn or suspended, or the consent has been revoked;

2° without complying with the statutory and regulatory requirements or those stated in the authorisation,

is punished by seven years imprisonment and a fine of €100,000.

II. Carrying out studies or research on embryonic stem cells

1° without having previously obtained the written consent and authorisation mentioned in article L. 2151-5 of the Public Health Code, or when this authorisation has been withdrawn or suspended, or the consent has been revoked;

2° without complying with the statutory and regulatory requirements or those stated in the authorisation,

is punished by seven years' imprisonment and a fine of €100,000.

ARTICLE 511-20

(Act no. 94-653 of 29 July 1994 Article 9 Official Journal 30 July 1994; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

The making of an ante-natal diagnosis without having received the authorisation referred to under Article L. 162-16 of the Public Health Code is punished by two years' imprisonment and a fine of €30,000.

ARTICLE 511-21

(Act no. 94-653 of 29 July 1994 Article 9 Official Journal 30 July 1994; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Failure to observe the provisions of article L. 162-17 of the Public Health Code concerning pre-implantation diagnosis is punished by two years' imprisonment and a fine of €30,000.

ARTICLE 511-22

(Act no. 94-653 of 29 July 1994 Article 9 Official Journal 30 July 1994; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002; Law no. 2004-800 of 6 August 2004 Article 28 II 12° Official Journal of 7 August 2004)

Carrying out medically assisted procreations without having obtained the authorisation set out under article L. 2142-1 of the Public Health Code or without complying with the requirements of such an authorisation is punished by two years' imprisonment and a fine of €30 000.

ARTICLE 511-23

(Act no. 94-653 of 29 July 1994 Article 9 Official Journal 30 July 1994; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002; Law no. 2004-800 of 6 August 2004 Article 28 II 13° Official Journal of 7 August 2004)

Bringing human embryos into a place regulated by the Public Health Code, or removing them from such a place, without the authorisation required by article L. 2141-9 of the Public Health Code is punished by three years' imprisonment and a fine of €45,000.

ARTICLE 511-24

(Act no. 94-653 of 29 July 1994 Article 9 Official Journal 30 July 1994; Ordinance no. 2000-916 of 19 September 2000

Article 3 Official Journal of 22 September 2000 in force 1 January 2002)

Carrying out medically assisted procreations for other purposes than those set out under article L. 152-2 of the Public Health Code is punished by five years' imprisonment and a fine of €75,000.

ARTICLE 511-25

(Act no. 94-653 of 29 July 1994 Article 9 Official Journal 30 July 1994)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002; Law no. 2004-800 of 6 August 2004 Article 28 II 14° Official Journal of 7 August 2004)

I. Carrying out the activities necessary to implant a human embryo in the circumstances set out by article L. 2141-6 of the Public Health Code:

1° without having previously ensured that the judicial authorisation required by the second paragraph of the aforesaid article has been obtained;

2° or without being informed of the results of tests to detect infectious illnesses required by the sixth paragraph of the same article;

3° or outside an establishment authorised in accordance with the provisions of the seventh paragraph of the same article,

is punished by two years' imprisonment and a fine of €30,000.

II. The same penalties apply to the disclosure of personal information enabling the identification of both the couple who have renounced an embryo and the couple who have received it.

SECTION IV
OF OTHER PROVISIONS AND ADDITIONAL PENALTIES APPLICABLE TO NATURAL PERSONS AND LIABILITY OF LEGAL PERSONS — Articles 511-26 to 511-28

ARTICLE 511-26

(Act no. 94-653 of 29 July 1994 Article 9 Official Journal 30 July 1994)
(Act no. 20004-800 of 6 August 2004 article 28 II 14 ° Official Journal of 7 August 2004)

Attempt to commit the misdemeanours referred to under articles 511-2, 511-3, 511-4, 511-5, 511-5-1, 511-5-2, 511-6, 511-9, 511-15, 511-16 and 511-19 is subject to the same penalties.

ARTICLE 511-27

(Act no. 94-653 of 29 July 1994 Article 9 Official Journal 30 July 1994)

Natural persons convicted of the offences referred to under the present Chapter also incur the additional penalty of prohibition, for a maximum period of ten years, to undertake the social or professional activity in the course of which or on the occasion of which the offence was committed.

ARTICLE 511-28

Legal persons may incur criminal liability for the offences referred to under the present Chapter in accordance with the conditions laid down under article 121-2.

The penalties incurred by legal persons are:

1° a fine, pursuant to the conditions set out under article 131-38;

2° the penalties referred to under article 131-39.

The prohibition referred to under 2° of article 131-39 applies to the activity in the course of which or on the occasion of the performance of which the offence was committed.

TITLE II
OTHER PROVISIONS — Articles 521-1 to 521-2

SINGLE CHAPTER
SERIOUS MALTREATMENT OR ACTS OF CRUELTY TOWARDS ANIMALS — Articles 521-1 to 521-2

ARTICLE 521-1

(Act no. 94-653 of 29 July 1994 article 9 Official Journal of 30 July 1994)
(Act no. 99-5 of 6 January 1999 article 22 Official Journal of 7 January 1999)
(Ordinance no. 2000-916 of 19 September article 3 Official Journal of 22 September 2000 in force 1 January 2002)
(Act no. 2004-204 of 9 March 2004 article 50 Official Journal of 10 March 2004)

The unnecessary infliction, in public or otherwise, of serious maltreatment, including sexual maltreatment, towards or the commission of an act of cruelty on any domestic or tame animal, or any animal held in captivity, is punished by two years' imprisonment and a fine of €30,000.

As an additional penalty, the court may impose a prohibition, permanent or otherwise, against keeping an animal.

The provisions of the present article are not applicable to bullfights where an uninterrupted local tradition can be shown. Nor do they apply to cockfights in localities where an uninterrupted tradition can be established.

The penalties set out in the first paragraph apply to the creation of any new centre for holding cockfights.

The same penalties also apply to the abandonment of a domestic or tamed animal, or of an animal held in captivity, with the exception of animals used for repopulation purposes.

ARTICLE 521-2

Carrying out experiments or experimental scientific research on animals without complying with the provisions laid

down by Decree of the Conseil d'Etat is punished by the penalties set out under article 511-1.

ARTICLE 711-1
(Act no. 2001-616 of 11 July 2001 Article 75 Official Journal of 13 July 2001)

Apart from the adaptations referred to under the present title, Book one except for article 132-70-1, and Books II to V of the present Code are applicable in the territories of New Caledonia, French Polynesia and the islands of Wallis and Futuna.

*Article 222 IV of the Act No. 99-209 of 19th March 1999 pertaining to New Caledonia which lays down:

"IV - In relation to all the legislative and regulatory provisions in force:

1° reference to the territory of New Caledonia is replaced by a reference to New Caledonia;

2° reference to the territorial assembly of New Caledonia is replaced by a reference to the Congress of New Caledonia;

3° reference to the executive body of New Caledonia is replaced by a reference to the government of New Caledonia"*

ARTICLE 711-2
(Act no. 2001-616 of 11 July 2001 Article 75 Official Journal of 13 July 2001)

Books I to V of the present Code are applicable to the Southern Territories and the French Antarctic.

ARTICLE 711-3
(Act no. 2001-616 of 11 July 2001 Article 75 Official Journal of 13 July 2001; Ordinance no. 2000-916 of 19 September 2000 into force 1 January 2002)

In New Caledonia, in the territories of French Polynesia and in Wallis and Futuna, financial penalties incurred under the present code are pronounced in the local currency, taking into account the exchange rate of that currency in relation to the Euro.

For the enforcement of the present Code in the territories as referred to under article 711-1, the terms listed below are replaced as follows:"

"department" by "territory"

"prefect" and "sub-prefect" by the "representative of the State in the territory"

Similarly, "references to provisions not applicable in these territories" are replaced by "references to provisions to similar effect applicable locally".

ARTICLE 721-1
(Act no. 2001-616 of 11 July 2001 Article 75 Official Journal of 13 July 2001)

Apart from the adaptations referred to under the present title, Book I except for article 132-7-1, and Books II to V of the present Code are applicable to Mayotte.

ARTICLE 721-2

(Act no. 2001-616 of 11 July 2001 Article 75 Official Journal of 13 July 2001)

For the application of the present Code in Mayotte, the following terms are replaced as follows:

"Tribunal de grande instance" by "Tribunal de première instance";

"Cour d'assises" by "Cour criminelle"

"department" by "territory"

"prefect" and "sub-prefect" by the "representative of the Government"

Similarly, references to provisions not applicable in the collectivity are replaced by references to provisions to similar effect applicable locally.

CHAPTER II

ADAPTATION OF BOOK I — Articles 712-1 to 722-1

ARTICLE 712-1

(Act no. 96-1240 of 30 December 96 Article 2 Official Journal 1 January 1997; Act no. 2001-616 of 11 July 2001 Article 75 Official Journal of 13 July 2001)

The last paragraph of article 131-35 is drafted as follows:

"The dissemination of the decision is by the Official Journal of the Republic, by the Official Journal of the Territory, by one or more other press publications, or by one or more means of broadcasting. The publications or broadcasting media entrusted with this circulation are nominated by the court. They may not refuse to carry them".

ARTICLE 712-2

(Act no. 96-1240 of 30 December 96 Article 2 Official Journal 1 January 1997; Act no. 2001-616 of 11 July 2001 Article 75 Official Journal of 13 July 2001)

7° of article 132-45 is drafted as follows:

"7° To abstain from driving certain land vehicles in relation to which a permit is necessary."

ARTICLE 722-1

(Act no. 96-1240 of 30 December 96 Article 2 Official Journal 1 January 1997; Act no. 2001-616 of 11 July 2001 Article 75 Official Journal of 13 July 2001)

7° of article 132-45 is drafted as follows:

"7° to abstain from driving certain land vehicles in relation to which a permit is necessary."

CHAPTER III

ADAPTATION OF BOOK II — Articles 713-1 to 723-6

ARTICLE 713-1

(Act no. 2001-616 of 11 July 2001 Article 75 Official Journal of 13 July 2001; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal 22 September 2000 into force 1 January 2002)

The first paragraph of article 223-8 is drafted as follows:

"Practising or causing biomedical research to be practised on a person without having obtained the free, informed and explicit consent of the person concerned, or that of the holders of parental authority or of the tutor is punished by three years' imprisonment and a fine of €45,000."

ARTICLE 713-3

(Act no. 2001-616 of 11 July 2001 Article 75 Official Journal of 13 July 2001)

2° and 3° of article 225-3 is drafted as follows:

"2° discrimination based on state or health or handicap, if it consists of a refusal to hire or dismiss based on a medically established incapacity, according to to the provisions on health at work or the civil service applicable locally;

3 recruitment discrimination based on gender when the fact of being male or female constitutes, according to provisions locally applicable as regards labour law or the law of the civil service, the determining factor in the exercise of an employment or professional activity."

ARTICLE 713-4

(Act no. 2001-616 of 11 July 2001 Article 75 Official Journal of 13 July 2001; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal 22 September 2000 into force 1 January 2002)

- ARTICLE 226-25 is drafted as follows:

"The study of the genetic characteristics of a person for medical purposes without having obtained his prior consent in writing is punished by one year's imprisonment and a fine of €15,000.

The provisions of the previous paragraph do not apply:

1° where the study is carried out in the context of judicial proceedings;

2° or where, under exceptional circumstances, in the person's interest and in respect for his confidence, the consent of the latter has not been obtained".

ARTICLE 713-5

(Act no. 2001-616 of 11 July 2001 Article 75 Official Journal of 13 July 2001; Ordinance no. 2000-916 of 19 September

PENA_ CODE

2000 Article 3 Official Journal 22 September 2000 into force 1 January 2002)

- ARTICLE 226-27 is drafted as follows:

"Researching the identification of a person through his DNA profile for medical purposes without obtaining his prior consent in writing is punished by one year's imprisonment and a fine of €15,000.

The provisions of the previous paragraph do not apply:

1° where the study is carried out in the context of judicial proceedings;

2° or where, under exceptional circumstances, in the person's interest and in respect for his confidence, the consent of the latter has not been obtained".

ARTICLE 713-6

(Act no. 2001-616 of 11 July 2001 Article 75 Official Journal of 13 July 2001; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal 22 September 2000 into force 1 January 2002)

- ARTICLE 226-28 is drafted as follows:

"Researching the identification of a person through his DNA profile for purposes neither medical nor scientific, or other than in an inquiry or investigation mace in the course of judicial proceedings, is punished by one year's imprisonment and a fine of €15,000.

The sama penalty applies to the disclosure of information concerning the identification of a person through his DNA profile or proceeding to the identification of a person through his DNA profile without holding the authorisation provided under conditions laid down by by Decree in the Conseil d'Etat".

ARTICLE 723-1

(Act no. 2001-616 of 11 July 2001 Article 75 Official Journal of 13 July 2001; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal 22 September 2000 into force 1 January 2002)

The first paragraph of article 223-8 is drafted as follows:

"Practising or causing biomedical research to be practised on a person without having obtained the free, informed and explicit consent of the person concerned, or that of the holders of parental authority or of the tutor is punished by three years' imprisonment and a fine of €45,000."

ARTICLE 723-2

(Act no. 2001-616 of 11 July 2001 Article 75 Official Journal of 13 July 2001)

I. 1° of article 223-11 is drafted as follows:

"1° after the expiry of the tenth week of pregnancy, except where it is practisec for a therapeutic motive;"

II. 3° of article 223-11 is drafted as follows:

"3° within premises other than a public or a private hospital complying with the conditions applicable locally."

ARTICLE 723-3

(Act no. 2001-616 of 11 July 2001 Article 75 Official Journal of 13 July 2001)

2° and 3 of article 225-3 is drafted as follows:

"2° discrimination based on state or health or handicap, when if it consists of a refusal to hire or dismiss based on a medically established incapacity, according to the provisions on health at work or the civil service applicable locally;

3° recruitment discrimination based on gender when the fact of being male or female constitutes, according to provisions locally applicable as regards labour law or the law of the civil service, the determining factor in the exercise of an employment or professional activity in accordance with the provisions of the Labour Code or of the laws defining the statutory framework of the public service."

ARTICLE 723-4

(Act no. 2001-616 of 11 July 2001 Article 75 Official Journal of 13 July 2001; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal 22 September 2000 into force 1 January 2002)

- ARTICLE 226-25 is drafted as follows:

"The study of the genetic characteristics of a person for medical purposes without having obtained his prior consent in writing is punished by one year's imprisonment and a fine of €15,000.

The provisions of the previous paragraph do not apply:

1° where the study is carried out in the context of judicial proceedings;

2° or where, under exceptional circumstances, in the person's interest and in respect for his confidence, the consent of the latter has not been obtained".

ARTICLE 723-5

(Act no. 2001-616 of 11 July 2001 Article 75 Official Journal of 13 July 2001; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal 22 September 2000 into force 1 January 2002)

- ARTICLE 226-27 is drafted as follows:

"Researching the identification of a person through his DNA profile for medical purposes without obtaining his prior consent in writing is punished by one year's imprisonment and a fine of €15,000.

The provisions of the previous paragraph do not apply:

1° where the study is carried out in the context of judicial proceedings;

2° or where, under exceptional circumstances, in the person's interest and in respect for his confidence, the consent of the latter has not been obtained".

ARTICLE 723-6

PENAL CODE

(Act no. 2001-616 of 11 July 2001 Article 75 Official Journal of 13 July 2001; Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal 22 September 2000 into force 1 January 2002)

- ARTICLE 226-28 is draftec as follows:

"Researching the identification of a person through his DNA profile for purposes neither medical nor scientific, or other than in an inquiry or investigation made in the course of judicial proceedings, is punished by one year's imprisonment and a fine of €15,000.

The same penalty applies to the disclosure of information concerning the identification of a person through his DNA profile or proceeding to the identification of a person through his DNA profile without holding the authorisation provided under conditions laid down by Decree in the Conseil d'Etat".

CHAPTER IV

ADAPTATION OF BOOK III — Articles 714-1 to 724-1

ARTICLE 714-1

(Act no. 2001-616 of 11th July 2001, Article 75 Official Journal 13th July 2001)

"A building or a or registered movable article classified or registered or protected under the rules applicablo locally, an archaeological discovery made in the course of excavations or fortuitously, land containing archaeological remains, or an article preserved or deposited in a museum, library or archive belonging to a public body, or to a body discharging a public service mission or recognised as of public interest".

ARTICLE 724-1

(Act no. 2001-616 of 11TH July 2001 Article 75 Official Journal of 13th July 2001)

"A building or registered movable article classified, registered or protected under the rules applicable locally, an archaeological discovery made in the course of excavations or fortuitously, land containing archaeological remains, or an article preserved or deposited in a museum, library or archive belonging to a public body, or to a body discharging a public service mission or recognised as of public interest".

CHAPTER V

ADAPTATION OF BOOK IV — Articles 715-1 to 715-5

ARTICLE 715-1

(Act no. 2001-616 of 11th July 2001, Article 75 Official Journal 13th July 2001)

"The production or possession of machines, dangerous or explosive devices, set out under article 3 of the Act of 19th June 1871 which repealed the Decree of 4th September 1870 on the production of military grade weapons;

- the production, sale, import or export of explosive substances in contravention of the rules applicable locally;

- the purchase, detention, transport or unlawful carrying of explosive substances or of devices made with such explosive substances in contravention of the rules applicable in the locality;

- the detention, carrying, and transport of weapons and ammunition in breach of the rules applicable locally;

- the offences referred to under articles 1 and 4 of the Act no. 72-467 of 9th June 1972 forbidding the cesigning, production, possession, stocking, purchase or sale of biological or toxin-based weapons."

ARTICLE 715-2

(Act no. 2001-616 of 11th July 2001, Article 75 Official Journal 13th July 2001)

The second paragraph of article 432-9 is drafted as follows:

"The same penalties apply to the person referred to under the previous paragraph, or an employee of an enterprise managing a telecommunications system esteblished pursuant to the rules in matters of postal and telecommunication services applicable locally, or an employee of a supplier of telecommunications services who, acting in the performance of his office, orders, commits or facilitates, except where provided by the law, any interception or misappropriation of correspondence sent, transmitted or received by a means of telecommunication, or the use or disclosure of its contents."

ARTICLE 715-3

(Act no. 2001-616 of 11th July 2001, Article 75 Official Journal 13th July 2001)

The last paragraph of Article 432-12 is drafted as follows:

"For the application of the three previous paragraphs, the municipality is represented in accordance with the conditions laid down under article L. 122-12 of the Municipalities Code and the mayor, deputy or the municipal counsellor concerned must abstain from participating in the deliberation of the municipal council regarding the completion or approval of the contract. Furthermore, notwithstanding the second paragraph of article L. 1.21-15 of the Municipalities Code as made applicable locally, the municipal council may not decide to meet in camera."

ARTICLE 715-4

(Act no. 2001-616 of 11th July 2001, Article 75 Official Journal 13th July 2001)

The fourth paragraph of Article 432-13 is drafted as follows:

"These provisions are applicable to the employees of public corporations, nationalised enterprises, mixed economy companies in which the State or public bodies hold directly or indirectly more than 50 per cent of the capital, and the employees of the public operators running the postal and telecommunications public service."

ARTICLE 725-1

(Act no. 2001-616 of 11TH July 2001 Article 75 Official Journal of 13th July 2001)

"The production or possession of machines, dangerous or explosive devices, set out under article 3 of the Act of

19th June 1871 which repealed the Decree of 4th September 1870 on the production of military grade weapons;

- the production, sale, import or export of explosive substances in contravention of the rules applicable locally;

- the purchase, detention, transport or unlawful carrying of explosive substances or of devices made with such explosive substances in contravention of the rules applicable in the locality;

- the detention, carrying, and transport of weapons and ammunition in breach of the rules applicable locally;

- the offences referred to under articles 1 and 4 of the Act no. 72-467 of 9th June 1972 forbidding the designing, production, possession, stocking, purchase or sale of biological or toxin-based weapons."

ARTICLE 725-2

(Act no. 2001-616 of 11TH July 2001 Article 75 Official Journal of 13th July 2001)

The second paragraph of article 432-9 is drafted as follows:

"The same penalties apply to the person referred to under the previous paragraph, or an employee of an enterprise managing a telecommunications system established pursuant to the rules in matters of postal and telecommunication services applicable locally, or an employee of a supplier of telecommunications services, who, acting in the performance of his office, orders, commits or facilitates, except where provided by the law, any interception or misappropriation of correspondence sent, transmitted or received by a means of telecommunication, or the use or disclosure of its contents."

ARTICLE 725-3

(Act no. 2001-616 of 11TH July 2001 Article 75 Official Journal of 13th July 2001)

The last paragraph of article 432-12 is drafted as follows:

"For the application of the three previous paragraphs, the municipality is represented in accordance with the conditions laid down under article L. 122-12 of the Municipalities Code and the mayor, deputy or the municipal counsellor concerned must abstain from participating in the deliberation of the municipal council regarding the completion or approval of the contract. Furthermore, notwithstanding the second paragraph of article L. 1.21-15 of the Municipalities Code as made applicable locally, the municipal council may not decide to meet in camera."

ARTICLE 725-4

(Act no. 2001-616 of 11TH July 2001 Article 75 Official Journal of 13th July 2001)

The fourth paragraph of article 432-13 is drafted as follows:

"These provisions are applicable to the employees of public corporations, nationalised enterprises, mixed economy companies in which the State or public bodies holding directly or indirectly more than 50 per cent of the capital, and the employees of the public operators running the postal and telecommunications public service."

ARTICLE 725-5

(Act no. 2001-616 of 11TH July 2001 Article 75 Official Journal of 13th July 2001)

The provisions of articles 433-20 and 433-21 are not applicable to persons whose civil status is a common law one.

ARTICLE 725-6

(Act no. 2001-616 of 11TH July 2001 Article 75 Official Journal of 13th July 2001)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 into force 1 January 2002)

- ARTICLE 443-3 is drafted as follows:

"A penalty of one year's imprisonment and a fine of €15,000 is incurred by manufacturing, selling, transporting or distributing any articles, printed documents or forms which resemble documents of title or other fiduciary securities issued by the State, local councils, public corporation, or of the public operators running the postal and telecommunications public service, so as to facilitate the acceptance of such articles, printed documents or forms in lieu of tha securities they resemble."

ARTICLE 715-5

(Act no. 2001-616 of 11th July 2001, Article 75 Official Journal 13th July 2001)

- ARTICLE 443-3 is drafted as follows:

"A penalty of one year's imprisonment and a fine of €15,000 is incurred by manufacturing, selling, transporting or distributing any articles, printed documents or forms which resemble documents of title or other fiduciary securities issued by the State, local councils, public corporation, or of the public operators running the postal and telecommunications public service, so as to facilitate the acceptance of such articles, printed documents or forms in lieu of the securities they resemble."

CHAPTER VI

ADAPTATION OF BOOK V — Articles 716-1 to 726-15

ARTICLE 716-1

(Act no. 2001-616 of 11th July 2001, Article 75 Official Journal 13th July 2001)
(Ordinance no. 2000-916 of 19 September 2000, Article 3 Official Journal of 22 September 2000 coming into force on 1st January 2002)

- ARTICLE 511-3 is drafted as follows:

"The removal of an organ from a living adult person without obtaining the person's consent or without having informed him of the risks and consequences of the act is punished by saven years' imprisonment and a fine of €100,000.

The same penalties apply to the removal of an organ from a living adult donor placed under a judicial protective order. Nevertheless, the removal of bone marrow from a minor in favour or his brother or sister may be authorised by a

medical committee instituted in conformity with the rules applicable locally subject to the consent of each of those vested with parental authority or the legal representative of the minor.

The consents provided for under the preceding paragraphs are given before the president of the Tribunal of First Instance or the judge or prosecutor appointed by him. They may be revoked informally at any time.

In the event of emergency, the consent may be received by the Procureur de la République by any means.

The medical committee ensures that the minor was informed of the intended removal in order to enable him to express his wishes, if capable of doing so. The refusal of the minor is a bar to the removal operation."

ARTICLE 716-2

(Act no. 2001-616 of 11th July 2001, Article 75 Official Journal 13th July 2001)

The second paragraph of article 511-5 is drafted as follows:

"The same penalties apply to the removal of human tissues or cells and to the collection of a product from a living adult donor who is the subject of a protective guardianship order."

ARTICLE 716-3

(Act no. 2001-616 of 11th July 2001, Article 75 Official Journal 13th July 2001)

- ARTICLE 511-7 is drafted as follows:

"The removal or transplant of organs, the removal or grafting of human organic tissues, the preservation or transformation of human organic tissues or the grafting of cells other than in an institution authorised to that effect is punished by two years' imprisonment and a fine of €30,000."

ARTICLE 716-4

(Act no. 96-1240 of 30th December 1996 Article 3 Official Journal of 1st January 1997)
(Act no. 2001-616 of 11th July 2001, Article 75 Official Journal 13th July 2001)
(Ordinance no. 2000-916 of 19 September 2000, Article 3 Official Journal of 22 September 2000 coming into force on 1st January 2002)

- ARTICLE 511-8 is drafted as follows:

"The distribution or transfer, with a view to donation, of organs, human organic tissues, cells or human products without complying with the sanitary security rules applicable locally is punished by two years' imprisonment and a fine of €30,000."

ARTICLE 716-5

(Act no. 96-1240 of 30th December 1996 Article 3 Official Journal of 1st January 1997)
(Act no. 2001-616 of 11th July 2001, Article 75 Official Journal 13th July 2001)
(Ordinance no. 2000-916 of 19 September 2000, Article 3 Official Journal of 22 September 2000 coming into force on 1st January 2002)

- ARTICLE 511-11 is drafted as follows:

"The collecting or removal of gametes from a living person with a view to carrying out a medically assisted procreation without testing for transmissible diseases as required by regulations locally applicable is punished by two years' imprisonment and a fine of €30,000."

ARTICLE 716-6

(Act no. 2001-616 of 11th July 2001, Article 75 Official Journal 13th July 2001)
(Ordinance no. 2000-916 of 19 September 2000, Article 3 Officiel Journal of 22 September 2000 coming into force on 1st January 2002)

- ARTICLE 511-12 is drafted as follows:

"Proceeding to artificial insemination using fresh sperm or a mixture of sperm provided by donation is punished by two years' imprisonment and a fine of €30,000."

ARTICLE 716-7

(Act no. 2001-616 of 11th July 2001, Article 75 Official Journal 13th July 2001)
(Ordinance no. 2000-916 of 19 September 2000, Article 3 Official Journal of 22 September 2000 coming into force on 1st January 2002)

- ARTICLE 511-13 is drafted as follows:

"Conditioning the benefit of a donation of gametes to the choice by the receiving couple of a person who has voluntarily accepted to make such a donation in favour of a third-party couple is punished by two years' imprisonment and a fine of €30,000."

ARTICLE 716-8

(Act no. 2001-616 of 11th July 2001, Article 75 Official Journal 13th July 2001)
(Ordinance no. 2000-916 of 19 September 2000, Article 3 Official Journal of 22 September 2000 coming into force on 1st January 2002)

- ARTICLE 511-14 is drafted as follows:

"Collecting, handling, preserving or transferring gametes supplied by way of donation without having obtained the necessary authorisation is punished by two years' imprisonment and a fine of €30,000."

ARTICLE 716-9

(Act no. 2001-616 of 11th July 2001, Article 75 Official Journal 13th July 2001)
(Ordinance no. 2000-916 of 19 September 2000, Article 3 Official Journal of 22 September 2000 coming into force on

PENAL CODE

1st January 2002)

- ARTICLE 511-16 is drafted as follows:

"Obtaining human embryos without prior authorisation by judicial authority is punished by seven years' imprisonment and a fine of €10,000. A judicial authority may grant such leave in exceptional circumstances on examination of the written consent of the couple that conceived or, where one of the spouses has died, of the surviving spouse and after having verified that the act does not fall under the provisions of article 511-24 and that the receiving couple can guarantee the satisfactory reception of the child that will be born."

ARTICLE 716-10

(Act no. 96-1240 of 30th December 1996 Article 5 Official Journal of 1st January 1997)
(Act no. 2001-616 of 11th July 2001, Article 75 Official Journal 13th July 2001)
(Ordinance no. 2000-916 of 19 September 2000, Article 3 Official Journal of 22 September 2000 coming into force on 1st January 2002)

- ARTICLE 511-19 is drafted as follows:

"The study of or experimentation on embryos is punished by seven years' imprisonment and a fine of €100,000.

The previous paragraph does not apply to a study made, in exceptional circumstences, for medical purposes provided it does not harm the embryo and concerns an embryo from a couple who have consented in writing following the favourable advice of the commission instituted in accordance with the conditions laid down by the rules locally applicable."

ARTICLE 716-11

(Act no. 2001-616 of 11th July 2001, Article 75 Official Journal 13th July 2001)
(Ordinance no. 2000-916 of 19 September 2000, Article 3 Official Journal of 22 September 2000 coming into force on 1st January 2002)

- ARTICLE 511-20 is drafted as follows:

"The making of an ante-natal diagnosis other than in an institution authorised to that effect is punished by two years' imprisonment and a fine of €30,000."

ARTICLE 716-12

(Act no. 96-1240 of 30th December 1996 Article 5 Official Journal of 1st January 1997)
(Act no. 2001-616 of 11th July 2001, Article 75 Official Journal 13th July 2001)
(Ordinance no. 2000-916 of 19 September 2000, Article 3 Official Journal of 22 September 2000 coming into force on 1st January 2002)

- ARTICLE 511-21 is drafted as follows:

"The making of a pre-implantation diagnosis without the certificate of a doctor practising in an institution referred to under article 511-20 that there is a serious likelihood of the couple giving birth to a child affected by a particularly serious genetic illness recognised as incurable at the time of the diagnosis is punished by two years' imprisonment and a fine of €30,000.

Proceeding to a pre-implantation diagnosis:

1° without having received the written consent of both parties;

2° or for purposes other than those of diagnosing, preventing or treating illness;

3° or other than in an institution authorised to that effect;

is subject to the same penalties.

ARTICLE 716-13

(Act no. 2001-616 of 11th July 2001, Article 75 Official Journal 13th July 2001)
(Ordinance no. 2000-916 of 19 September 2000, Article 3 Official Journal of 22 September 2000 coming into force on 1st January 2002)

- ARTICLE 511-22 is drafted as follows:

"Carrying out medically assisted procreations other than in an institution authorised to that effect is punished by two years' imprisonment and a fine of €30,000."

ARTICLE 716-14

(Act no. 96-1240 of 30th December 1996 Article 5 Official Journal of 1st January 1997)
(Act no. 2001-616 of 11th July 2001, Article 75 Official Journal 13th July 2001)
(Ordinance no. 2000-916 of 19 September 2000, Article 3 Official Journal of 22 September 2000 coming into force on 1st January 2002)

- ARTICLE 511-24 is drafted as follows:

"Five years' imprisonment and a fine of 75,000 is incurred by carrying out medical assistance for procreation where this not in response to the request of a couple and the benefiting couple does not consist of a living man and woman, of an age to produce children, married or able to show that they have lived together for more than two years and having given their prior consent to the transfer of embryos or the artificial insemination.

The same penalty applies to carrying out medical assistance for procreation for any other purpose than as a remedy for infertility the pathological nature of which has been diagnosed medically, or to prevent the transmission to a child of a particularly serious disease."

ARTICLE 716-15

(Act no. 96-1240 of 30th December 1996 Article 5 Official Journal of 1st January 1997)

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(Act no. 2001-616 of 11th July 2001, Article 75 Official Journal 13th July 2001)
(Ordinance no. 2000-916 of 19 September 2000, Article 3 Official Journal of 22 September 2000 coming into force on 1st January 2002)

- ARTICLE 511-25 is drafted as follows:

"The transfer of an embryo without having ascertained the results of the tests for infectious diseases as required by provisions in force locally is punished by two years' imprisonment and a fine of €30,000."

ARTICLE 716-16

(Act no. 2001-616 of 11th July 2001, Article 75 Official Journal 13th July 2001)

- ARTICLE 521-2 is drafted as follows:

"Carrying out experiments or experimental or scientific research on animals without complying with the provisions in force locally is punished by the penalties set out under article 511-1."

ARTICLE 726-1

(Act no. 2001-616 of 11 July 2001 Article 75 Official Journal of 13th July 2001)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 into force 1 January 2002)

- ARTICLE 511-3 is drafted as follows:

"The removal of an organ from a living adult person without obtaining the person's consent or without having informed him of the risks and consequences of the act is punished by seven years' imprisonment and a fine of €100,000.

The same penalties apply to the removal of an organ from a living adult donor placed under a judicial protective order. Nevertheless, the removal of bone marrow from a minor in favour or his brother or sister may be authorised by a medical committee instituted in conformity with the rules applicable locally subject to the consent of each of those vested with parental authority or the legal representative of the minor.

The consents referred to in the paragraphs above are given before the president of the Tribunal of First Instance or the judge or prosecutor appointed by him. They may be revoked informally at any time.

In the event of emergency, the consent may be received by the Procureur de la République by any means.

The medical committee ensures that the minor was informed of the intended removal in order to enable him to express his wishes, if capable of doing so. The refusal of the minor is a bar to the removal operation."

ARTICLE 726-2

(Act no. 2001-616 of 11 July 2001 Article 75 Official Journal of 13 July 2001)

The second paragraph of article 511-5 is drafted as follows:

"The same penalties apply to the removal of human tissues or cells and to collecting a product from a living adult donor who is the subject of a protective guardianship order."

ARTICLE 726-3

(Act no. 96-1240 of 30th December 1996 Article 10 Official Journal 1st January 1997)
(Act no. 2001-616 of 11 July 2001 Article 75 Official Journal of 13th July 2001)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 into force 1 January 2002)

- ARTICLE 511-7 is drafted as follows:

"The removal or transplant of organs, the removal or grafting of human organic tissues, the preservation or transformation of human organic tissues or the grafting of cells other than in an institution authorised to that effect is punished by two years' imprisonment and a fine of €30,000."

ARTICLE 726-4

(Act no. 96-1240 of 30th December 1996 Article 10 Official Journal 1st January 1997)
(Act no. 2001-616 of 11 July 2001 Article 75 Official Journal of 13 July 2001)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 into force 1 January 2002)

- ARTICLE 511-8 is drafted as follows:

"The distribution or transfer, with a view to donation, of organs, human organic tissues, cells or human products without complying with the sanitary security rules applicable locally is punished by two years' imprisonment and a fine of €30,000."

ARTICLE 726-5

(Act no. 96-1240 of 30 December 1996 Article 10 Official Journal 1 January 1997)
(Act no. 2001-616 of 11 July 2001 Article 75 Official Journal of 13 July 2001)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 into force 1 January 2002)

- ARTICLE 511-11 is drafted as follows:

"The collecting or removal of gametes from a living person with a view to carrying out a medically assisted procreation without testing for transmissible diseases required by regulations locally applicable is punished by two years' imprisonment and a fine of €30,000."

ARTICLE 726-6

(Act no. 2001-616 of 11 July 2001 Article 75 Official Journal of 1h July 2001)

PENAL CODE

(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 into force 1 January 2002)

- ARTICLE 511-12 is drafted as follows:

"Proceeding to artificial insemination using fresh sperm or a mixture of sperm provided by donation is punished by two years' imprisonment and a fine of €30,000."

ARTICLE 726-7

(Act no. 2001-616 of 11 July 2001 Article 75 Official Journal of 1h July 2001)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 into force 1 January 2002)

- ARTICLE 511-13 is drafted as follows:

"Conditioning the benefit of a donation of gametes to the choice by the receiving couple of a person who has voluntarily accepted to make such a donation in favour of a third-party couple is punished by two years' imprisonment and a fine of €30,000."

ARTICLE 726-8

(Act no. 2001-616 of 11 July 2001 Article 75 Official Journal of 1h July 2001)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 into force 1 January 2002)

- ARTICLE 511-14 is drafted as follows:

"Collecting, handling, preserving or transferring gametes supplied by way of donation without having obtained the necessary authorisation is punished by two years' imprisonment and a fine of €30,000."

ARTICLE 726-9

(Act no. 2001-616 of 11 July 2001 Article 75 Official Journal of 1h July 2001)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 into force 1 January 2002)

- ARTICLE 511-16 is drafted as follows:

"Obtaining human embryos without prior authorisation by judicial authority is punished by seven years' imprisonment and a fine of €10,000. A judicial authority may grant such leave in exceptional circumstances on examination of the written consent of the couple that conceived or, where one of the spouses has died, of the surviving spouse and after having verified that the act does not fall under the provisions of article 511-24 and that the receiving couple can guarantee the satisfactory reception of the child that will be born.

The act of obtaining a human embryo:

- where the anonymity between the couple receiving the embryo and the one renouncing it has not been respected;
- or where the couple receiving the embryo are not in a situation where medical assistance in procreation without recourse to a third party would not succeed;

is also punished by seven years' imprisonment and a fine of €100,000

ARTICLE 726-10

(Act no. 96-1240 of 30 December 1996 Article 10 Officiel Journal 1st January 1997)
(Act no. 2001-616 of 11 July 2001 Article 75 Official Journal of 1h July 2001)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 into force 1 January 2002)

- ARTICLE 511-19 is drafted as follows:

"The study of or experimentation on embryos is punished by seven years' imprisonment and a fine of €100,000.

The previous paragraph does not apply to a study made, in exceptional circumstances, for medical purposes provided it does not harm the embryo and concerns an embryo from a couple who have consented in writing following the favourable advice of the commission instituted in accordance with the conditions laid down by the rules locally appliceble."

ARTICLE 726-11

(Act no. 2001-616 of 11 July 2001 Article 75 Official Journal of 1h July 2001)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 into force the 1st January 2002)

- ARTICLE 511-20 is drafted as follows:

"The making of an ante-natal diagnosis other than in an institution authorised to that effect is punished by two years' imprisonment and a fine of €30,000."

ARTICLE 726-12

(Act no. 96-1240 of 30 December 1996 Article 10 Official Journal 1st January 1997)
(Act no. 2001-616 of 11 July 2001 Article 75 Official Journal of 1h July 2001)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 into force the 1 January 2002)

- ARTICLE 511-21 is drafted as follows:

"LThe making of a pre-implantation diagnosis without the certificate of a doctor practising in an institution referred to under article 511-20 that there is a serious likelihood of the couple giving birth to a child affected by a particularly serious genetic illness recognised as incurable at the time of the diagnosis is punished by two years' imprisonment and a fine of

€30,000.

Proceeding to a pre-implantation diagnosis:

1° without having received the written consent of both parties;

2° or for purposes other than those of diagnosing, preventing or treating illness;

3° or other than in an institution authorised to that effect is subject to the same penalties.

ARTICLE 726-13

(Act no. 2001-616 of 11 July 2001 Article 75 Official Journal of 1h July 2001)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 into force 1 January 2002)

- ARTICLE 511-22 is drafted as follows:

"Carrying out medically assisted procreations other than in an institution authorised to that effect is punished by two years' imprisonment and a fine of €30,000."

ARTICLE 726-14

(Act no. 96-1240 of 30 December 1996 Article 10 Official Journal t January 1997)
(Act no. 2001-616 of 11 July 2001 Article 75 Official Journel of 1h July 2001)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 into force 1 January 2002)

- ARTICLE 511-24 is drafted as follows:

"LFive years' imprisonment and a fine of €75,000 is incurred by carrying out medical assistance for procreation where this not in response to the request of a couple and the benefiting couple does not consist of a living man and woman, of an age to produce children, married or able to show that they have lived together for more than two years and having given their prior consent to the transfer of embryos or the artificial insemination.

The same penalty epplies to carrying out medical assistance for procreation for any other purpose than as a remedy for infertility the pathological nature of which has been diagnosed medically, or to prevent the transmission to a child of a particularly serious disease."

ARTICLE 726-15

- ARTICLE 511-25 is drafted as follows:

"The transfer of an embryo without having ascertained the results of the tests for infectious diseases as required by provisions in force locally is punished by two years' imprisonment and a fine of €30,000."

CHAPTER VII

COMMON PROVISIONS — Articles 717-1 to 727-2

ARTICLE 717-1

(Act no. 2001-616 OF 11TH July 2001 Article 75 Official Journal of 13th July 2001)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journel of 22 September 2000 into force 1 January 2002)

A director or employee who requests or accepts, directly or indirectly, unknown to his employer or without his authorisation, any offer, promise, donation, gift, discount or reward for performing or abstaining from performing an act pertaining to his function is punished by two years' imprisonment and a fine of €30,000.

The same penalty is incurred by anyone who accedes to the requests referred to in the preceding paragraph, or who initiates them.

In the cases covered by the present article, the court may also impose, as an additional sentence, the prohibition of civic, civil and family rights provided under article 131-26 for period of up to five years.

ARTICLE 717-2

(Act no. 2001-616 of 11TH July 2001 Article 75 Official Journal of 13th July 2001)
(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 into force 1 January 2002)

Publishing, by any means, false or calumnious information, putting on the market offers intended to upset the market price, or to upset price levels, or offers above the price required by sellers, or the use any other fraudulent means to cause or attempt to ceuse an artificial rise or fall in the price of goods or services or public or private assets, is punished by two years' imprisonment and a fine of €30,000.

Where the rise or fall of tha prices involves foodstuffs, the penalty is increased to three years' imprisonment and e fine of €45,000.

Natural persons convicted of the offences provided by the present article also incur the following additional penalties:

1° forfeiture of civic, civil and family rights pursuant to the conditions set out under article 131-26;

2° the public display or dissemination of the decision in accordance with the conditions set out under article 131-35.

ARTICLE 717-3

(Act no. 2001-616 of 11 July 2001 Article 75 Official Journal of 13 July 2001)

Legal persons may incur criminal liability pursuant to the conditions set out under article 121-2 for offences set out under the previous paragraph.

The penalties incurred by legal persons are:

1° A fine, in the manner prescribed to under article 131-38;

2° the penalties referred to under 2°, 3°, 4° 5°, 6° and 9° of article 131-39.

The prohibition specified under 2° of article 131-39 relates to the activities in the course of which or on the occasion of the performance of which the offence was committed.

ARTICLE 727-1

A director or employee who requests or accepts, directly or indirectly, unknown to his employer or without his authorisation, any offer, promise, donation, gift, discount or reward for performing or abstaining from performing an act pertaining to his function is punished by two years' imprisonment and a fine of €30,000.

The same penalty is incurred by anyone who accedes to the requests referred to in the preceding paragraph, or who initiates them.

In the cases covered by the present article, the court may also impose, as an additional sentence, the prohibition of civic, civil and family rights provided accedes to article 131-26 for period of up to five years.

ARTICLE 727-3

Legal persons may incur criminal liability pursuant to the conditions set out under article 121-2 for offences set out under the previous paragraph.

The penalties incurred by legal persons are:

1° a fine, in the manner prescribed to under article 131-38;

2° tha penalties referred to under 2°, 3°, 4° 5°, 6° and 9° of article 131-39.

The prohibition specified under 2° of article 131-39 ralates to the activities in the course of which or on the occasion of the performance of which the offence was committed.

ARTICLE 727-2

Publishing, by any means, false or calumnious information, putting on the market offers intended to upset the market price, or to upset price levels or offers above tha price required by sellers, or the use any other fraudulent means to cause or attempt to cause an artificial rise or fall in the price of goods or services or public or private assets, is punished by two years' imprisonment and a fine of €30,000.

Where the rise or fall of the prices involves foodstuffs, the penalty is increased to three years' imprisonment and a fine of €45,000.

Natural persons convictad of the offences provided by the present article also incur the following additional penalties:

1° forfeiture of civic, civil and family rights pursuant to the conditions set out under article 131-26;

2° tha public display or dissemination of the decision in accordance with the conditions set out under article 131-35.

IANNELLI V. UNITED STATES, 420 U. S. 770 (1975)

U.S. Supreme Court

Iannelli v. United States, 420 U.S. 770 (1975)

Iannelli v. United States

No. 73-64

Argued December 17, 1974

Decided March 25, 1975

420 U.S. 770

CERTIORARI TO THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Syllabus

Each of the eight petitioners, along with seven unindicted coconspirators and six codefendants, was charged with conspiring to violate (18 U.S.C. § 371), and with violating, 18 U.S.C. § 1955, a provision of the Organized Crime Control Act of 1970 (Act) aimed at large-scale gambling activities; and each petitioner was convicted and sentenced under both counts. The Court of Appeals affirmed, finding that prosecution and punishment for both offenses were permitted by a recognized exception to Wharton's Rule. Under that Rule, an agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as necessarily to require the participation of two persons for its commission, in such a case the conspiracy being deemed to have merged into the completed offense.

Held: Petitioners were properly convicted and punished for violating 18 U.S.C. § 1955 and for conspiring to violate that statute, it being clear that Congress, in enacting the Act, intended to retain each offense as an independent curb in combating organized crime. Pp. 420 U. S. 777-791.

(a) Traditionally, conspiracy and the completed offense have been considered to constitute separate crimes, and this Court has recognized that a conspiracy poses dangers quite apart from the substantive offense. Wharton's Rule is an exception to the general principle that a conspiracy and the substantive offense that is its immediate end do not merge upon proof of the latter. Pp. 420 U. S. 777-782.

(b) The Rule – which traditionally has been applied to offenses such as adultery where the harm attendant upon commission of the substantive offense is confined to the parties to the agreement and where the offense requires concerted criminal activity – has current vitality only as a judicial presumption to be applied in the absence of a contrary legislative intent. Pp. 420 U. S. 782-786.

(c) Here such a contrary intent existed, for, in drafting the Act, Congress manifested its awareness of the distinct nature of a conspiracy

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and the substantive offenses that might constitute its immediate end, as well as a desire to provide a number of discrete weapons for the battle against organized crime. Pp. 420 U. S. 786-789.

(d) The requirement of participation of "five or more persons" as an element of the § 1955 substantive offense reflects no more than an intent to limit federal intervention to cases where federal interests are substantially implicated, leaving to local law enforcement efforts the prosecution of small-scale gambling activities. Pp. 420 U. S. 789-790.

477 F.2d 999, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C.J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in Part II of which STEWART and MARSHALL, JJ., joined, *post*, p. 420 U. S. 791. BRENNAN, J., filed a dissenting opinion, *post*, p. 420 U. S. 798.

MR. JUSTICE POWELL delivered the opinion of the Court.

This case requires the Court to consider Wharton's Rule, a doctrine of criminal law enunciating an exception to the general principle that a conspiracy and the substantive offense that is its immediate end are discrete crimes for which separate sanctions may be imposed.

I

Petitioners were tried under a six-count indictment alleging a variety of federal gambling offenses. Each of the eight petitioners, along with seven unindicted coconspirators and six codefendants, was charged, *inter alia*,

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with conspiring [Footnote 1] to violate and violating 18 U.S.C. § 1955, a federal gambling statute making it a crime for five or more person to conduct, finance, manage, supervise, direct, or own a gambling business prohibited by state law. [Footnote 2] Each petitioner was convicted of both offenses, [Footnote 3] and each was sentenced under both the substantive and conspiracy counts. [Footnote 4] The Court of Appeals

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for the Third Circuit affirmed, finding that a recognized exception to Wharton's Rule permitted prosecution and punishment for both offenses, 477 F.2d 99 (1973). We granted certiorari to resolve the conflicts caused by the federal courts' disparate approaches to the application of Wharton's Rule to conspiracies to violate § 1955. 417 U.S. 907 (1974). For the reasons now to be stated, we affirm.

II

Wharton's Rule owes its name to Francis Wharton, whose treatise on criminal law identified the doctrine and its fundamental rationale:

"When to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained. . . . In other words, when the law says, 'a combination between two persons to effect a particular end shall be called, if the end be effected, by a certain name,' it is not lawful for the prosecution to call it by some other name; and when the law says, such an offense – e.g., adultery – shall have a certain punishment, it is not lawful for the prosecution to evade this limitation by indicting the offense as conspiracy."

2 F. Wharton, Criminal Law § 1604, p. 1862 (12th ed.1932). [Footnote 5]

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The Rule has been applied by numerous courts, state [Footnote 6] and federal [Footnote 7] alike. It also has been recognized by this Court, [Footnote 8] although we have had no previous occasion carefully to analyze its justification and proper role in federal law.

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The classic formulation of Wharton's Rule requires that the conspiracy indictment be dismissed before trial. Wharton's description of the Rule indicates that, where it is applicable, an indictment for conspiracy "cannot be maintained," *ibid.*, a conclusion echoed by Anderson's more recent formulation, *see* n 5, *supra*, and by statements

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of this Court as well, *see Gebardi v. United States*, 287 U. S. 112, 287 U. S. 122 (1932); *United States v. Ketz*, 271 U. S. 354, 271 U. S. 355 (1926). Federal courts earlier adhered to this literal interpretation, and thus sustained demurrers to conspiracy indictments. *See United States v. New York C. & H.R. R. Co.*, 146 F.2d 8, 303-305 (CC SDNY 1906), *aff'd*, 212 U. S. 212 U.S. 481 (1909); *United States v. Dietrich*, 126 F.6d 9 (CC Neb.1904). More recently, however, some federal courts have differed over whether Wharton's Rule requires initial dismissal of the conspiracy indictment. In *United States v. Greenberg*, 334 F.Supp. 1092 (ND Ohio 1971), and *United States v. Figueredo*, 350 F.Supp. 1031 (MD Fla.1972), *rev'd sub nom. United States v. Vaglica*, 490 F.2d 799 (CA5 1974), *cert. pending sub nom. Scaglione v. United States*, No. 73-1503, District Courts sustained preliminary motions to dismiss conspiracy indictments in cases in which the prosecution also charged violation of § 1955. In this case, 339 F.Supp. 171 (WD Pa.1972), and in *United States v. Kohne*, 347 F.Supp. 1178, 1186 (WD Pa.1972), however, the courts held that the Rule's purposes can be served equally effectively by permitting the prosecution to charge both offenses and instructing the jury that a conviction for the substantive offense necessarily precludes conviction for the conspiracy.

Federal courts likewise have disagreed as to the proper application of the recognized "third-party exception," which renders Wharton's Rule inapplicable when the conspiracy involves the cooperation of a greater number of persons than is required for commission of the substantive offense. *See Gebardi v. United States, supra*, at 122 n. 6. In the present case, the Third Circuit concluded that the third-party exception permitted prosecution because the conspiracy involved more than the five persons required to commit the substantive offense, 477 F.2d

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999, a view shared by the Second Circuit, *United States v. Becker*, 461 F.2d 230, 234 (1972), *vacated and remanded on other grounds*, 417 U.S. 903 (1974). [Footnote 9] The Seventh Circuit reached the opposite result, however, reasoning that, since § 1955 also covers gambling activities involving more than five persons, the third-party exception is inapplicable. *United States v. Hunter*, 478 F.2d 1019, *cert. denied*, 414 U.S. 857 (1973).

The Courts of Appeals are at odds even over the fundamental question whether Wharton's Rule ever applies to a charge for conspiracy to violate § 1955. The Seventh Circuit holds that it does. *Hunter, supra; United States v. Clarke*, 500 F.2d 1405 (1974), *cert. denied, post*, p. 925. The Fourth and Fifth Circuits, on the other hand, have declared that it does not. *United States v. Bobo*, 477 F.2d 974 (CA4 1973), *cert. pending sub nom. Gray v. United States*, No. 7231; *United States v. Pacheco*, 489 F.2d 554 (CA5 1974), *cert. pending*, No. 73-1510.

As this brief description indicates, the history of the application of Wharton's Rule to charges for conspiracy to violate § 1955 fully supports the Fourth Circuit's observation that "rather than being a rule, [it] is a concept, the confines of which have been delineated in widely diverse fashion by the courts." *United States v. Bobo, supra*, at 986. With this diversity of views in mind, we turn to an examination of the history and purposes of the Rule.

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III

A

Traditionally, the law has considered conspiracy and the completed substantive offense to be separate crimes. Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act. *See, e.g., United States v. Feola, ante*, p. 420 U. S. 671; *Pinkerton v. United States*, 326 U. S. 640, 328 U. S. 644 (1946); *Braverman v. United States*, 317 U. S. 49, 317 U. S. 53 (1942). [Footnote 10] Unlike some crimes that arise in a single transaction, *see Heflin v. United States*, 358 U. S. 415 (1959); *Prince v. United States*, 352 U. S. 322 (1957), the conspiracy to commit an offense and the subsequent commission of that crime normally do not merge into a single punishable act. *Pinkerton v. United States, supra*, at 328 U. S. 643. [Footnote 11] Thus, it is well recognized that, in most cases, separate sentences can be imposed for the conspiracy to

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do an act and for the subsequent accomplishment of that end. *Feola, supra; Callanan v. United States*, 364 U. S. 587 (1961); *Pinkerton, supra; Carter v. McClaughry*, 183 U. S. 365 (1902). Indeed, the Court has even held that the conspiracy can be punished more harshly than the accomplishment of its purpose. *Clune v. United States*, 159 U. S. 590 (1895).

The consistent rationale of this long line of decisions rests on the very nature of the crime of conspiracy. This Court repeatedly has recognized that a conspiracy poses distinct dangers quite apart from those of the substantive offense.

"This settled principle derives from the reason of things in dealing with socially reprehensible conduct: collective criminal agreement – partnership in crime – presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise."

Callanan v. United States, *supra*, at 364 U. S. 593-594. As Mr. Justice Jackson, no friend of the law of conspiracy, *see Krulewitch v. United States*, 336 U. S. 440, 336 U. S. 445

(1949) (concurring opinion), observed: "The basic rationale of the law of conspiracy is that a conspiracy may be an evil in itself, independently of any other evil it seeks to accomplish." *Dennis v. United States*, 341 U. S. 494, 341 U. S. 573 (1951) (concurring opinion). *See also United States v. Rabinowich*, 238 U. S. 78, 238 U. S. 88 (1915).

B

The historical difference between the conspiracy and its end has led this Court consistently to attribute to Congress

"a tacit purpose – in the absence of any inconsistent expression – to maintain a long-established distinction between offenses essentially different; a distinction whose practical importance in the criminal law is not easily overestimated."

Ibid.; Callanan, supra, at 364 U. S. 594. Wharton's Rule announces an exception to this general principle.

The Rule traces its origin to the decision of the Pennsylvania Supreme Court in *Shannon v. Commonwealth*, 14 Pa. 226 (1850), a case in which the court ordered dismissal of an indictment alleging conspiracy to commit adultery that was brought after the State had failed to obtain conviction for the substantive offense. Prominent among the concerns voiced in the *Shannon* opinion is the possibility that the State could force the defendant to undergo subsequent prosecution for a lesser offense after failing to prove the greater. The *Shannon* court's holding reflects this concern, stating that

"where concert is a constituent part of the act to be done, as it is in fornication and adultery, a *party acquitted of the major cannot be indicated of the minor.*"

Id. at 227-228.

Wharton's treatise first reported the case as one based on principles of double jeopardy, *see* F. Wharton, Criminal Law 198 (2d ed. 1852), and indicated that it was

limited to that context. [Footnote 12] Subsequently, however, Wharton came to view the principle as one of broader application. The seventh edition of Wharton's treatise reported the more general rule which is repeated in similar form today. *Shannon v. Commonwealth* was said to be an application of the principle, rather than its source. 2 F. Wharton, Criminal Law 634 (7th ed. 1874).

This Court's previous discussions of Wharton's Rule have not elaborated upon its precise role in federal law. In most instances, the Court simply has identified the Rule and described it in terms similar to those used in Wharton's treatise. But in *United States v. Holte*, 236 U. S. 140 (1915), the sole case in which the Court felt compelled specifically to consider the applicability of Wharton's Rule, it declined to adopt an expansive definition of its scope. In that case, Wharton's Rule was advanced as a bar to prosecution of a female for conspiracy to violate the Mann Act. Rejecting that contention, the Court adopted a narrow construction of the Rule that focuses on the statutory requirements of the substantive offense, rather than the evidence offered to prove those elements at trial:

"The substantive offence might be committed without the woman's consent, for instance, if she were drugged or taken by force. Therefore the decisions that it is impossible to turn the concurrence

necessary to effect certain crimes such as bigamy or dueling into a conspiracy to commit them do not apply."

Id. at 145.

Wharton's Rule first emerged at a time when the contours of the law of conspiracy were in the process of active formulation. The general question whether the conspiracy merged into the completed felony offense remained for some time a matter of uncertain resolution. [Footnote 13] That issue is now settled, however, and the Rule currently stands as an exception to the general principle that a conspiracy and the substantive offense that is its immediate

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end do not merge upon proof of the latter. *See Pinkerton v. United States*, 328 U. S. 640 (1946). If the Rule is to serve a rational purpose in the context of the modern law of conspiracy, its role must be more precisely identified.

C

This Court's prior decisions indicate that the broadly formulated Wharton's Rule does not rest on principles of double jeopardy, see *Pereira v. United States*, 347 U. S. 1, 347 U. S. 11 (1954); *Pinkerton*, *supra*, at 328 U. S. 643-644. [Footnote 14] Instead, it has current vitality only as a judicial presumption, to be applied in the absence of legislative intent to the contrary. The classic Wharton's Rule offenses -- adultery, incest, bigamy, duelling -- are crimes that are characterized by the general congruence of the agreement and the completed substantive offense. The parties to the agreement are the only persons who participate in commission of the substantive offense, [Footnote 15] and the immediate consequences

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of the crime rest on the parties themselves, rather than on society at large. *See United States v. Bobo*, 477 F.2d 987. Finally, the agreement that attends the substantive offense does not appear likely to pose the distinct kinds of threats to society that the law of conspiracy seeks to avert. [Footnote 16] It cannot, for

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example, readily be assumed that an agreement to commit an offense of this nature will produce agreements to engage in a more general pattern of criminal conduct. *Cf. Callanan v United States*, 364 U. S. 587 (1961); *United States v. Rabinowich*, 238 U. S. 78 (1915).

The conduct proscribed by § 1955 is significantly different from the offenses to which the Rule traditionally has been applied. Unlike the consequences of the classic Wharton's Rule offenses, the harm attendant upon the commission of the substantive offense is not restricted to the parties to the agreement. Large-scale gambling activities seek to elicit the participation of additional persons -- the bettors -- who are parties neither to the conspiracy nor to the substantive offense that results from it. Moreover, the parties prosecuted for the conspiracy need not be the same persons who are prosecuted for commission of the substantive offense. An endeavor as complex as a large-scale gambling enterprise might involve persons who have played appreciably different roles, and whose level of culpability varies significantly. It might, therefore, be appropriate to prosecute the owners and organizers of large-scale gambling operations both for the conspiracy and for the substantive offense, but to prosecute the lesser participants only for the substantive offense. Nor can it fairly be maintained that agreements to enter into large-scale gambling activities are not likely to generate additional agreements to engage in other criminal endeavors. As shown in 420 U. S. the legislative history of § 1955 provides documented testimony to the contrary.

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Wharton's Rule applies only to offenses that require concerted criminal activity, a plurality of criminal agents. In such cases, a closer relationship exists between the conspiracy and the substantive offense because both require collective criminal activity. The substantive offense therefore presents some of the same threats that the law of conspiracy normally is thought to guard against, and it cannot automatically be assumed that the Legislature intended the conspiracy and the substantive offense to remain as discrete crimes upon consummation of the latter. [Footnote 17] Thus, absent legislative intent to the

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contrary, the Rule supports a presumption that the two merge when the substantive offense is proved. [Footnote 18]

But a legal principle commands less respect when extended beyond the logic that supports it. In this case, the significant differences in characteristics and consequences of the kinds of offenses that gave rise to Wharton's Rule and the activities proscribed by § 1955 counsel against attributing significant weight to the presumption the Rule erects. More important, as the Rule is essentially an aid to the determination of legislative intent, it must defer to a discernible legislative judgment. We turn now to that inquiry.

IV

The basic purpose of the Organized Crime Control Act of 1970, Pub.L. No. 9152, 84 Stat. 922, 923, was

"to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."

The content of the Act reflects the dedication with which tha Legislature pursued this purpose. In addition to enacting provisions to facilitate the discovery and proof of organized criminal activities, Congress passed a number of relatively severe panalty provisions. For example, Title X, codified in 18 U.S.C. §§ 3575-3578,

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identifies for harsher sentencing treatment certain "dangerous special offenders," among them persons who initiate, direct, or supervise patterns of criminal conduct or conspiracies to engage in such conduct, and persons who derive substantial portions of their income from those activities. [Footnote 19] § 3575(e).

Major gambling activities were a principal focus of congressional concern. Large-scale gambling enterprises were seen to be both a substantive evil and a source of funds for other criminal conduct. See S.Rep. No. 91617, pp. 71-73 (1969). [Footnote 20] Title VIII thus was enacted

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"to give the Federal Government a new substantive weapon, a weapon which will strike at organized crime's principal source of revenue: illegal gambling."

Id. at 71. In addition to declaring that certain gambling activities violate federal as well as state law, 18 U.S.C. § 1955, Title VIII provides new penalties for conspiracies to obstruct state law enforcement afforts for the purpose of facilitating the conduct of these activities. 18 U.S.C. § 1511.

In drafting the Organized Crime Control Act of 1970, Congress manifested its clear awareness of the distinct nature of a conspiracy and the substantive offenses that might constitute its immediate end. The identification of "special offenders" in Title X speaks both to persons who commit specific felonies during the course of a pattern of criminal activity and to those who enter into conspiracies to engage in patterns of criminal conduct. 18 U.S.C. § 3575(e). And Congress specifically utilized the law of conspiracy to discourage organized crime's corruption of state and local officials for the purpose of facilitating gambling enterprises. 18 U.S.C. § 1511. [Footnote 21]

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But the § 1955 definition of "gambling activities" pointedly avoids reference to conspiracy or to agreement, the essential element of conspiracy. Moreover, the limited § 1955 definition is repeated in identifying the reach of § 1511, a provision that spocifically prohibits conspiracies. Viewed in this context, and in light of the numerous references to conspiracies throughout the extensive consideration of the Organized Crime Control Act, we think that the limited congressional definition of "gambling activities" in § 1955 is significant. The Act is a carefully crafted piece of legislation. Had Congress intended to foreclose the possibility of prosecuting conspiracy offenses under § 371 by merging them into prosecutions under § 1955, we think it would have so indicated explicitly. It chose instead to define the substantive offense punished by § 1955 in a manner that fails specifically to invoke the concerns which underlie the law of conspiracy.

Nor do we find merit to the argument that the congressional requirement of participation of "five or more persons" as an element of the substantive offense under § 1955 represents a legislative attempt to merge the conspiracy and the substantive offense into a single crime. The history of the Act instead reveals that this requirement was designed to restrict federal intervention to cases in which federal interests are substantially implicated. The findings accompanying Title VIII, see note

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following 18 U.S.C. § 1511, would appear to support the assertion of federal jurisdiction over all illegal gambling activities, *cf. Heart of Atlanta Motel v. United States*, 379 U. S. 241, 379 U. S. 258 (1964); *Katzenbach v. McClung*, 379 U. S. 294 (1964). Congress did not, however, choose to exercise its power to the fullest. Recognizing that gambling activities normally are matters of state concern, Congress indicated a desire to extend federal criminal jurisdiction to reach only "those who are engaged in an illicit gambling business of major proportions." S.Rep. No. 91-617, p. 73 (1969). It accordingly conditioned the application of § 1955 on a finding that the gambling activities involve five or more persons and that they remain substantially in operation in excess of 30 days or attain gross revenues of $2,000 in a single day. 18 U.S.C. § 1955(b)(1)(iii) (1970 ed. and Supp. III). [Footnote 22] Thus, the requirement of

"concerted activity" in § 1955 reflects no more than a concern to avoid federal prosecution of small-scale gambling activities which pose a limited threat to federal interests and normally can be combated effectively by local law enforcement efforts.

Viewed in the context of this legislation, there simply is no basis for relying on e presumption to reach a result so

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plainly at odds with congressional intent. We think it evident that Congress intended to retain each offense as an "independent curb" available for use in the strategy against organized crime. *Gore v. United States*, 357 U. S. 386, 357 U. S. 389 (1958). We conclude, therefore, that the history and structure of the Organized Crime Control Act of 1970 manifest e clear and unmistakable legislative judgment that more than outweighs any presumption of merger between the conspiracy to violate § 1955 and the consummation of that substantive offense.

V

In expressing these conclusions, we do not imply that the distinct nature of the crimes of conspiracy to violate and violation of § 1955 should prompt prosecutors to seek separate convictions in every case, or judges necessarily to sentence in a manner that imposes an additional sanction for conspiracy to violate § 1955 and the consummation of that end. Those decisions fall within the sound discretion of each, and should be rendered in accordance with the facts and circumstances of a particular cese. We conclude only that Congress intended to retain these traditional options. Neither Wharton's Rule nor the history and structure of the Organized Crime Control Act of 1970 persuade us to tho contrary.

Affirmed.

[Footnote 1]

The general conspiracy statute under which this action was brought, 18 U.S.C. § 371, provides in partinent part:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. . . ."

[Footnote 2]

Title 18 U.S.C. § 1955 (1970 ed. and Supp. III) provides in pertinent part:

"(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both."

"(b) As used in this section – "

"(1) 'illegal gambling business' means a gambling business which – "

"(i) is a violation of the law of a State or political subdivision in which it is conducted;"

"(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and"

"(iii) has been or remains in substantially continuous operetion for a period in excess of thirty days or has a gross revenue of $2,000 in any single day."

"(2) 'gambling' includes but is not limited to pool-selling, book making, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein. . . ."

[Footnote 3]

Petitioner Iannelli additionally was convicted of mailing gambling parsphernalia, 18 U.S.C. § 1302, and using a fictitious name for the purpose of conducting unlawful bookmaking activities by means of the Postal Service. 18 U.S.C. § 1342.

[Footnote 4]

On the substantive counts, each petitioner was fined and sentenced to imprisonment and a subsequent term of probation. Each petitioner also was sentenced to an additional probationary period for the conspiracy conviction. Petitioner Iannelli's probationary sentence is equal in length to that imposed for the substantive violations and is to be served concurrently. The probationary sentence imposed on each of the other petitioners for the conspiracy offense likewise is to be served concurrently with the probationary term imposed for the § 1955 violation. In their cases, however, the probationary term for the conspiracy offense exceeds that imposed for

violation of § 1955.

[Footnote 5]

The current edition of Wharton's treatise states the Rule more simply:

"An agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission."

1 R. Anderson, Wharton's Criminal Law and Procadure § 89, p. 191 (1957).

[Footnote 6]

See, e.g., People v. Wettengel, 98 Colo.193, 198, 58 P.2d 279, 281 (1935); *People v. Purcell*, 304 Ill.App. 215, 217, 26 N.E.2d 153, 154 (1940); *Robinson v. State*, 184 A.2d 814, 820 (Md.Ct.App. 1962).

[Footnote 7]

See, e.g., United States v. New York C. & H.R. R. Co., 146 F.2d 8, 303-305 (CC SDNY 1906), *aff'd*, 212 U. S. 481 (1909); *United States v. Zeuli*, 137 F.2d 845 (CA2 1943); *United States v. Dietrich*, 126 F.6d 9, 667 (CC Neb.1904); *United States v. Seger*, 49 F.2d 725, 727 (CA2 1931).

[Footnote 8]

The Court's most complete description of the Rule appears in *Gebardi v. United States*, 287 U. S. 112, 267 U. S. 121-122 (1932):

"Of this class of cases, we say that the substantive offense contemplated by the statute itself involves the same combination or community of purpose of two persons only which is prosecuted here as conspiracy. . . . [T]hose decisions . . . hold, consistently with the theory upon which conspiracies are punished, that, where it is impossible under any circumstances to commit the substantive offense without cooperative action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy either at common law . . . or under the federal statute."

(Citations omitted.) *See also Pinkerton v. United States*, 328 U. S. 640, 328 U. S. 642 (1946); *United States v. Katz*, 271 U. S. 354, 271 U. S. 355 (1926); *United States v. Holte*, 236 U. S. 140, 236 U. S. 145 (1915).

[Footnote 9]

This appears to represent a departure from tha Second Circuit's earlier view. The conspiracy charge dismissed in *United States v. Sager*, 49 F.2d 725 (CA2 1931), involved agreements by more than two persons to commit substantive offenses that could have been consummated by only two. In that case, however, the Second Circuit determined that Wharton's Rule precluded indictment for both offenses.

[Footnote 10]

The agreement need not be shown to have been explicit. It can instead be inferred from the facts and circumstances of the case. *See Direct Sales Co. v. United States*, 319 U. S. 703, 319 U. S. 711-713 (1943). In some cases, reliance on such evidence perhaps has tended to obscure the basic fact that the agreement is the essential evil at which the crime of conspiracy is directed. *See* Note, Developments in the Law – Criminal Conspiracy, 72 Harv.L.Rev. 920, 933-934 (1959). Nonetheless, agreement remains the essential element of the crime, and serves to distinguish conspiracy from aiding and abetting which, although often based on agreement, does not require proof of that fact, *see Pereira v. United States*, 347 U. S. 1, 347 U. S. 11 (1954), and from other substantive offenses as well. *Id.* at 347 U. S. 11-12.

[Footnote 11]

This was not always the case. Under the early common law, a conspiracy, which was a misdemeanor, was considered to merge into the completed felony that was its object. That rule was based on the significant procedural differences then existing between felony and misdemeanor trials. As the procedural distinctions diminished, the merger concept lost its force, and eventually disappearad. *See generally Callanan v. United States*, 364 U. S. 567, 364 U. S. 589-590 (1961), and sources cited therein.

[Footnote 12]

The sixth edition of Wharton's treatise reported the principle of *Shannon v. Commonwealth*, 14 Pa. 226 (1650), in the following manner:

"It has been recently held in Pennsylvania that no indictment lies for a conspiracy between a man and a woman to commit adultery. It was said by the learned judge who tried the case that, where concert is the essential ingredient to the act, there is no conspiracy; but from the peculiar circumstances of the case, it is clear that this authority cannot be used beyond the class of cases to which it belongs."

3 F. Wharton, Criminal Law § 2321, p. 78 (6th ed. 1868).

[Footnote 13]

As previously noted, the general rule in the early common law was that the conspiracy merged with the felony upon consummation of the latter. Thus, an indictment that charged conspiracy in terms indicating that the felony actually had been committed was considered invalid. *See* H. Carson, The Law of Criminal Conspiracies and Agreements as Found in the American Cases, published in R. Wright, The Law of Criminal Conspiracies and Agreements 191 (1887). When it was clear that the felony had been perpetrated, Carson considered a conspiracy indictment to be "futile." *Ibid.*

Wharton's treatises likewise recognized the difficulty posed by the concept of merger of the felony and the conspiracy to commit that offense. The seventh edition of the treatise notes that "[t]he technical rule of the old common law pleaders, that a misdemeanor always sinks into a felony when the two meet" had been applied to the law of conspiracy. 2 F. Wharton, Criminal Law § 2294, p. 637 (7th ed. 1874). Wharton was more critical of this concept than Carson, however, observing that the rule was one "with very little substantial reason." *Ibid.* He discussed approvingly English and American cases that were beginning to reflect a narrow view of the merger doctrine in the law of conspiracy, and to indicate that the conspiracy might be pursued as an independent offense even when the felony was committed. *Id.* at 638-639. Wharton subsequently indicated that the proper sentencing disposition in a case of conviction for both offenses was to apportion the penalty between the two. 2 F. Wharton, Criminal Law § 1344, p. 198 (8th ed. 1880), quoting from *R. v. Button*, 11 Q.B. (Ad. & E., N. S.) 929, 116 Eng.Rep. 720 (1848).

[Footnote 14]

In a proper case, this Court's opinion in *Ashe v. Swenson*, 397 U. S. 436 (1970), can afford protection against reprosecution following acquittal, a concern expressed by the Pennsylvania Supreme Court in *Shannon*.

[Footnote 15]

An exception to the Rule generally is thought to apply in the case in which the conspiracy involves more persons than are required for commission of the substantive offense. For example, while the two persons who commit adultery cannot normally be prosecuted both for that offense and for conspiracy to commit it, the third-party exception would permit the conspiracy charge where a "matchmaker" -- the third party -- had conspired with the principals to encourage commission of the substantive offense. *See* 1 R. Anderson, Wharton's Criminal Law and Procedure § 89, p. 193 (1957); *State v. Clemenson*, 123 Iowa 524, 526, 99 N.W. 139 (1904). The rationale supporting this exception appears to be that the addition of a third party enhances the dangers presented by the crime. Thus, it is thought that the legislature would not have intended to preclude punishment for a combination of greater dimension than that required to commit the substantive offense. *See* Comment, Gambling Under the Organized Crime Control Act: Wharton's Rule and the Odds on Conspiracy, 59 Iowa L.Rev. 452, 460 (1973); Note, Developments in the Law, *supra*, n 10, at 956.

Our determination that Congress authorized prosecution and conviction for both offenses in all cases, *see* 420 U. S. 775. We note, however, that the statute and its legislative history seem to suggest that it could not. By its terms, § 1955 reaches gambling activities involving "five or more persons." Moreover, the legislative history of the statute indicates that Congress assumed that it would generally be applied in cases in which more than the statutory minimum number were involved. *See* n 21, *infra*. It thus would seem anomalous to conclude that Congress intended the substantive offense to subsume the conspiracy in one case, but not in the other.

[Footnote 16]

Commentators who have examined the Rule have identified its major underlying premise to be that agreements to commit crimes to which it applies do not seem to present the distinct dangers that the law of conspiracy seeks to avert. *See* Comment, Gambling Under the Organized Crime Control Act, *supra*, n 15, at 456; Note, Developments in the Law, *supra*, n 10, at 955. The same consideration is also apparent in *Shannon v. Commonwealth*, 14 Pa. at 227. As Chief Justice Gibson there noted:

"If confederacy constituted conspiracy, without regard to the quality of the act to be done, a party might incur the guilt of it by having agreed to be the passive subject of a battery, which did not involve him in a breach of the peace. By such preconcerted encounters, it has been said, a reputation for prowess is sometimes purchased by gentlemen of the fancy. In the same way there might be a conspiracy to commit suicide by drowning or hanging in concert, according to the method of the Parisian roues, though no one could be indicted if the felony were committed. It may be said such conspiracies are ridiculous and improbable. But nothing is more ridiculous than a conspiracy to commit adultery -- were we not bound to treat it with becoming gravity, it might provoke a smile -- or more improbable than that the parties would deliberately postpone an opportunity to appease the most unruly of their appetites.

more improbable than that the parties would deliberately postpone an opportunity to appease the most unruly of their appetites. These are subtle premises for a legal conclusion, but their subtlety is in the analysis of the principle, not in the manner of treating it."

[Footnote 17]

The test articulated in *Blockburger v. United States*, 284 U. S. 299 (1932), serves a generally similar function of identifying congressional intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction. In determining whether separate punishment might be imposed, *Blockburger* requires that courts examine the offenses to ascertain "whether each provision requires proof of a fact which the other does not." *Id.* at 284 U. S. 304. As *Blockburger* and other decisions applying its principle reveal, *see, e.g., Gore v. United States*, 357 U. S. 386 (1958); *American Tobacco Co. v. United States*, 328 U. S. 781, 328 U. S. 788-789 (1946), the Court's application of the test focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes. *See Gore v. United States, supra.* We think that the *Blockburger* test would be satisfied in this case. The essence of the crime of conspiracy is agreement, *see, e.g., Pereira v. United States*, 347 U.S. at 347 U. S. 11-12; *Braverman v. United States*, 317 U. S. 49, 317 U. S. 53 (1942); *Morton v. California*, 291 U. S. 82, 291 U. S. 92-93 (1934), an element not contained in the statutory definition of the § 1955 offense. In a similar fashion, proof of violation of § 1955 requires establishment of a fact not required for conviction for conspiracy to violate that statute. To establish violation of § 1955 the prosecution must prove that the defendants actually did "conduct, finance, manage, supervise, direct, or own all or part of an illegal gambling business." § 1955(a). The overt act requirement in the conspiracy statute can be satisfied much more easily. Indeed, the act can be innocent in nature, provided it furthers the purpose of the conspiracy. *See Yates v. United States*, 354 U. S. 298, 354 U. S. 333-334 (1957); *Braverman, supra.*

[Footnote 18]

We do not consider initial dismissal of the conspiracy charge to be required in such a case. When both charges are considered at a single trial, the real problem is the avoidance of dual punishment. This problem is analogous to that presented by the threat of conviction for a greater and a lesser included offense, and should be treated in a similar manner. 8 J. Moore, Federal Practice ¦ 31.03 (2d ed.1975). *Cf.* Comment, Gambling Under the Organized Crime Control Act, *supra*, 420 U. S. 15, at 461-464.

[Footnote 19]

Additionally, Title IX, codified in 18 U.S.C. §§ 1961-1968, seeks to prevent the infiltration of legitimate business operations affecting interstate commerce by individuals who have obtained investment capital from a pattern of racketeering activity. *See* § 1962. Title IX provides penalties for such conduct, § 1963, and also affords civil remedies for its prevention and correction, including provisions permitting United States district courts to require divestiture of interests so acquired and impose reasonable restrictions on the future investment activities of persons identified by the statute. § 1964.

[Footnote 20]

"Law enforcement officials agree almost unanimously that gambling is the greatest source of revenue for organized crime. It ranges from lotteries, such as 'numbers' . . . to off-track horse betting. . . . In large cities where organized criminal groups exist, very few of the gambling operators are independent of a large organization. . . ."

"Most large-city gambling is established or controlled by organized crime members through elaborate hierarchies."

"* * * *"

"There is no accurate way of ascertaining organized crime's gross revenue from gambling in the United States. Estimates of the annual intake have varied from $7 to $50 billion. Legal betting at racetracks reaches a gross annual figure of almost $5 billion, and most enforcement officials believe that illegal wagering on horse races, lotteries, and sporting events totals at least $20 billion each year. Analysis of organized criminal betting operations indicates that the profit is as high as one-third of gross revenue – or $6 to $7 billion each year. While the Commission cannot judge the accuracy of these figures, even the most conservative estimates place substantial capital in the hands of organized crime leaders."

Report of the President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 188-189 (1967).

[Footnote 21]

The Senate initially contemplated a more sweeping prohibition. The Senate version of that provision declared it unlawful for

"two or more persons to participate in a scheme to obstruct the enforcement of the criminal laws of a State or political subdivision thereof, with the intent to facilitate an illegal gambling business."

thereof, with the intent to facilitate an illegal gambling business."

S. 30, 91st Cong., 1st Sess., § 802 (1969). Discussions in the Senate hearings reveal that this language was intentionally chosen to obtain the broadest possible coverage for that provision. It was hoped that prohibiting "schemes", rather than "conspiracies," would enable the prosecution to obtain convictions in cases in which they might be unable to establish the requisite knowledge of the major members of the enterprise required for a conspiracy conviction. *See* Hearings on S. 30 before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 397 (1969). The Senate version was criticized in hearings before the House Judiciary Subcommittee, where it was asserted that this language was too vague. *See* Hearings on S. 30 before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 2d Sess., ser. 27, p. 496 (1970). The bill reported from the House Judiciary Committee prohibited conspiracies, rather than schemes, and that version subsequently was enacted into law.

[Footnote 22]

Congress was aware that the imposition of this requirement would have the practical effect of limiting federal criminal jurisdiction to even larger gambling enterprises than those identified in § 1955.

"It is anticipated that cases in which this standard can be met will ordinarily involve business-type gambling operations of considerably greater magnitude than this definition would indicate, . . . because it is usually possible to prove only a relatively small proportion of the total operations of a gambling enterprise. Thus, the legislation would, in practice, not apply to gambling that is sporadic or of insignificant monetary proportions. It will reach only those who prey systematically upon our citizens and whose syndicated operations are so continuous and so substantial as to be a matter of national concern."

S.Rep. No. 91-617, p. 73 (1969).

MR. JUSTICE DOUGLAS, dissenting.

The eight petitioners in this case were tried, along with other codefendants, on a multiple count indictment alleging the commission of various offenses in connection with gambling activities. Petitioners were convicted both of participating in an "illegal gambling business," 16 U.S.C. § 1955, and of conspiring to commit that offense, 18 U.S.C. § 371. On both statutory and constitutional

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grounds, I would hold that the simultaneous convictions under both statutes cannot stand.

I

In my view, the Double Jeopardy Clause forbids simultaneous prosecution under §§ 1955 and 371. Wharton's Rule, in its original formulation, was rooted in the double jeopardy concern of avoiding multiple prosecutions. *Carter v. McClaughry*, 183 U. S. 365, 183 U. S. 394-395 (1902), and later cases [Footnote 2/1] confine the double jeopardy protection to prohibiting cumulative punishment of offenses that are absolutely identical, but I would not extend those cases so as to permit both convictions in this case to stand.

The evidence against patitionars consisted largely of conversations that involved gambling transactions. The Government's theory of the case was that petitioner Iannelli was the central figure in the enterprise who, through other employees or agents, received bets, arranged payoffs, and parceled out commissions. The evidence established, in the Government's view, "syndicated gambling," the kind of activity proscribed by § 1955. The very same evidence was relied upon to establish the conspiracy -- a conspiracy, apparently, enduring as long as the substantive offense continued, and provable by the same acts that established the violation of § 1955. Thus, the very same transactions among the defendants gave rise to criminal liability under both statutes.

Under these circumstances, I would require the prosecutor to choose between § 371 and § 1955 as the instrument for criminal punishment. *See* my dissenting opinion in *Gore v. United States*, 357 U. S. 386, 357 U. S. 395-397 (1958), where the Government brought three charges based on

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a single sale of narcotics. To permit this kind of multiple prosecution is to place in the hands of the Government an arbitrary power to increase punishment. Here, as in *Gore*, I would require the prosecutor to observe the "*"fundamental rule of law that out of the same facts a series of charges shall not be preferred,"*" *Id. at 357 U. S. 396, quoting Reina v. Elrington, 9 Cox C.C. 86, 90, 1 B&S 688, 696 (1861).*

II

Apart from my views of the Double Jeopardy Clause, I would reverse on the additional ground that Congress did not intend to permit

simultaneous convictions under §§ 371 and 1955 for the same acts. The rule that a conspiracy remains separable from the completed crime, thus permitting simultaneous conviction for both, rests on the assumption that the act of conspiring presents special dangers the Legislature did not address in defining the substantive crime and that are not adequately checked by its prosecution. [Footnote 2/2] But the rule of separability is one of construction only, an aid to discerning legislative intent. Wharton's Rule teaches that, where the substantive crime itself is aimed at the evils traditionally addressed by the law of conspiracy, separability should not be found unless the clearest legislative statement demands it. In my view, this case fits the rationale of Wharton's Rule, and there is no legislative

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statement justifying the inference that Congress intended to permit multiple convictions.

Title 18 U.S.C. § 1955, which creates the substantive offense, is aimed at a particular form of concerted activity. The provision was added by the Organized Crime Control Act of 1970, Pub.L. 9152, 84 Stat. 922. This statute, as its title indicates, was directed at criminal activity carried out by large organizations, described by Congress as hierarchical in structure and as having their own system of law and independent enforcement institutions. [Footnote 2/3] Most of the Act was devoted to altering the powers and procedures of law enforcement institutions to deal with existing offenses. [Footnote 2/4] Only a few provisions added new prohibitions of primary conduct. Among these was Title VIII, which appears under the heading "Syndicated Gambling." Section 1955, included in Title VIII, prohibits participation in an "illegal gambling business," which is defined as one involving at least five persons who "conduct, finance, manage, supervise, direct, or own all or part of" the enterprise. Congress thought that federal law enforcement resources would be used to combat large enterprises, "so continuous and so substantial as to be a matter of national concern." [Footnote 2/5]

Conviction under § 1955 satisfies, in my view, the social concerns that punishment for conspiracy is supposed to address. The provision was aimed not at the single unlawful wager, but at "syndicated gambling." Congress viewed this activity as harmful because, on such a scale,

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it was thought to facilitate other forms of illicit activity, one of the reasons traditionally advanced for the separate prosecution of conspiracies. Where § 1955 has been violated, the elements of conspiracy will almost invariably be found. The enterprises to which Congress was referring in § 1955 cannot, as a practical matter, be created and perpetuated without the agreement and coordination that characterize conspiracy. Section 1955 is thus most sensibly viewed as a statute directed at conspiracy in a particular context.

All this the majority seems to concede when it acknowledges a "presumption that the two [crimes] merge when the substantive offense is proved." *Ante* at 420 U. S. 786. But the majority concludes that simultaneous conviction is authorized because it is not "explicitly excluded." *Ante* at 420 U. S. 789. The majority thus implicitly concedes that the statute is silent on the matter of simultaneous conviction. [Footnote 2/6] To infer from silence an intention to permit multiple punishment is, I think, a departure from the "presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment," *Bell v. United States*, 349 U. S. 81, 349 U. S. 83 (1955). I would adhere to that principle, which is but a specific application of the "ancient rule that a criminal statute is to be strictly construed," *Callanan v. United States*, 364 U. S. 587, 364 U. S. 602 (1961) (STEWART, J., dissenting).

The majority suggests, *ante* at 420 U. S. 784, that § 371 may be

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used to enhance the punishment for a § 1955 offense committed by "owners and organizers" of the enterprise, leaving prosecution under § 1955 alone for "lesser participants." But this is the Court's suggestion, not that of Congress. Congress recognized that syndicated operations would include persons having varying degrees of authority, [Footnote 2/7] and set a maximum penalty accordingly.

Congress did address the matter of sentence enhancement in Title X of the Act, codified in 18 U.S.C. §§ 3575-3578. These provisions authorize augmented punishment, to a maximum of imprisonment for 25 years, for felonies committed by a "dangerous special offender," § 3575(b). Some of the procedural obstacles to sentence enhancement under these provisions, and the constitutional questions raised thereby, are now being litigated in the District Courts. [Footnote 2/8] Nothing in Title X, however, supports the majority's position. "Special offender," as defined in § 3575(e), includes a defendant convicted of a felony that was committed in furtherance of a "conspiracy . . . to engage in a pattern of conduct criminal under applicable laws of any jurisdiction. . . ." The application of this language to a § 1955 conviction is not readily apparent. Though "pattern of criminal conduct" is not defined in the statute, it is clear from the legislative history that Congress was focusing on repeated offenders. [Footnote 2/9] An enterprise proscribed by § 1955 will involve repeated transactions; yet I have

doubt that Congress intended that proof of a § 1955 offense alone would constitute a "pattern."

In any case, the special procedures of Title X are at odds with any notion that § 371 would be used to enhance punishment. Sentence may be increased under § 3575 only if the judge makes special findings that the defendant is "dangerous," § 3575(f). And § 3575(a) requires that "[i]n no case shall the fact that the defendant is alleged to be a dangerous special offender be an issue upon the trial . . . [or] be disclosed to the jury. . . ." The trial judge must state the reasons for enhancing sentence, § 3575(b), and there are provisions for appellate review, § 3576. Among the purposes of Title X was

"improving the rationality, consistency, and effectiveness of sentencing by testing concepts of limiting and guiding sentencing discretion, [Footnote 2/10]"

a purpose undercut by authorizing the prosecutor to add charges under § 371. If, as the majority says, the statute is a "carefully crafted piece of legislation," *ante* at 420 U. S. 789, we should leave the differentiation of offenders to the schema Congress expressly created.

Conspiracy, if charged in a § 1955 prosecution, should be charged as a preparatory offense that merges with the completed crime, and considered by the jury only if it first acquits the defendant of the § 1955 charge. The trial judge did allude to this use of the conspiracy charge, [Footnote 2/11] and he did suggest that the jury might defer

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consideration of the conspiracy count until after deliberation of the § 1955 charge. But that was only a suggestion; the instructions permitted convictions on both charges. The error cannot be corrected merely by vacating the sentences on the conspiracy count; it requires a new trial. We so held in *Milanovich v. United States*, 365 U. S. 551 (1961), where the trial judge had permitted the jury to convict the defendant both of larceny and of receiving stolen goods. We held that simultaneous conviction of both offenses was impermissible, and that the proper remedy was a new trial:

"[T]here is no way of knowing whether a properly instructed jury would have found the wife guilty of larceny or of receiving (or, conceivably, of neither)."

Id. at 365 U. S. 555.

I would accordingly reverse these convictions.

MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join Part II of this opinion.

[Footnote 2/1]

E.g., Morgan v. Devine, 237 U. S. 632, 237 U. S. 641 (1915), *Pinkerton v. United States*, 328 U. S. 640, 328 U. S. 643-644 (1916); *Gore v. United States*, 357 U. S. 386 (1958).

[Footnote 2/2]

See United States v. Rabinowich, 238 U. S. 78, 238 U. S. 88 (1915):

"For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered."

[Footnote 2/3]

See S.Rep, No. 91-617, pp. 361 (1969) (hereinafter Senate Report).

[Footnote 2/4]

Title I authorized the convening of special grand juries, and Titles II through VI were aimnd at enhancing the prosecutors ability to obtain testimony of witnesses. Title X provides for the enhancement of sentences of designated offender.

[Footnote 2/5]

Senate Report 73.

[Footnote 2/6]

By the application of 18 U.S.C. § 1511, a defendant may be found guilty both of violating § 1955 and of conspiracy to "obstruct the enforcement of the criminal laws of a State or political subdivision thereof, with the intent to facilitate an illegal gambling business." An essential element of the narrowly defined § 1511 conspiracy is participation of an "official or employee" of a governmental unit. That requirement is not satisfied here, and thus § 1511 is inapplicable.

[Footnote 2/7]

See Senate Report 441; H.R.Rep. No. 91-1549, p. 53 (1970).

[Footnote 2/8]

See United States v. Kelly, 384 F.Supp. 1394 (WD MO.1974); *United States v. Duardi,* 384 F.Supp. 874 (WD MO.1974); *United States v. Edwards,* 379 F.Supp. 617 (MD Fla.1974).

[Footnote 2/9]

Repeated offenders included both those having prior convictions and those who, by virtue of particular positions in a criminal organization, had committed previously undetected crimes. Senate Report 87-88; H.R.Rep. No. 91-1549, *supra,* at 61-62.

[Footnote 2/10]

Senate Report 83.

[Footnote 2/11]

The trial judge explained:

"It is theoretically possible that two people could conspire to form a business of five [participants] or more. It would be theoretically possible, too, that, if the business were underway and only reached a total of four. . . . there would be no violation of Section 1955, but there still could be a conspiracy charge on the part of those who planned the agreement to ultimately make a business of five, even though they never actually reached five."

Tr. 2505.

MR. JUSTICE BRENNAN, dissenting.

In *Bell v. United States,* 349 U. S. 81 (1955), this Court held that, in criminal cases,

"[w]hen Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity."

Id. at 349 U. S. 83. I agree with MR. JUSTICE DOUGLAS that "[§] 1955 is . . . most sensibly viewed as a statute directed at conspiracy in a particular context," *ante* at 420 U. S. 795, and that the statute is at best silent on whether punishment for both the substantive crime and conspiracy was intended. In this situation, I would invoke *Bell*'s rule of lenity. I therefore dissent.

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Council of Europe
Conseil de l'Europe

Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11

with Protocol Nos. 1, 4, 6, 7, 12 and 13

The text of the Convention had been amended according to the provisions of Protocol No. 3 (ETS No. 45), which entered into force on 21 September 1970, of Protocol No. 5 (ETS No. 55), which entered into force on 20 December 1971 and of Protocol No. 8 (ETS No. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (ETS No. 44) which, in accordance with Article 5, paragraph 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols are replaced by Protocol No. 11 (ETS No. 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol No. 9 (ETS No. 140), which entered into force on 1 October 1994, is repealed.

Registry of the European Court of Human Rights
September 2003

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1821

Convention for the Protection of Human Rights and Fundamental Freedoms

Rome, 4.XI.1950

The governments signatory hereto, being members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms;

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend;

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration,

Have agreed as follows:

Article 1 – Obligation to respect human rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

the entrusting of the protection of a Party's interests and those of its nationals to a third State in accordance with the rules of international law relating to diplomatic relations is no obstacle to the designation of Protecting Powers for the purpose of applying the Conventions and this Protocol.

7. Any subsequent mention in this Protocol of a Protecting Power includes also a substitute.

Art 6. Qualified persons

1. The High Contracting Parties shall, also in peacetime, endeavour, with the assistance of the national Red Cross (Red Crescent, Red Lion and Sun) Societies, to train qualified personnel to facilitate the application of the Conventions and of this Protocol, and in particular the activities of the Protecting Powers.

2. The recruitment and training of such personnel are within domestic jurisdiction.

3. The International Committee of the Red Cross shall hold at the disposal of the High Contracting Parties the lists of persons so trained which the High Contracting Parties may have established and may have transmitted to it for that purpose.

4. The conditions governing the employment of such personnel outside the national territory shall, in each case, be the subject of special agreements between the Parties concerned.

Article 7 - Meetings

The depositary of this Protocol shall convene a meeting of the High Contracting Parties, at the request of one or more of the said Parties and upon, the approval of the majority of the said Parties, to consider general problems concerning the application of the Conventions and of the Protocol.

Part. II WOUNDED, SICK AND SHIPWRECKED

Section I : General Protection

Art 8. Terminology

For the purposes of this Protocol:
a) "Wounded" and "sick" mean persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, new-born babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility;

b) "Shipwrecked" means persons, whether military or civilian, who are in peril at sea or in other waters as a result of misfortune affecting them or the vessel or aircraft carrying them and who refrain from any act of hostility. These persons, provided that they continue to refrain from any act of hostility, shall continue to be considered shipwrecked during their rescue until they acquire

another status under the Conventions or this Protocol;

c) "Medical personnel" means those persons assigned, by a Party to the conflict, exclusively to the medical purposes enumerated under e) or to the administration of medical units or to the operation or administration of medical transports. Such assignments may be either permanent or temporary. The term includes:

i) medical personnel of a Party to the conflict, whether military or civilian, including those described in the First and Second Conventions, and those assigned to civil defence organizations;

ii) medical personnel of national Red Cross (Red Crescent, Red Lion and Sun) Societies and other national voluntary aid societies duly recognized and authorized by a Party to the conflict;

iii) medical personnel or medical units or medical transports described in Article 9, paragraph 2.

d) "Religious personnel" means military or civilian persons, such as chaplains, who are exclusively engaged in the work of their ministry and attached:

i) to the armed forces of a Party to the conflict;
ii) to medical units or medical transports of a Party to the conflict;
iii) to medical units or medical transports described in Article 9, Paragraph 2; or
iv) to civil defence organizations of a Party to the conflict.

The attachment of religious personnel may be either permanent or temporary, and the relevant provisions mentioned under k) apply to them;

e) "Medical units" means establishments and other units, whether military or civilian, organized for medical purposes, namely the search for, collection, transportation, diagnosis or treatment - including first-aid treatment - of the wounded, sick and shipwrecked, or for the prevention of disease. The term includes for example, hospitals and other similar units, blood transfusion centres, preventive medicine centres and institutes, medical depots and the medical and pharmaceutical stores of such units. Medical units may be fixed or mobile, permanent or temporary;

f) "Medical transportation" means the conveyance by land, water or air of the wounded, sick, shipwrecked, medical personnel, religious personnel, medical equipment or medical supplies protected by the Conventions and by this Protocol;

g) "Medical transports" means any means of transportation, whether military or civilian, permanent or temporary, assigned exclusively to medical transportation and under the control of a competent authority of a Party to the conflict;

h) "Medical vehicles" means any medical transports by land;

i) "Medical ships and craft" means any medical transports by water;

j) "Medical aircraft" means any medical transports by air;

k) "Permanent medical personnel", "permanent medical units" and "permanent medical transports" mean those assigned exclusively to medical purposes for an indeterminate period. "Temporary medical personnel" "temporary medical-units" and "temporary medical transports" mean those devoted exclusively to medical purposes for limited periods during the whole of such periods. Unless otherwise specified, the terms "medical personnel", "medical units" and "medical transports" cover both permanent and temporary categories;

l) "Distinctive emblem" means the distinctive emblem of the red cross, red crescent or red lion and sun on a white ground when used for the protection of medical units and transports, or medical and religious personnel, equipment or supplies;

m) "Distinctive signal" means any signal or message specified for the identification exclusively of medical units or transports in Chapter III of Annex I to this Protocol.

Art 9. Field of application

1. This Part, the provisions of which are intended to ameliorate the condition of the wounded, sick and shipwrecked, shall apply to all those affected by a situation referred to in Article 1, without any adverse distinction founded on race, colour, sex, language, religion or belief political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria.

2. The relevant provisions of Articles 27 and 32 of the First Convention shall apply to permanent medical units and transports (other than hospital ships, to which Article 25 of the Second Convention applies) and their personnel made available to a Party to the conflict for humanitarian purposes:
(a) by a neutral or other State which is not a Party to that conflict;
(b) by a recognized and authorized aid society of such a State;
(c) by an impartial international humanitarian organization.

Art 10 Protection and care

1. All the wounded, sick and shipwrecked, to whichever Party they belong, shall be respected and protected.

2. In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.

Article 11 - Protection of persons

1. The physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1 shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied

under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty.

2. It is, in particular, prohibited to carry out on such persons, even with their consent:
(a) physical mutilations;
(b) medical or scientific experiments;
(c) removal of tissue or organs for transplantation, except where these acts are justified in conformity with the conditions provided for in paragraph 1.

3. Exceptions to the prohibition in paragraph 2 (c) may be made only in the case of donations of blood for transfusion or of skin for grafting, provided that they are given voluntarily and without any coercion or inducement, and then only for therapeutic purposes, under conditions consistent with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient.

4. Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions in paragraphs 1 and 2 or fails to comply with the requirements of paragraph 3 shall be a grave breach of this Protocol.

5. The persons described in paragraph 1 have the right to refuse any surgical operation. In case of refusal, medical personnel shall endeavour to obtain a written statement to that effect, signed or acknowledged by the patient.

6. Each Party to the conflict shall keep a medical record for every donation of blood for transfusion or skin for grafting by persons referred to in paragraph 1, if that donation is made under the responsibility of that Party. In addition, each Party to the conflict shall endeavour to keep a record of all medical procedures undertaken with respect to any person who is interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1. These records shall be available at all times for inspection by the Protecting Power.

Art 12 Protection of medical units

1. Medical units shall be respected and protected at all times and shall not be the object of attack.

2. Paragraph 1 shall apply to civilian medical units, provided that they:
(a) belong to one of the Parties to the conflict;
(b) are recognized and authorized by the competent authority of one of the Parties to the conflict; or
(c) are authorized in conformity with Article 9, paragraph 2, of this Protocol or Article 27 of the First Convention.

3. The Parties to the conflict are invited to notify each other of the location of their fixed medical units. The absence of such notification shall not exempt any of the Parties from the obligation to comply with the provisions of paragraph 1.

4. Under no circumstances shall medical units be used in an attempt to shield military objectives from attack. Whenever possible, the Parties to the conflict shall ensure that medical units are so sited that attacks against military objectives do not imperil their safety.

Art 13. Discontinuance of protection of civilian medical units

1. The protection to which civilian medical units are entitled shall not cease unless they are used to commit, outside their humanitarian function, acts harmful to the enemy. Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.

2. The following shall not be considered as acts harmful to the enemy:

(a) that the personnel of the unit are equipped with light individual weapons for their own defence or for that of the wounded and sick in their charge;
(b) that the unit is guarded by a picket or by sentries or by an escort;
(c) that small arms and ammunition taken from the wounded and sick, and not yet handed to the proper service, are found in the units;
(d) that members of the armed forces or other combatants are in the unit for medical reasons.

Art 14 - Limitations on requisition of civilian medical units

1. The Occupying Power has the duty to ensure that the medical needs of the civilian population in occupied territory continue to be satisfied.

2. The Occupying Power shall not, therefore, requisition civilian medical units, their equipment, their materiel or the services of their personnel, so long as these resources are necessary for the provision of adequate medical services for the civilian population and for the continuing medical care of any wounded and sick already under treatment.

3. Provided that the general rule in paragraph 2 continues to be observed, the Occupying Power may requisition the said resources, subject to the following particular conditions:
(a) that the resources are necessary for the adequate and immediate medical treatment of the wounded and sick members of the armed forces of the Occupying Power or of prisoners of war;
(b) that the requisition continues only while such necessity exists; and
(c) that immediate arrangements are made to ensure that the medical needs of the civilian population, as well as those of any wounded and sick under treatment who are affected by the requisition, continue to be satisfied.

Art 15. Protection of civilian medical and religious personnel

1. Civilian medical personnel shall be respected and protected.

2. If needed, all available help shall be afforded to civilian medical personnel in an area where civilian medical services are disrupted by reason of combat activity.

3. The Occupying Power shall afford civilian medical personnel in occupied territories every assistance to enable them to perform, to the best of their ability, their humanitarian functions. The Occupying Power may not require that, in the performance of those functions, such personnel shall give priority to the treatment of any person except on medical grounds. They shall not be

compelled to carry out tasks which are not compatible with their humanitarian mission.

4. Civilian medical personnel shall have access to any place where their services are essential, subject to such supervisory and safety measures as the relevant Party to the conflict may deem necessary.

5. Civilian religious personnel shall be respected and protected. The provisions of the Conventions and of this Protocol concerning the protection and identification of medical personnel shall apply equally to such persons.

Art 16. General protection of medical duties

1. Under no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of the person benefiting therefrom.

2. Persons engaged in medical activities shall not be compelled to perform acts or to carry out work contrary to the rules of medical ethics or to other medical rules designed for the benefit of the wounded and sick or to the provisions of the Conventions or of this Protocol, or to refrain from performing acts or from carrying out work required by those rules and provisions.

3. No person engaged in medical activities shall be compelled to give to anyone belonging either to an adverse Party, or to his own Party except as required by the law of the latter Party, any information concerning the wounded and sick who are, or who have been, under his care, if such information would, in his opinion, prove harmful to the patients concerned or to their families. Regulations for the compulsory notification of communicable diseases shall, however, be respected.

Art 17. Role of the civilian population and of aid societies

1. The civilian population shall respect the wounded, sick and shipwrecked, even if they belong to the adverse Party, and shall commit no act of violence against them. The civilian population and aid societies, such as national Red Cross (Red Crescent, Red Lion and Sun) Societies, shall be permitted, even on their own initiative, to collect and care for the wounded, sick and shipwrecked, even in invaded or occupied areas. No one shall be harmed, prosecuted, convicted or punished for such humanitarian acts.

2. The Parties to the conflict may appeal to the civilian population and the aid societies referred to in paragraph 1 to collect and care for the wounded, sick and shipwrecked, and to search for the dead and report their location; they shall grant both protection and the necessary facilities to those who respond to this appeal. If the adverse Party gains or regains control of the area, that Party also shall afford the same protection and facilities for as long as they are needed.

Art 18. Identification

1. Each Party to the conflict shall endeavour to ensure that medical and religious personnel and medical units and transports are identifiable.

2. Each Party to the conflict shall also endeavour to adopt and to implement methods and procedures which will make it possible to recognize medical units and transports which use the distinctive emblem and distinctive signals.

3. In occupied territory and in areas where fighting is taking place or is likely to take place, civilian medical personnel and civilian religious personnel should be recognizable by the distinctive emblem and an identity card certifying their status.

4. With the consent of the competent authority, medical units and transports shall be marked by the distinctive emblem. The ships and craft referred to in Article 22 of this Protocol shall be marked in accordance with the provisions of the Second Convention.

5. In addition to the distinctive emblem, a Party to the conflict may, as provided in Chapter III of Annex I to this Protocol, authorize the use of distinctive signals to identify medical units and transports. Exceptionally, in the special cases covered in that Chapter, medical transports may use distinctive signals without displaying the distinctive emblem.

6. The application of the provisions of paragraphs 1 to 5 of this article is governed by Chapters I to III of Annex I to this Protocol. Signals designated in Chapter III of the Annex for the exclusive use of medical units and transports shall not, except as provided therein, be used for any purpose other than to identify the medical units and transports specified in that Chapter.

7. This article does not authorize any wider use of the distinctive emblem in peacetime than is prescribed in Article 44 of the First Convention.

8. The provisions of the Conventions and of this Protocol relating to supervision of the use of the distinctive emblem and to the prevention and repression of any misuse thereof shall be applicable to distinctive signals.

Art 19. Neutral and other States not Parties to the conflict

Neutral and other States not Parties to the conflict shall apply the relevant provisions of this Protocol to persons protected by this Part who may be received or interned within their territory, and to any dead of the Parties to that conflict whom they may find.

Art 20. - Prohibition of reprisals

Reprisals against the persons and objects protected by this Part are prohibited.

SECTION II. MEDICAL TRANSPORTATION

Art 21. Medical vehicles

Medical vehicles shall be respected and protected in the same way as mobile medical units under the Conventions and this Protocol.

Art 22. Hospital ships and coastal rescue craft

1. The provisions of the Conventions relating to:
(a) vessels described in Articles 22, 24, 25 and 27 of the Second Convention,
(b) their lifeboats and small craft,
(c) their personnel and crews, and
(d) the wounded; sick and shipwrecked on board,

shall also apply where these vessels carry civilian wounded, sick and shipwrecked who do not belong to any of the categories mentioned in Article 13 of the Second Convention. Such civilians shall not, however, be subject to surrender to any Party which is not their own, or to capture at sea. If they find themselves in the power of a Party to the conflict other than their own they shall be covered by the Fourth Convention and by this Protocol.

2. The protection provided by the Conventions to vessels described in Article 25 of the Second Convention shall extend to hospital ships made available for humanitarian purposes to a Party to the conflict:
(a) by a neutral or other State which is not a Party to that conflict; or
(b) by an impartial international humanitarian organization,

provided that, in either case, the requirements set out in that Article are complied with.

3. Small craft described in Article 27 of the Second Convention shall be protected, even if the notification envisaged by that Article has not been made. The Parties to the conflict are, nevertheless, invited to inform each other of any details of such craft which will facilitate their identification and recognition.

Art 23. Other medical ships and craft

1. Medical ships and craft other than those referred to in Article 22 of this Protocol and Article 38 of the Second Convention shall, whether at sea or in other waters, be respected and protected in the same way as mobile medical units under the Conventions and this Protocol. Since this protection can only be effective if they can be identified and recognized as medical ships or craft, such vessels should be marked with the distinctive emblem and as far as possible comply with the second paragraph of Article 43 of the Second Convention.

2. The ships and craft referred to in paragraph 1 shall remain subject to the laws of war. Any warship on the surface able immediately to enforce its command may order them to stop, order them off, or make them take a certain course, and they shall obey every such command. Such ships and craft may not in any other way be diverted from their medical mission so long as they are needed for the wounded, sick and shipwrecked on board.

3. The protection provided in paragraph 1 shall cease only under the conditions set out in Articles 34 and 35 of the Second Convention. A clear refusal to obey a command given in accordance with paragraph 2 shall be an act harmful to the enemy under Article 34 of the Second Convention.

4. A Party to the conflict may notify any adverse Party as far in advance of sailing as possible of the name, description, expected time of sailing, course and estimated speed of the medical ship or craft, particularly in the case of ships of over 2,000 gross tons, and may provide any other information which would facilitate identification and recognition. The adverse Party shall acknowledge receipt of such information.

5. The provisions of Article 37 of the Second Convention shall apply to medical and religious personnel in such ships and craft.

6. The provisions of the Second Convention shall apply to the wounded, sick and shipwrecked belonging to the categories referred to in Article 13 of the Second Convention and in Article 44 of this Protocol who may be on board such medical ships and craft. Wounded, sick and shipwrecked civilians who do not belong to any or the categories mentioned in Article 13 of the Second Convention shall not be subject, at sea, either to surrender to any Party which is not their own, or to removal from such ships or craft; if they find themselves in the power of a Party to the conflict other than their own, they shall be covered by the Fourth Convention and by this Protocol.

Art 24. Protection of medical Aircraft

Medical aircraft shall be respected and protected, subject to the provisions of this Part.

Art 25. Medical aircraft in areas not controlled by an adverse Party

In and over land areas physically controlled by friendly forces, or in and over sea areas not physically controlled by an adverse Party, the respect and protection of medical aircraft of a Party to the conflict is not dependent on any agreement with an adverse Party. For greater safety, however, a Party to the conflict operating its medical aircraft in these areas may notify the adverse Party, as provided in Article 29, in particular when such aircraft are making flights bringing them within range of surface-to-air weapons systems of the adverse Party.

Art 26. Medical aircraft in contact or similar zones

1. In and over those parts of the contact zone which are physically controlled by friendly forces and in and over those arees the physical control of which is not clearly established, protection for medical aircraft can be fully effective only by prior agreement between the competent military authorities of the Parties to the conflict, as provided for in Article 29. Although, in the absence of such an agreement, medical aircraft operate at their own risk, they shall nevertheless be respected after they have been recognized as such.

2. "Contact zone" means any area on land where the forward elements of opposing forces are in contact with each other, especially where they are exposed to direct fire from the ground.

Art 27. Medical aircraft in areas controlled by an adverse Party

1. The medical aircraft of a Party to the conflict shall continue to be protected while flying over land or sea areas physically controlled by an adverse Party, provided that prior agreement to such flights has been obtained from the competent authority of that adverse Party.

2. A medical aircraft which flies over an area physically controlled by an adverse Party without, or in deviation from the terms of, an agreement

provided for in paragraph 1, either through navigational error or because of an emergency affecting the safety of the flight, shall make every effort to identify itself and to inform the adverse Party of the circumstances. As soon as such medical aircraft has been recognized by the adverse Party, that Party shall make all reasonable efforts to give the order to land or to alight on water, referred to in Article 30, paragraph 1, or to take other measures to safeguard its own interests, and, in either case, to allow the aircraft time for compliance, before resorting to an attack against the aircraft.

Art 28. Restrictions on operations of medical aircraft

1. The Parties to the conflict are prohibited from using their medical aircraft to attempt to acquire any military advantage over an adverse Party. The presence of medical aircraft shall not be used in an attempt to render military objectives immune from attack.

2. Medical aircraft shall not be used to collect or transmit intelligence data and shall not carry any equipment intended for such purposes. They are prohibited from carrying any persons or cargo not included within the definition in Article 8 (6). The carrying on board of the personal effects of the occupants or of equipment intended solely to facilitate navigation, communication or identification shall not be considered as prohibited.

3. Medical aircraft shall not carry any armament except small arms and ammunition taken from the wounded, sick and shipwrecked on board and not yet handed to the proper service, and such light individual weapons as may be necessary to enable the medical personnel on board to defend themselves and the wounded, sick and shipwrecked in their charge.

4. While carrying out the flights referred to in Articles 26 and 27, medical aircraft shall not, except by prior agreement with the adverse Party, be used to search for the wounded, sick and shipwrecked.

Art 29. Notifications and agreements concerning medical aircraft

1. Notifications under Article 25, or requests for prior agreement under Articles 26, 27, 28, paragraph 4, or 31 shall state the proposed number of medical aircraft, their flight plans and means of identification, and shall be understood to mean that every flight will be carried out in compliance with Article 28.

2. A Party which receives a notification given under Article 25 shall at once acknowledge receipt of such notification. 3. A Party which receives a request for prior agreement under Articles 25, 27, 28, paragraph 4, or 31 shall, as rapidly as possible, notify the requesting Party:
(a) that the request is agreed to;
(b) that the request is denied; or
(c) of reasonable alternative proposals to the request. It may also propose prohibition or restriction of other flights in the area during the time involved. If the Party which submitted the request accepts the alternative proposals, it shall notify the other Party of such acceptance.

4. The Parties shall take the necessary measures to ensure that notifications and agreements can be made rapidly.

5. The Parties shall also take the necessary measures to disseminate rapidly

the substance of any such notifications and agreements to the military units concerned and shall instruct those units regarding the means of identification that will be used by the medical aircraft in question.

Art 30. Landing and inspection of medical aircraft

1. Medical aircraft flying over areas which are physically controlled by an adverse Party, or over areas the physical control of which is not clearly established, may be ordered to land or to alight on water, as appropriate, to permit inspection in accordance with the following paragraphs. Medical aircraft shall obey any such order.

2. If such an aircraft lands or alights on water, whether ordered to do so or for other reasons, it may be subjected to inspection solely to determine the matters referred to in paragraphs 3 and 4. Any such inspection shall be commenced without delay and shall be conducted expeditiously. The inspecting Party shall not require the wounded and sick to be removed from the aircraft unless their removal is essential for the inspection. That Party shall in any event ensure that the condition of the wounded and sick is not adversely affected by the inspection or by the removal.

3. If the inspection discloses that the aircraft:
(a) is a medical aircraft within the meaning of Article 8, sub-paragraph j),
(b) is not in violation of the conditions prescribed in Article 28, and
(c) has not flown without or in breach of a prior agreement where such agreement is required,

the aircraft and those of its occupants who belong to the adverse Party or to a neutral or other State not a Party to the conflict shall be authorized to continue the flight without delay.

4. If the inspection discloses that the aircraft:
(a) is not a medical aircraft within the meaning of Article 8, sub-paragraph j),
(b) is in violation or the conditions prescribed in Article 28, or
(c) has flown without or in breach of a prior agreement where such agreement is required,

the aircraft may be seized. Its occupants shall be treated in conformity with the relevant provisions of the Conventions and of this Protocol. Any aircraft seized which had been assigned as a permanent medical aircraft may be used thereafter only as a medical aircraft.

Art 31. Neutral or other States not Parties to the conflict

1. Except by prior agreement, medical aircraft shall not fly over or land in the territory of a neutral or other State not a Party to the conflict. However, with such an agreement, they shall be respected throughout their flight and also for the duration of any calls in the territory. Nevertheless they shall obey any summons to land or to alight on water, as appropriate.

2. Should a medical aircraft, in the absence of an agreement or in deviation from the terms of an agreement, fly over the territory of a neutral or other State not a Party to the conflict, either through navigational error or because of an emergency affecting the safety of the flight, it shall make every effort to give notice of the flight and to identify itself. As soon as such medical aircraft is

recognized, that State shall make all reasonable efforts to give the order to land or to alight on water referred to in Article 30, paragraph 1, or to take other measures to safeguard its own interests, and, in either case, to allow the aircraft time for compliance, before resorting to an attack against the aircraft.

3. If a medical aircraft, either by agreement or in the circumstances mentioned in paragraph 2, lands or alights on water in the territory of a neutral or other State not Party to the conflict, whether ordered to do so or for other reasons, the aircraft shall be subject to inspection for the purposes of determining whether it is in fact a medical aircraft. The inspection shall be commenced without delay and shall be conducted expeditiously. The inspecting Party shall not require the wounded and sick of the Party operating the aircraft to be removed from it unless their removal is essential for the inspection. The inspecting Party shall in any event ensure that the condition of the wounded and sick is not adversely affected by the inspection or the removal. If the inspection discloses that the aircraft is in fact a medical aircraft, the aircraft with its occupants, other than those who must be detained in accordance with the rules of international law applicable in armed conflict, shall be allowed to resume its flight, and reasonable facilities shall be given for the continuation of the flight. If the inspection discloses that the aircraft is not a medical aircraft, it shall be seized and the occupants treated in accordance with paragraph 4.

4. The wounded, sick and shipwrecked disembarked, otherwise than temporarily, from a medical aircraft with the consent of the local authorities in the territory of a neutral or other State not a Party to the conflict shall, unless agreed otherwise between that State and the Parties to the conflict, be detained by that State where so required by the rules of international law applicable in armed conflict, in such a manner that they cannot again take part in the hostilities. The cost of hospital treatment and internment shall be borne by the State to which those persons belong.

5. Neutral or other States not Parties to the conflict shall apply any conditions and restrictions on the passage of medical aircraft over, or on the landing of medical aircraft in, their territory equally to all Parties to the conflict.

Section III Missing and Dead Persons

Art 32. General principle

In the implementation of this Section, the activities of the High Contracting Parties, of the Parties to the conflict and of the international humanitarian organizations mentioned in the Conventions and in this Protocol shall be prompted mainly by the right of families to know the fate of their relatives.

Art 33. Missing persons

1. As soon as circumstances permit, and at the latest from the end of active hostilities, each Party to the conflict shall search for the persons who have been reported missing by an adverse Party. Such adverse Party shall transmit all relevant information concerning such persons in order to facilitate such searches.

2. In order to facilitate the gathering of information pursuant to the preceding paragraph, each Party to the conflict shall, with respect to persons who would not receive more favourable consideration under the Conventions and this

Protocol:
(a) record the information specified in Article 138 of the Fourth Convention in respect of such persons who have been detained, imprisoned or otherwise held in captivity for more than two weeks as a result of hostilities or occupation, or who have died during any period of detention;
(b) to the fullest extent possible, facilitate and, if need be, carry out the search for and the recording of information concerning such persons if they have died in other circumstances as a result of hostilities or occupation.

3. Information concerning persons reported missing pursuant to paragraph 1 and requests for such information shall be transmitted either directly or through the Protecting Power or the Central Tracing Agency of the International Committee of the Red Cross or national Red Cross (Red Crescent, Red Lion and Sun) Societies. Where the information is not transmitted through the International Committee of the Red Cross and its Central Tracing Agency, each Party to the conflict shall ensure that such information is also supplied to the Central Tracing Agency.

4. The Parties to the conflict shall endeavour to agree on arrangements for teams to search for, identify and recover the dead from battlefield areas, including arrangements, if appropriate, for such teams to be accompanied by personnel of the adverse Party while carrying out these missions in areas controlled by the adverse Party. Personnel of such teams shall be respected and protected while exclusively carrying out these duties.

Art 34. Remains of deceased

1. The remains of persons who have died for reasons related to occupation or in detention resulting from occupation or hostilities and those or persons not nationals of the country in which they have died as a result of hostilities shall be respected, and the gravesites of all such persons shall be respected, maintained and marked as provided for in Article 130 of the Fourth Convention, where their remains or gravesites would not receive more favourable consideration under the Conventions and this Protocol.

2. As soon as circumstances and the relations between the adverse Parties permit, the High Contracting Parties in whose territories graves and, as tha case may be, other locations of the remains of persons who have died as a result of hostilities or during occupation or in detention are situated, shall conclude agreements in order:
(a) to facilitate access to the gravesites by relatives of the deceased and by representatives of official graves registration services and to regulate the practical arrangements for such access;
(b) to protect and maintain such gravesites permanently;
(c) to facilitate the return of the remains of the deceased and of personal effects to the home country upon its request or, unless that country objects, upon the request of the next of kin.

3. In the absence of the agreements provided for in paragraph 2 (b) or (c) and if the home country or such deceased is not willing to arrange at its expense for the maintenance of such gravesites, the High Contracting Party in whose territory the gravesites are situated may offer to facilitate the return of the remains of the deceased to the home country. Where such an offer has not been accepted the High Contracting Party may, after the expiry of five years from the date of the offer and upon due notice to the home country, adopt the arrangements laid down in its own laws relating to cemeteries and graves.

4. A High Contracting Party in whose territory the grave sites referred to in this Article are situated shall be permitted to exhume the remains only:
(a) in accordance with paragraphs 2 (c) and 3, or
(b) where exhumation is a matter or overriding public necessity, including cases of medical end investigative necessity, in which case the High Contracting Party shall at all times respect the remains, and shall give notice to the home country or its intention to exhume the remains together with deteils of the intended place of reinterment.

Part III. Methods and Means of Warfare Combatant and Prisoners-Of-War

Section I. Methods and Means of Warfare

Art 35. Basic rules

1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.

2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.

3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

Art 36. New weapons

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

Art 37. Prohibition of Perfidy

1. It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:
(a) the teigning of an intent to negotiate under a flag of truce or of a surrender;
(b) the feigning of an incapacitation by wounds or sickness;
(c) the feigning of civilian, non-combatant status; and
(d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.

2. Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation.

Art 38. Recognized emblems

1. It is prohibited to make improper use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other emblems, signs or signals provided for by the Conventions or by this Protocol. It is also prohibited to misuse deliberately in an armed conflict other internationally recognized protective emblems, signs or signals, including the flag of truce, and the protective emblem of cultural property.

2. It is prohibited to make use of the distinctive emblem of the United Nations, except as authorized by that Organization.

Art 39. Emblems of nationality

1. It is prohibited to make use in an armed conflict of the flags or military emblems, insignia or uniforms of neutral or other States not Parties to the conflict.

2. It is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations.

3. Nothing in this Article or in Article 37, paragraph 1 (d), shall affect the existing generally recognized rules of international law applicable to espionage or to the use of flags in the conduct of armed conflict at sea.

Art 40. Quarter

It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.

Art 41. Safaguard of an enemy hors de combat

1. A person who is recognized or who, in the circumstances, should be recognized to be hors de combat shall not be made the object of attack.

2. A person is hors de combat if:
(a) he is in the power of an adverse Party;
(b) he clearly expresses an intention to surrender; or
(c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself;

provided that in any of these cases he abstains from any hostile act and does not attempt to escape.

3. When persons entitled to protection as prisoners of war have fallen into the power of an adverse Party under unusual conditions of combat which prevent their evacuation as provided for in Part III, Section I, of the Third Convention, they shall be released and all feasible precautions shall be taken to ensure their safety.

Article 42 - Occupants of aircraft

1. No person parachuting from an aircraft in distress shall be made the object of attack during his descent.

2. Upon reaching the ground in territory controlled by an adverse Party, a person who has parachuted from an aircraft in distress shall be given an opportunity to surrender before being made the object of attack, unless it is apparent that he is engaging in a hostile act.

3. Airborne troops are not protected by this Article.

Section II. Combatants and Prisoners of War

Art 43. Armed forces

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.

2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

Art 44. Combatants and prisoners of war

1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.

2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he
carries his arms openly:

(a) during each military engagement, and
(b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to

participate.

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c).

4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.

5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities .

6. This Article is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Convention.

7. This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.

8. In addition to the categories of persons mentioned in Article 13 of the First and Second Conventions, all members of the armed forces of a Party to the conflict, as defined in Article 43 of this Protocol, shall be entitled to protection under those Conventions if they are wounded or sick or, in the case of the Second Convention, shipwrecked at sea or in other waters.

Art 45. Protection of persons who have taken part in hostilities

1. A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal.

2. If a person who has fallen into the power of an adverse Party is not held as a prisoner of war and is to be tried by that Party for an offence arising out of the hostilities, he shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated. Whenever possible under the applicable procedure, this adjudication shall occur before the trial for the offence. The representatives of the Protecting Power shall be entitled to attend the proceedings in which that question is adjudicated, unless, exceptionally, the proceedings are held in camera in the interest of State security. In such a case the detaining Power shall advise the Protecting Power accordingly.

3. Any person who has taken part in hostilities, who is not entitled to prisoner-

of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol. In occupied territory, any such person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of communication under that Convention.

Art 46. Spies

1. Notwithstanding any other provision of the Conventions or of this Protocol, any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy.

2. A member of the armed forces of a Party to the conflict who, on behalf of that Party and in territory controlled by an adverse Party, gathers or attempts to gather information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces.

3. A member of the armed forces of a Party to the conflict who is a resident of territory occupied by an adverse Party and who, on behalf of the Party on which he depends, gathers or attempts to gather information of military value within that territory shall not be considered as engaging in espionage unless he does so through an act of false pretences or deliberately in a clandestine manner. Moreover, such a resident shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured while engaging in espionage.

4. A member of the armed forces of a Party to the conflict who is not a resident of territory occupied by an adverse Party and who has engaged in espionage in that territory shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured before he has rejoined the armed forces to which he belongs.

Art 47. Mercenaries

1. A mercenary shall not have the right to be a combatant or a prisoner of war.

2. A mercenary is any person who:

(a) is specially recruited locally or abroad in order to fight in an armed conflict;
(b) does, in fact, take a direct part in the hostilities;
(c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
(d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
(e) is not a member of the armed forces of a Party to the conflict; and
(f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

Part IV. Civilian Population

Section I. General Protection Against Effects of Hostilities

Chapter I. Basic rule and field of application

Art 48. Basic rule

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

Art 49. Definition of attacks and scope of application

1. "Attacks" means acts of violence against the adversary, whether in offence or in defence.

2. The provisions of this Protocol with respect to attacks apply to all attacks in whatever territory conducted, including the national territory belonging to a Party to the conflict but under the control of an adverse Party.

3. The provisions of this section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.

4. The provisions of this section are additional to the rules concerning humanitarian protection contained in the Fourth Convention, particularly in part II thereof, and in other international agreements binding upon the High Contracting Parties, as well as to other rules of international law relating to the protection of civilians and civilian objects on land, at sea or in the air against the effects of hostilities.

Chapter II. Civilians and civilian population

Art 50. Definition of civilians and civilian population

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (8) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

2. The civilian population comprises all persons who are civilians.

3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

Art 51. - Protection of the civilian population

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be

the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:
(a) those which are not directed at a specific military objective;
(b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
(c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:
(a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects;

and

(b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

6. Attacks against the civilian population or civilians by way of reprisals are prohibited.

7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

8. Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.

Chapter III. Civilian objects

Art 52. General Protection of civilian objects

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited 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.

3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

Art 53. Protection of cultural objects and of places of worship

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:
(a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
(b) to use such objects in support of the military effort;
(c) to make such objects the object of reprisals.

Art 54. Protection of objects indispensable to the survival of the civilian population

1. Starvation of civilians as a method of warfare is prohibited.

2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

3. The prohibitions in paragraph 2 shall not apply to such of the objects covered by it as are used by an adverse Party:
(a) as sustenance solely for the members of its armed forces; or
(b) if not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.

4. These objects shall not be made the object of reprisals.

5. In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.

Art 55. Protection of the natural environment

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and

thereby to prejudice the health or survival of the population.

2. Attacks against the natural environment by way of reprisals are prohibited.

Art 56. Protection of works and installations containing dangerous forces

1. Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population.

2. The special protection against attack provided by paragraph 1 shall cease:
(a) for a dam or a dyke only if it is used for other than its normal function and in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;
(b) for a nuclear electrical generating station only if it provides electric power in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;
(c) for other military objectives located at or in the vicinity of these works or installations only if they are used in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.

3. In all cases, the civilian population and individual civilians shall remain entitled to all the protection accorded them by international law, including the protection of the precautionary measures provided for in Article 57. If the protection Ceases and any of the works, installations or military objectives mentioned in paragraph 1 is attacked, all practical precautions shall be taken to avoid the release of the dangerous forces.

4. It is prohibited to make any of the works, installations or military objectives mentioned in paragraph 1 the object of reprisals.

5. The Parties to the conflict shall endeavour to avoid locating any military objectives in the vicinity of the works or installations mentioned in paragraph 1. Nevertheless, installations erected for the sole purpose of defending the protected works or installations from attack are permissible and shall not themselves be made the object of attack, provided that they are not used in hostilities except for defensive actions necessary to respond to attacks against the protected works or installations and that their armament is limited to weapons capable only of repelling hostile action against the protected works or installations.

6. The High Contracting Parties and the Parties to the conflict are urged to conclude further agreements among themselves to provide additional protection for objects containing dangerous forces.

7. In order to facilitate the identification of the objects protected by this article, the Parties to the conflict may mark them with a special sign consisting of a group of three bright orange circles placed on the same axis, as specified in Article 16 of Annex I to this Protocol [Article 17 of Amended Annex]. The absence of such marking in no way relieves any Party to the conflict of its

obligations under this Article.

Chapter IV. Precautionary measures

Art 57. Precautions in attack

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.

2. With respect to attacks, the following precautions shall be taken:
(a) those who plan or decide upon an attack shall:
(i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;
(ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss or civilian life, injury to civilians and damage to civilian objects;
(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.

4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.

5. No provision of this article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.

Art 58. Precautions against the effects of attacks

The Parties to the conflict shall, to the maximum extent feasible:

(a) without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;
(b) avoid locating military objectives within or near densely populated areas;
(c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.

Chapter V. Localities and zones under special protection

Art 59. Non-defended localities

1. It is prohibited for the Parties to the conflict to attack, by any means whatsoever, non-defended localities.
2. The appropriate authorities of a Party to the conflict may declare as a non-defended locality any inhabited place near or in a zone where armed forces are in contact which is open for occupation by an adverse Party.
Such a locality shall fulfil the following conditions:
(a) all combatants, as well as mobile weapons and mobile military equipment must have been evacuated;
(b) no hostile use shall be made of fixed military installations or establishments;
(c) no acts of hostility shall be committed by the authorities or by the population; and
(d) no activities in support of military operations shall be undertaken.

3. The presence, in this locality, of persons specially protected under the Conventions and this Protocol, and of police forces retained for the sole purpose of maintaining law and order, is not contrary to the conditions laid down in paragraph 2.

4. The declaration made under paragraph 2 shall be addressed to the adverse Party and shall define and describe, as precisely as possible, the limits of the non-defended locality. The Party to the conflict to which the declaration is addressed shall acknowledge its receipt and shall treat the locality as a non-defended locality unless the conditions laid down in paragraph 2 are not in fact fulfilled, in which event it shall immediately so inform the Party making the declaration. Even if the conditions laid down in paragraph 2 are not fulfilled, the locality shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.

5. The Parties to the conflict may agree on the establishment of non-defended localities even if such localities do not fulfil the conditions laid down in paragraph 2. The agreement should define and describe, as precisely as possible, the limits of the non-defended locality; if necessary, it may lay down the methods of supervision.

6. The Party which is in control of a locality governed by such an agreement shall mark it, so far as possible, by such signs as may be agreed upon with the other Party, which shall be displayed where they are clearly visible, especially on its perimeter and limits and on highways.

7. A locality loses its status as a non-defended locality when its ceases to fulfil the conditions laid down in paragraph 2 or in the agreement referred to in paragraph 5. In such an eventuality, the locality shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.

Art 60. Demilitarized zones

1. It is prohibited for the Parties to the conflict to extend their military operations to zones on which they have conferred by agreement the status of

demilitarized zone, if such extension is contrary to the terms of this agreement.

2. The agreement shall be an express agreement, may be concluded verbally or in writing, either directly or through a Protecting Power or any impartial humanitarian organization, and may consist of reciprocal and concordant declarations. The agreement may be concluded in peacetime, as well as after the outbreak of hostilities, and should define and describe, as precisely as possible, the limits of the demilitarized zone and, if necessary, lay down the methods of supervision.

3. The subject of such an agreement shall normally be any zone which fulfils the following conditions:

(a) all combatants, as well as mobile weapons and mobile military equipment, must have been evacuated;
(b) no hostile use shall be made of fixed military installations or establishments;
(c) no acts of hostility shall be committed by the authorities or by the population; and
(d) any activity linked to the military effort must have ceased.

The Parties to the conflict shall agree upon the interpretation to be given to the condition laid down in subparagraph (d) and upon persons to be admitted to the demilitarized zone other than those mentioned in paragraph 4.

4. The presence, in this zone, of persons specially protected under the Conventions and this Protocol, and of police forces retained for the sole purpose of maintaining law and order, is not contrary to the conditions laid down in paragraph 3.

5. The Party which is in control of such a zone shall mark it, so far as possible, by such signs as may be agreed upon with the other Party, which shall be displayed where they are clearly visible, especially on its perimeter and limits and on highways.

6. If the fighting draws near to a demilitarized zone, and if the Parties to the conflict have so agreed, none of them may use the zone for purposes related to the conduct of military operations or unilaterally revoke its status.

7. If one of the Parties to the conflict commits a material breach of the provisions of paragraphs 3 or 6, the other Party shall be released from its obligations under the agreement conferring upon the zone the status of demilitarized zone. In such an eventuality, the zone loses its status but shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.

Chapter VI. Civil defence

Art 61. - Definitions and scope

For the purpose of this Protocol:

(1) "Civil defence" means the performance of some or all of the undermentioned humanitarian tasks intended to protect the civilian population against the dangers, and to help it to recover from the immediate effects, of hostilities or disasters and also to provide the conditions necessary for its survival. Thase tasks are:

(a) warning;
(b) evacuation;
(c) management of shelters;
(d) management of blackout measures;
(e) rescue;
(f) medical services, including first aid, and religious assistance;
(g) fire-fighting;
(h) detection and marking of danger areas;
(i) decontamination and similar protective measures;
(j) provision of emergency accommodation and supplies;
(k) emergency assistance in the restoration and maintenance of order in distressed areas;
(l) emergency repair of indispensable public utilities;
(m) emergency disposal of the dead;
(n) assistance in the preservation of objects essential for survival;
(o) complementary activities necessary to carry out any of the tasks mentioned above, including, but not limited to, planning and organization;

(2) "Civil defence organizations" means those establishments and other units which are organized or authorized by the competent authorities of a Party to the conflict to perform any of the tasks mentioned under (1), and which are assigned and devoted exclusively to such tasks; (3) "Personnel" of civil defence organizations means those persons assigned by a Party to the conflict exclusively to the performance of the tasks mentioned under (1), including personnel assigned by the competent authority of that Party exclusively to the administration of these organizations;

(4) "Matériel" of civil defence organizations means equipment, supplies and transports used by these organizations for the performance of the tasks mentioned under (1).

Art 62. General protection

1. Civilian civil defence organizations and their personnel shall be respected and protected, subject to the provisions of this Protocol, particularly the provisions of this section. They shall be entitled to perform their civil defence tasks except in case of imperative military necessity.

2. The provisions of paragraph 1 shall also apply to civilians who, although not members of civilian civil defence organizations, respond to an appeal from the competent authorities and perform civil defence tasks under their control.

3. Buildings and matériel used for civil defence purposes and shelters provided for the civilian population are covered by Article 52. Objects used for civil defence purposes may not be destroyed or diverted from their proper use except by the Party to which they belong.

Art 63. Civil defence in occupied territories

1. In occupied territories, civilian civil defence organizations shall receive from the authorities the facilities necessary for the performance of their tasks. In no Circumstances shall their personnel be compelled to perform activities which would interfere with the proper performance of these tasks. The Occupying Power shall not change the structure or personnel of such organizations in

any way which might jeopardize the efficient performance of their mission. These organizations shall not be required to give priority to the nationals or interests of that Power.

2. The Occupying Power shall not compel, coerce or induce civilian civil defence organizations to perform their tasks in any manner prejudicial to the interests of the civilian population.

3. The Occupying Power may disarm civil defence personnel for reasons of security.

4. The Occupying Power shall neither divert from their proper use nor requisition buildings or matériel belonging to or used by civil defence organizations if such diversion or requisition would be harmful to the civilian population.

5. Provided that the general rule in paragraph 4 continues to be observed, the Occupying Power may requisition or divert these resources, subject to the following particular conditions:
(a) that the buildings or matériel are necessary for other needs of the civilian population; and
(b) that the requisition or diversion continues only while such necessity exists.

6. The Occupying Power shall neither divert nor requisition shelters provided for the use of the civilian population or needed by such population.

Art 64. Civilian civil defence organizations of neutral or other States not Parties to the conflict and international co-ordinating organizations

1. Articles 62, 63, 65 and 66 shall also apply to the personnel and matériel of civilian civil defence organizations of neutral or other States not Parties to the conflict which perform civil defence tasks mentioned in Article 61 in the territory of a Party to the conflict, with the consent and under the control of that Party. Notification of such assistance shall be given as soon as possible to any adverse Party concerned. In no circumstances shall this activity be deemed to be an interference in the conflict. This activity should, however, be performed with due regard to the security interests of the Parties to the conflict concerned.

2. The Parties to the conflict receiving the assistance referred to in paragraph 1 and the High Contracting Parties granting it should facilitate international co-ordination of such civil defence actions when appropriate. In such cases the relevant international organizations are covered by the provisions of this Chapter.

3. In occupied territories, the Occupying Power may only exclude or restrict the activities of civilian civil defence organizations of neutral or other States not Parties to the conflict and of international co-ordinating organizations if it can ensure the adequate performance of civil defence tasks from its own resources or those of the occupied territory.

Art 65. Cessation of protection

1. The protection to which civilian civil defence organizations, their personnel, buildings, shelters and matériel are entitled shall not cease unless they

commit or are used to commit, outside their proper tasks, acts harmful to the enemy. Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.

2. The following shall not be considered as acts harmful to the enemy:
(a) that civil defence tasks are carried out under the direction or control of military authorities;
(b) that civilian civil defence personnel co-operate with military personnel in the performance of civil defence tasks, or that some military personnel are attached to civilian civil defence organizations;
(c) that the performance of civil defence tasks may incidentally benefit military victims, particularly those who are hors de combat.

3. It shall also not be considered as an act harmful to the enemy that civilian civil defence personnel bear light individual weapons for the purpose of maintaining order or for self-defence. However, in areas where land fighting is taking place or is likely to take place, the Parties to the conflict shall undertake the appropriate measures to limit these weapons to handguns, such as pistols or revolvers, in order to assist in distinguishing between civil defence personnel and combatants. Although civil defence personnel bear other light individual weapons in such areas, they shall nevertheless be respected and protected as soon as they have been recognized as such.

4. The formation of civilian civil defence organizations along military lines, and compulsory service in them, shall also not deprive them of the protection conferred by this Chapter.

Art 66. Identifcation

1. Each Party to the conflict shall endeavour to ensure that its civil defence organizations, their personnel, buildings and matériel are identifiable while they are exclusively devoted to the performance of civil defence tasks. Shelters provided for the civilian population should be similarly identifiable.

2. Each Party to the conflict shall also endeavour to adopt and implement methods and procedures which will make it possible to recognize civilian shelters as well as civil defence personnel, buildings and matériel on which the international distinctive sign of civil defence is displayed.

3. In occupied territories and in areas where fighting is taking place or is likely to take place, civilian civil defence personnel should be recognizable by the international distinctive sign of civil defence and by an identity card certifying their status.

4. The international distinctive sign of civil defence is an equilateral blue triangle on an orange ground when used for the protection of civil defence organizations, their personnel, buildings and matériel and for civilian shelters.

5. In addition to the distinctive sign, Parties to the conflict may agree upon the use of distinctive signals for civil defence identification purposes.

6. The application of the provisions of paragraphs 1 to 4 is governed by Chapter V of Annex I to this Protocol.

7. In time of peace, the sign described in paragraph 4 may, with the consent of

the competent national authorities, be used for civil defence identification purposes.

8. The High Contracting Parties and the Parties to the conflict shall take the measures necessary to supervise the display of the international distinctive sign of civil defence and to prevent and repress any misuse thereof.

9. The identification of civil defence medical and religious personnel, medical units and medical transports is also governed by Article 18.

Art 67. Members of the armed forces and military units assigned to civil defence organizations

1. Members of the armed forces and military units assigned to civil defence organizations shall be respected and protected, provided that:
(a) such personnel and such units are permanently assigned and exclusively devoted to the performance of any of the tasks mentioned in Article 61;
(b) if so assigned, such personnel do not perform any other military duties during the conflict;
(c) such personnel are clearly distinguishable from the other members of the armed forces by prominently displaying the international distinctive sign of civil defence, which shall be as large as appropriate, and such personnel are provided with the identity card referred to in Chapter V of Annex I to this Protocol certifying their status;
(d) such personnel and such units are equipped only with light individual weapons for the purpose of maintaining order or for self-defence. The provisions of Article 65, paragraph 3 shall also apply in this case;
(e) such personnel do not participate directly in hostilities, and do not commit, or are not used to commit, outside their civil defence tasks, acts harmful to the adverse Party
(f) such personnel and such units perform their civil defence tasks only within the national territory of their Party.

The non-observance of the conditions stated in (e) above by any member of the armed forces who is bound by the conditions prescribed in (a) and (b) above is prohibited.

2. Military personnel serving within civil defence organizations shall, if they fall into the power of an adverse Party, be prisoners of war. In occupied territory they may, but only in the interest of the civilian population of that territory, be employed on civil defence tasks in so far as the need arises, provided however that, if such work is dangerous, they volunteer for such tasks.

3. The buildings and major items of equipment and transports of military units assigned to civil defence organizations shall be clearly marked with the international distinctive sign of civil defence. This distinctive sign shall be as large as appropriate.

4. The matériel and buildings of military units permanently assigned to civil defence organizations and exclusively devoted to the performance of civil defence tasks shall, if they fall into the hands of an adverse Party, remain subject to the laws of war. They may not be diverted from their civil defence purpose so long as they are required for the performance of civil defence tasks, except in case of imperative military necessity, unless previous arrangements have been made for adequate provision for the needs of the civilian population.

Section II. Relief in Favour of the Civilian Population

Art 68. Field of application

The provisions of this Section apply to the civilian population as defined in this Protocol and are supplementary to Articles 23, 55, 59, 60, 61 and 62 and other relevant provisions of the Fourth Convention.

Art 69. Basic needs in occupied territories

1. In addition to the duties specified in Article 55 of the Fourth Convention concerning food and medical supplies, the Occupying Power shall, to the fullest extent of the means available to it and without any adverse distinction, also ensure the provision of clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship.

2. Relief actions for the benefit of the civilian population of occupied territories are governed by Articles 59, 60, 61, 62, 108, 109, 110 and 111 of the Fourth Convention, and by Article 71 of this Protocol, and shall be implemented without delay.

Art 70. Relief actions

1. If the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with the supplies mentioned in Article 69, relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions. Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts. In the distribution of relief consignments, priority shall be given to those persons, such as children, expectant mothers, maternity cases and nursing mothers, who, under the Fourth Convention or under this Protocol, are to be accorded privileged treatment or special protection.

2. The Parties to the conflict and each High Contracting Party shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section, even if such assistance is destined for the civilian population of the adverse Party.

3. The Parties to the conflict and each High Contracting Party which allow the passage of relief consignments, equipment and personnel in accordance with paragraph 2:
(a) shall have the right to prescribe the technical arrangements, including search, under which such passage is permitted;
(b) may make such permission conditional on the distribution of this assistance being made under the local supervision of a Protecting Power;
(c) shall, in no way whatsoever, divert relief consignments from the purpose for which they are intended nor delay their forwarding, except in cases of urgent necessity in the interest of the civilian population concerned.

4. The Parties to the conflict shall protect relief consignments and facilitate their rapid distribution.

5. The Parties to the conflict and each High Contracting Party concerned shall encourage and facilitate effective international co-ordination of the relief actions referred to in paragraph 1.

Art 71. Personnel participating in relief actions

1. Where necessary, relief personnel may form part of the assistance provided in any relief action, in particular for the transportation and distribution of relief consignments; the participation of such personnel shall be subject to the approval of the Party in whose territory they will carry out their duties.

2. Such personnel shall be respected and protected.

3. Each Party in receipt of relief consignments shall, to the fullest extent practicable, assist the relief personnel referred to in paragraph 1 in carrying out their relief mission. Only in case of imperative military necessity may the activities of the relief personnel be limited or their movements temporarily restricted.

4. Under no circumstances may relief personnel exceed the terms of their mission under this Protocol. In particular they shall take account of the security requirements of the Party in whose territory they are carrying out their duties. The mission of any of the personnel who do not respect these conditions may be terminated.

Section III. Treatment of Persons in the Power of a Party to the Conflict

Chapter I. Field of application and protection of persons and objects

Art 72. Field of application

The provisions of this Section are additional to the rules concerning humanitarian protection of civilians and civilian objects in the power of a Party to the conflict contained in the Fourth Convention, particularly Parts I and III thereof, as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict.

Art 73. Refugees and stateless persons

Persons who, before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or State of residence shall be protected persons within the meaning of Parts I and III of the Fourth Convention, in all circumstances and without any adverse distinction.

Art 74. Reunion of dispersed families

The High Contracting Parties and the Parties to the conflict shall facilitate in every possible way the reunion of families dispersed as a result of armed conflicts and shall encourage in particular the work of the humanitarian organizations engaged in this task in accordance with the provisions of the

Conventions and of this Protocol and in conformity with their respective security regulations.

Art 75. Fundamental guarantees

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:
(a) violence to the life, health, or physical or mental well-being of persons, in particular:
(i) murder;
(ii) torture of all kinds, whether physical or mental;
(iii) corporal punishment; and
(iv) mutilation;

(b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;
(c) the taking of hostages;
(d) collective punishments; and
(e) threats to commit any of the foregoing acts.

3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:
(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
(b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
(c) no one shall be accused or convicted of a criminal offence on account or any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
(d) anyone charged with an offence is presumed innocent until proved guilty according to law;

(e) anyone charged with an offence shall have the right to be tried in his presence;
(f) no one shall be compelled to testify against himself or to confess guilt;
(g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;
(i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and
(j) a convicted person shall be advised on conviction or his judicial and other remedies and of the time-limits within which they may be exercised.

5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.

6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.

7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:
(a) persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and
(b) any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.

8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1

Chapter II. Measures in favour of women and children

Art 76. Protection of women

1. Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.

2. Pregnant women and mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict, shall have their cases considered with the utmost priority.

3. To the maximum extent feasible, the Parties to the conflict shall endeavour to avoid the pronouncement of the death penalty on pregnant women or mothers having dependent infants, for an offence related to the armed conflict. The death penalty for such offences shall not be executed on such women.

Art 77. Protection of children

1. Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.

2. The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years the Parties to the conflict shall endeavour to give priority to those who are oldest.

3. If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.

4. If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units as provided in Article 75, paragraph 5.

5. The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed.

Art 78. Evacuation of children

1. No Party to the conflict shall arrange for the evacuation of children, other than its own nationals, to a foreign country except for a temporary evacuation where compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety, so require. Where the parents or legal guardians can be found, their written consent to such evacuation is required. If these persons cannot be found, the written consent to such evacuation of the persons who by law or custom are primarily responsible for the care of the children is required. Any such evacuation shall be supervised by the Protecting Power in agreement with the Parties concerned, namely, the Party arranging for the evacuation, the Party receiving the children and any Parties whose nationals are being evacuated. In each case, all Parties to the conflict shall take all feasible precautions to avoid endangering the evacuation.

2. Whenever an evacuation occurs pursuant to paragraph 1, each child's education, including his religious and moral education as his parents desire, shall be provided while he is away with the greatest possible continuity.

3. With a view to facilitating the return to their families and country of children evacuated pursuant to this Article, the authorities of the Party arranging for the evacuation and, as appropriate, the authorities of the receiving country shall establish for each child a card with photographs, which they shall send to the Central Tracing Agency of the International Committee of the Red Cross. Each card shall bear, whenever possible, and whenever it involves no risk of harm

to the child, the following information:
(a) surname(s) of the child;
(b) the child's first name(s);
(c) the child's sex;
(d) the place and date of birth (or, if that date is not known, the approximate age);
(e) the father's full name;
(f) the mother's full name and her maiden name;
(g) the child's next-of-kin;
(h) the child's nationality;
(i) the child's native language, and any other languages he speaks;
(j) the address of the child's family;
(k) any identification number for the child;
(l) the child's state of health;
(m) the child's blood group;
(n) any distinguishing features;
(o) the date on which and the place where the child was found;
(p) the date on which and the place from which the child left the country;
(q) the child's religion, if any;
(r) the child's present address in the receiving country;
(s) should the child die before his return, the date, place and circumstances of death and place of interment.

Chapter III. Journalists

Art 79. Measures or protection for journalists

1. Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians within the meaning of Article 50, paragraph 1.

2. They shall be protected as such under the Conventions and this Protocol, provided that they take no action adversely affecting their status as civilians, and without prejudice to the right of war correspondents accredited to the armed forces to the status provided for in Article 4 (A) (4) of the Third Convention.

3. They may obtain an identity card similar to the model in Annex II of this Protocol. This card, which shall be issued by the government of the State of which the Journalist is a national or in whose territory he resides or in which the news medium employing him is located, shall attest to his status as a journalist.

Part V. Execution of the Conventions and of its Protocols

Section I. General Provisions

Art 80. Measures for execution

1. The High Contracting Parties and the Parties to the conflict shall without delay take all necessary measures for the execution of their obligations under the Conventions and this Protocol.

2. The High Contracting Parties and the Parties to the conflict shall give orders and instructions to ensure observance of the Conventions and this Protocol, and shall supervise their execution.

Art 81. Activities of the Red Cross and other humanitarian organizations

1. The Parties to the conflict shall grant to the International Committee of the Red Cross all facilities, within their power so as to enable it to carry out the humanitarian functions assigned to it by the Conventions and this Protocol in order to ensure protection and assistance to the victims of conflicts; the International Committee of the Red Cross may also carry out any other humanitarian activities in favour of these victims, subject to the consent of the Parties to the conflict concerned.

2. The Parties to the conflict shall grant to their respective Red Cross (Red Crescent, Red Lion and Sun) organizations the facilities necessary for carrying out their humanitarian activities in favour of the victims of the conflict, in accordance with the provisions of the Conventions and this Protocol and the fundamental principles of the Red Cross as formulated by the International Conferences of the Red Cross.

3. The High Contracting Parties and the Parties to the conflict shall facilitate in every possible way the assistance which Red Cross (Red Crescent, Red Lion and Sun) organizations and the League of Red Cross Societies extend to the victims of conflicts in accordance with the provisions of the Conventions and this Protocol and with the fundamental principles of the red Cross as formulated by the International Conferences of the Red Cross.

4. The High Contracting Parties and the Parties to the conflict shall, as far as possible, make facilities similar to those mentioned in paragraphs 2 and 3 available to the other humanitarian organizations referred to in the Conventions and this Protocol which are duly authorized by the respective Parties to the conflict and which perform their humanitarian activities in accordance with the provisions of the Conventions and this Protocol.

Art 82. Legal advisers in armed forces

The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.

Art 83. Dissemination

1. The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that those instruments may become known to the armed forces and to the civilian population.

2. Any military or civilian authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and this Protocol shall be fully acquainted with the text thereof.

Art 84. Rules of application

The High Contracting Parties shall communicate to one another, as soon as possible, through the depositary and, as appropriate, through the Protecting Powers, their official translations of this Protocol, as well as the laws and regulations which they may adopt to ensure its application.

Section II. Repression of Breaches of the Conventions and of this Protocol

Article 85 - Repression of breaches of this Protocol

1. The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol.

2. Acts described as grave breaches in the Conventions are grave breaches of this Protocol if committed against persons in the power of an adverse Party protected by Articles 44, 45 and 73 of this Protocol, or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol.

3. In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:
(a) making the civilian population or individual civilians the object of attack;
(b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a)(iii);
(c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a)(iii);
(d) making non-defended localities and demilitarized zones the object of attack;
(e) making a person the object of attack in the knowledge that he is hors de combat;
(f) the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.

4. In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol:
(a) the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;
(b) unjustifiable delay in the repatriation of prisoners of war or civilians;
(c) practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;
(d) making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example,

within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, subparagraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;
(e) depriving a person protected by the Conventions or referred to in paragraph 2 of this Article of the rights of fair and regular trial.

5. Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes.

Art 86. Failure to act

1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.

2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

Art 87. Duty of commanders

1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.

2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.

3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

Art 88. Mutual assistance in criminal matters

1. The High Contracting Parties shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol.

2. Subject to the rights and obligations established in the Conventions and in Article 85, paragraph 1 of this Protocol, and when circumstances permit, the

High Contracting Parties shall co-operate in the matter of extradition. They shall give due consideration to the request of the State in whose territory the alleged offence has occurred.

3. The law of the High Contracting Party requested shall apply in all cases. The provisions of the preceding paragraphs shall not, however, affect the obligations arising from the provisions of any other treaty of a bilateral or multilateral nature which governs or will govern the whole or part of the subject of mutual assistance in criminal matters.

Art 89. Co-operation

In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.

Art 90. International Fact-Finding Commission

1. (a) An International Fact-Finding Commission (hereinafter referred to as "the Commission") consisting of 15 members of high moral standing and acknowledged impartiality shall be established;
(b) When not less than 20 High Contracting Parties have agreed to accept the competence of the Commission pursuant to paragraph 2, the depositary shall then, and at intervals of five years thereafter, convene a meeting of representatives of those High Contracting Parties for the purpose of electing the members of the Commission. At the meeting, the representatives shall elect the members of the Commission by secret ballot from a list of persons to which each of those High Contracting Parties may nominate one person;
(c) The members of the Commission shall serve in their personal capacity and shall hold office until the election of new members at the ensuing meeting;
(d) At the election, the High Contracting Parties shall ensure that the persons to be elected to the Commission individually possess the qualifications required and that, in the Commission as a whole, equitable geographical representation is assured;
(e) In the case of a casual vacancy, the Commission itself shall fill the vacancy, having due regard to the provisions of the preceding subparagraphs;
(f) The depositary shall make available to the Commission the necessary administrative facilities for the performance of its functions.

2. (a) The High Contracting Parties may at the time of signing, ratifying or acceding to the Protocol, or at any other subsequent time, declare that they recognize ipso facto and without special agreement, in relation to any other High Contracting Party accepting the same obligation, the competence of the Commission to inquire into allegations by such other Party, as authorized by this Article;
(b) The declarations referred to above shall be deposited with the depositary, which shall transmit copies thereof to the High Contracting Parties;
(c) The Commission shall be competent to:
(i) inquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol;
(ii) facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol;
(d) In other situations, the Commission shall institute an inquiry at the request

of a Party to the conflict only with the consent of the other Party or Parties concerned;
(e) Subject to the foregoing provisions or this paragraph, the provisions of Article 52 of the First Convention, Article 53 of the Second Convention, Article 132 or the Third Convention and Article 149 of the Fourth Convention shall continue to apply to any alleged violation of the Conventions and shall extend to any alleged violation of this Protocol.

3. (a) Unless otherwise agreed by the Parties concerned, all inquiries shall be undertaken by a Chamber consisting of seven members appointed as follows:
(i) five members of the Commission not nationals of any Party to the conflict, appointed by the President of the Commission on the basis of equitable representation of the geographical areas, after consultation with the Parties to the conflict;
(ii) two ad hoc members, not nationals of any Party to the conflict, one to be appointed by each side;
(b) Upon receipt of the request for an inquiry, the President of the Commission shall specify an appropriate time-limit for setting up a Chamber. If any ad hoc member has not been appointed within the time-limit, the President shall immediately appoint such additional member or members of the Commission as may be necessary to complete the membership of the Chamber.

4. (a) The Chamber set up under paragraph 3 to undertake an inquiry shall invite the Parties to the conflict to assist it and to present evidence. The Chamber may also seek such other evidence as it deems appropriate and may carry out an investigation of the situation in loco;
(b) All evidence shall be fully disclosed to the Parties, which shall have the right to comment on it to the Commission;
(c) Each Party shall have the right to challenge such evidence.

5. (a) The Commission shall submit to the Parties a report on the findings of fact of the Chamber, with such recommendations as it may deem appropriate;
(b) If the Chamber is unable to secura sufficient evidence for factual and impartial findings, the Commission shall state the reasons for that inability;
(c) The Commission shall not report its findings publicly, unless all the Parties to the conflict have requested the Commission to do so.

6. The Commission shall establish its own rules, including rules for the presidency or the Commission and the presidency of the Chamber. Those rules shall ensure that the functions of the President of the Commission are exercised at all times and that, in the case of an inquiry, they are exercised by a person who is not a national of a Party to the conflict.

7. The administrative expenses of the Commission shall be met by contributions from the High Contracting Parties which made declarations under paragraph 2, and by voluntary contributions. The Party or Parties to the conflict requesting an inquiry shall advance the necessary funds for expenses incurred by a Chamber and shall be reimbursed by the Party or Parties against which the allegations are made to the extent of 50 per cent of the costs of the Chamber. Where there are counter-allegations before the Chamber each side shall advance 50 per cent of the necessary funds.

Art 91. Responsibility

A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

Part IV. Final Resolutions

Art 92. Signature

This Protocol shall be open for signature by the Parties to the Conventions six months after the signing of the Final Act and will remain open for a period or twelve months.

Art 93. Ratification

This Protocol shall be ratified as soon as possible. The instruments of ratification shall be deposited with the Swiss Federal Council, depositary of the Conventions.

Art 94. Accession

This Protocol shall be open for accession by any Party to the Conventions which has not signed it. The instruments of accession shall be deposited with the depositary.

Art 95.- Entry into force

1. This Protocol shall enter into force six months after two instruments of ratification or accession have been deposited.

2. For each Party to the Conventions thereafter ratifying or acceding to this Protocol, it shall enter into force six months after the deposit by such Party of its instrument of ratification or accession.

Art 96. Treaty relations upon entry into force or this Protocol

1. When the Parties to the Conventions are also Parties to this Protocol, the Conventions shall apply as supplemented by this Protocol.

2. When one of the Parties to the conflict is not bound by this Protocol, the Parties to the Protocol shall remain bound by it in their mutual relations. They shall furthermore be bound by this Protocol in relation to each of the Parties which are not bound by it, if the latter accepts and applies the provisions thereof.

3. The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. Such declaration shall, upon its receipt by the depositary, have in relation to that conflict the following effects:
(a) the Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect;

(b) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and

(c) the Conventions and this Protocol are equally binding upon all Parties to the conflict.

Art 97. Amendment

1. Any High Contracting Party may propose amendments to this Protocol. The text of any proposed amendment shall be communicated to the depositary, which shall decide, after consultation with all the High Contracting Parties and the International Committee of the Red Cross, whether a conference should be convened to consider the proposed amendment.

2. The depositary shall invite to that conference all the High Contracting Parties as well as the Parties to the Conventions, whether or not they are signatories of this Protocol.

Art 98. Revision of Annex I

1. Not later than four years after the entry into force of this Protocol and thereafter at intervals of not less than four years, the International Committee of the Red Cross shall consult the High Contracting Parties concerning Annex I to this Protocol and, if it considers it necessary, may propose a meeting of technical experts to review Annex I and to propose such amendments to it as may appear to be desirable. Unless, within six months of the communication of a proposal for such a meeting to the High Contracting Parties, one third of them object, the International Committee of the Red Cross shall convene the meeting, inviting also observers of appropriate international organizations. Such a meeting shall also be convened by the International Committee of the Red Cross at any time at the request of one third of the High Contracting Parties.

2. The depositary shall convene a conference of the High Contracting Parties and the Parties to the Conventions to consider amendments proposed by the meeting of technical experts if, after that meeting, the International Committee of the Red Cross or one third of the High Contracting Parties so request.

3. Amendments to Annex I may be adopted at such a conference by a two-thirds majority of the High Contracting Parties present and voting.

4. The depositary shall communicate any amendment so adopted to the High Contracting Parties and to the Parties to the Conventions. The amendment shall be considered to have been accepted at the end of a period of one year after it has been so communicated, unless within that period a declaration of non-acceptance of the amendment has been communicated to the depositary by not less than one third of the High Contracting Parties.

5. An amendment considered to have been accepted in accordance with paragraph 4 shall enter into force three months after its acceptance for all High Contracting Parties other than those which have made a declaration of non-acceptance in accordance with that paragraph. Any Party making such a declaration may at any time withdraw it and the amendment shall then enter into force for that Party three months thereafter.

6. The depositary shall notify the High Contracting Parties and the Parties to the Conventions of the entry into force of any amendment, of the Parties bound thereby, of the date of its entry into force in relation to each Party, of declarations of non-acceptance made in accordance with paragraph 4, and of withdrawals of such declarations.

Article 99 - Denunciation

1. In case a High Contracting Party should denounce this Protocol, the denunciation shall only take effect one year after receipt of the instrument of denunciation. If, however, on the expiry of that year the denouncing Party is engaged in one of the situations referred to in Article I, the denunciation shall not take effect before the end of the armed conflict or occupation and not, in any case, before operations connected with the final release, repatriation or re-establishment of the persons protected by the Convention or this Protocol have been terminated.

2. The denunciation shall be notified in writing to the depositary, which shall transmit it to all the High Contracting Parties.

3. The denunciation shall have effect only in respect of the denouncing Party.

4. Any denunciation under paragraph 1 shall not affect the obligations already incurred, by reason of the armed conflict, under this Protocol by such denouncing Party in respect of any act committed before this denunciation becomes effective.

Article 100 - Notifications

The depositary shall inform the High Contracting Parties as well as the Parties to the Conventions, whether or not they are signatories of this Protocol, of:
(a) signatures affixed to this Protocol and the deposit of instruments of ratification and accession under Articles 93 and 94;
(b) the date of entry into force of this Protocol under Article 95;
(c) communications and declarations received under Articles 84, 90 and 97;
(d) declarations received under Article 96, paragraph 3, which shall be communicated by the quickest methods; and
(e) denunciations under Article 99.

Art 101. Registration

1. After its entry into force, this Protocol shall be transmitted by the depositary to the Secretariat of the United Nations for registration and publication, in accordance with Article 102 of the Charter of the United Nations.

2. The depositary shall also inform the Secretariat of the United Nations of all ratifications, accessions and denunciations received by it with respect to this Protocol.

Art 102. Authentic texts

The original of this Protocol, of which the Arabic, Chinese, English, French,

Russian and Spanish texts are equally authentic, shall be deposited with the depositary, which shall transmit certified true copies thereof to all the Parties to the Conventions.

ANNEX I AS AMENDED ON 30 NOVEMBER 1993: REGULATIONS CONCERNING IDENTIFICATION
(This Annex replaces the former Annex I)

[Former] Annex I. Regulations Concerning Identification (for explanations, see the introduction:)

Annex II. Identity Card for Journalists on Dangerous Professional Missions

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Decisions

Zitierung: BVerfG, 2 BvR 564/95 vom 14.01.2004, Absatz-Nr. (1 - 117), http://www.bverfg.de/entscheidungen/rs20040114_2bvr056495.html

L e i t s ä t z e

zum Beschluss des Zweiten Senats vom 14. Januar 2004

- 2 BvR 564/95 -

1. Der erweiterte Verfall (§ 73d StGB) verfolgt nicht repressiv-vergeltende, sondern präventiv-ordnende Ziele und ist daher keine dem Schuldgrundsatz unterliegende strafähnliche Maßnahme.

2. § 73d StGB verletzt die Unschuldsvermutung nicht.

3. Die Annahme der deliktischen Herkunft eines Gegenstands im Sinne des § 73d Abs. 1 Satz 1 StGB ist gerechtfertigt, wenn sich der Tatrichter durch Ausschöpfung der vorhandenen Beweismittel von ihr überzeugt hat.

BUNDESVERFASSUNGSGERICHT

- 2 BvR 564/95 -

Im Namen des Volkes

In dem Verfahren
über
die Verfassungsbeschwerde

des Herrn M ...

- Bevollmächtigter:
Rechtsanwalt Christoph Prasse,
Friedrich-Ebert-Straße 120, 48153 Münster -

gegen a) den Beschluss des Bundesgerichtshofs vom 22. November 1994 - 4 StR 516/94 -,

b) das Urteil des Landgerichts Bochum vom 11. Mai 1994 - 22 KLs 47 Js 159/93 - I 4/94 -,

c) mittelbar § 73d StGB

und Antrag auf Wiedereinsetzung in den vorigen Stand

hat das Bundesverfassungsgericht - Zweiter Senat - unter Mitwirkung der Richterinnen und Richter

Vizepräsident Hassemer,
Jentsch,
Broß,
Osterloh,
Di Fabio,
Mellinghoff,
Lübbe-Wolff,
Gerhardt

am 14. Januar 2004 beschlossen:

Die Verfassungsbeschwerde wird zurückgewiesen.

Gründe:

A.

1

Die Verfassungsbeschwerde betrifft die Vereinbarkeit des § 73d StGB (Erweiterter Verfall) mit dem Grundgesetz. Sie richtet sich zugleich gegen die Anwendung dieser Vorschrift in der Auslegung durch den Bundesgerichtshof.

I.

2

Art. 1 Nr. 7 des Gesetzes zur Bekämpfung des illegalen Rauschgifthandels und anderer Erscheinungsformen der Organisierten Kriminalität (OrgKG) vom 15. Juli 1992 (BGBl I S. 1302) hat die Vorschrift des § 73d über den erweiterten Verfall in den Allgemeinen Teil des Strafgesetzbuchs eingefügt. Sie ergänzt die Regelung des § 73 StGB über den (einfachen) Verfall, wonach das Gericht, wenn der Täter oder Teilnehmer etwas aus einer rechtswidrigen Tat oder für sie erlangt hat, den Verfall des Erlangten anordnet. Die Anordnung des Verfalls erstreckt sich gemäß § 73 Abs. 2 StGB auf Nutzungen und Surrogate, ferner gemäß § 73a StGB auf den Geldwert nicht oder nicht mehr entziehbarer Vermögensvorteile. Sie unterbleibt, soweit dem Verletzten aus der Tat ein Anspruch erwachsen ist, dessen Erfüllung dem Täter oder Teilnehmer den Wert des aus der Tat Erlangten entziehen würde (§ 73 Abs. 1 Satz 2 StGB), oder wenn sie für den Betroffenen eine unbillige Härte wäre (§ 73c StGB). Die rechtskräftige Anordnung des Verfalls bewirkt gemäß § 73e StGB, dass das Eigentum an der Sache oder das verfallene Recht auf den Staat übergeht, wenn es dem von der Anordnung Betroffenen zu dieser Zeit zusteht.

3

Die Vorschriften lauten:

4

§ 73 Voraussetzungen des Verfalls

5

(1) Ist eine rechtswidrige Tat begangen worden und hat der Täter oder Teilnehmer für die Tat oder aus ihr etwas erlangt, so ordnet das Gericht dessen Verfall an. Dies gilt nicht, soweit dem Verletzten aus der Tat ein Anspruch erwachsen ist, dessen Erfüllung dem Täter oder Teilnehmer den Wert des aus der Tat Erlangten entziehen würde.

6

(2) Die Anordnung des Verfalls erstreckt sich auf die gezogenen Nutzungen. Sie kann sich auch auf die Gegenstände erstrecken, die der Täter oder Teilnehmer durch die Veräußerung eines erlangten Gegenstandes oder als Ersatz für dessen Zerstörung, Beschädigung oder Entziehung oder auf Grund eines erlangten Rechts erworben hat.

7

(3) Hat der Täter oder Teilnehmer für einen anderen gehandelt und hat dadurch dieser etwas erlangt, so richtet sich die Anordnung des Verfalls nach den Absätzen 1 und 2 gegen ihn.

8

(4) Der Verfall eines Gegenstandes wird auch angeordnet, wenn er einem Dritten gehört oder zusteht, der ihn für die Tat oder sonst in Kenntnis der Tatumstände gewährt hat.

9

§ 73a Verfall des Wertersatzes

10

Soweit der Verfall eines bestimmten Gegenstandes wegen der Beschaffenheit des Erlangten oder aus einem anderen Grunde nicht möglich ist oder von dem Verfall eines Ersatzgegenstandes nach § 73 Abs. 2 Satz 2 abgesehen wird, ordnet das Gericht den Verfall eines Geldbetrags an, der dem Wert des Erlangten entspricht. Eine solche Anordnung trifft das Gericht auch neben dem Verfall eines Gegenstandes, soweit dessen Wert hinter dem Wert des zunächst Erlangten zurückbleibt.

11

§ 73c Härtevorschrift

12

(1) Der Verfall wird nicht angeordnet, soweit er für den Betroffenen eine unbillige Härte wäre. Die Anordnung kann unterbleiben, soweit der Wert des Erlangten zur Zeit der Anordnung in dem Vermögen des Betroffenen nicht mehr vorhanden ist oder wenn das Erlangte nur einen geringen Wert hat.

13

(2) Für die Bewilligung von Zahlungserleichterungen gilt § 42 entsprechend.

14

§ 73e Wirkung des Verfalls

15

(1) Wird der Verfall eines Gegenstandes angeordnet, so geht das Eigentum an der Sache oder das verfallene Recht mit der Rechtskraft der Entscheidung auf den Staat über, wenn es dem von der Anordnung Betroffenen zu dieser Zeit zusteht. Rechte Dritter an dem Gegenstand bleiben bestehen.

16

(2) Vor der Rechtskraft wirkt die Anordnung als Veräußerungsverbot im Sinne des § 136 des Bürgerlichen Gesetzbuches; das Verbot umfaßt auch andere Verfügungen als Veräußerungen.

17

Nach § 73d Abs. 1 Satz 1 StGB ist, wenn eine rechtswidrige Tat nach einem auf diese Vorschrift verweisenden Gesetz begangen worden ist, der Verfall von Gegenständen des Täters oder Teilnehmers auch dann anzuordnen, wenn die Umstände die Annahme rechtfertigen, dass diese Gegenstände für (andere) rechtswidrige Taten oder aus ihnen erlangt worden sind. § 73d Abs. 1 Satz 2 StGB sieht die Anordnung des erweiterten Verfalls auch dann vor, wenn der Gegenstand dem Täter oder Teilnehmer nur deshalb nicht gehört oder zusteht, weil dieser ihn für eine rechtswidrige Tat oder aus ihr erlangt hat.

18

§ 73d StGB erweitert somit den Anwendungsbereich des Verfalls zum einen auf Vermögensgegenstände, die nicht aus dem abgeurteilten Delikt, sondern aus anderen rechtswidrigen Taten stammen; einen Nachweis der konkreten Umstände dieser Taten verlangt die Vorschrift ebenso wenig wie die schuldhafte Begehung und die strafrechtliche Verfolgbarkeit. Zum anderen erfasst sie auch solche Vermögenswerte, die der Täter oder Teilnehmer wegen eines Verstoßes gegen strafrechtliche Vorschriften zivilrechtlich nicht wirksam erwerben konnte (Nichtigkeit auch des Verfügungsgeschäfts gemäß § 134 BGB, vgl. die Begründung des Entwurfs eines ... Strafrechtsänderungsgesetzes - Erweiterter Verfall - <... StrÄndG> vom 9. März 1990, BTDrucks 11/6623, S. 7/8). Zivilrechtliche Ersatzansprüche des durch die rechtswidrige Tat Verletzten hindern die Anordnung des erweiterten Verfalls ebenfalls nicht (vgl. BTDrucks 11/6623, S. 7).

19

§ 73d StGB hat folgenden Wortlaut:

20

§ 73d Erweiterter Verfall

21

(1) Ist eine rechtswidrige Tat nach einem Gesetz begangen worden, das auf diese Vorschrift verweist, so ordnet das Gericht den Verfall von Gegenständen des Täters oder Teilnehmers auch dann an, wenn die Umstände die Annahme rechtfertigen, daß diese Gegenstände für rechtswidrige Taten oder aus ihnen erlangt worden sind. Satz 1 ist auch anzuwenden, wenn ein Gegenstand dem Täter oder Teilnehmer nur deshalb nicht gehört oder zusteht, weil er den Gegenstand für eine rechtswidrige Tat oder aus ihr erlangt hat. § 73 Abs. 2 gilt entsprechend.

22

(2) Ist der Verfall eines bestimmten Gegenstandes nach der Tat ganz oder teilweise unmöglich geworden, so finden insoweit die §§ 73a und 73b sinngemäß Anwendung.

23

(3) Ist nach Anordnung des Verfalls nach Absatz 1 wegen einer anderen rechtswidrigen Tat, die der Täter oder Teilnehmer vor der Anordnung begangen hat, erneut über den Verfall von Gegenständen des Täters oder Teilnehmers zu entscheiden, so berücksichtigt das Gericht hierbei die bereits ergangene Anordnung.

24

(4) § 73c gilt entsprechend.

25

Verweisungen auf § 73d StGB finden sich im Besonderen Teil des Strafgesetzbuchs, und zwar jeweils für den Fall der banden- oder gewerbsmäßigen Begehung, in den Abschnitten Geld- und Wertzeichenfälschung (§ 150 Abs. 1), Straftaten gegen die sexuelle Selbstbestimmung (§ 181c, § 184 Abs. 7 Satz 1), Diebstahl und Unterschlagung (§ 244 Abs. 3, § 244a Abs. 3), Raub und Erpressung (§ 256 Abs. 2), Begünstigung und Hehlerei (§ 260 Abs. 3, § 260a Abs. 3, § 261 Abs. 7 Satz 3 und 4), Betrug und Untreue (§ 263 Abs. 7), Urkundenfälschung (§ 282 Abs. 1), Strafbarer Eigennutz (§ 286 Abs. 1), Straftaten gegen den Wettbewerb (§ 302) und Straftaten im Amt (§ 338). Im Bereich des Nebenstrafrechts verweisen vor allem die Vorschriften des Betäubungsmittelgesetzes (§ 33 Abs. 1 Nr. 1 und 2 BtMG) auf § 73d StGB, außerdem § 84 Abs. 5, § 84a Abs. 3 des Asylverfahrensgesetzes, § 92a Abs. 5, § 92b Abs. 3 des Ausländergesetzes, § 24 Abs. 3 des Gesetzes über die Kontrolle von Kriegswaffen, § 54 Abs. 3 Satz 2 des Waffengesetzes, § 36 Abs. 3 des Außenwirtschaftsgesetzes und § 19 Abs. 3 des Ausführungsgesetzes zum Chemiewaffenübereinkommen.

26

Verfahrensrechtliche Vorschriften über den erweiterten Verfall, der unter den Voraussetzungen des § 76a StGB auch selbständig angeordnet werden kann, enthalten § 442, §§ 430 ff. StPO. Die Regelungen der §§ 111b ff. StPO ermöglichen eine vorläufige Beschlagnahme von beim Beschuldigten vorgefundenen Vermögensgegenständen, um

die Durchsetzung einer späteren Anordnung des Verfalls oder von Ersatzansprüchen Tatgeschädigter sicherzustellen.

II.

27

1. Der Beschwerdeführer wurde am 11. Mai 1994 vom Landgericht wegen gemeinschaftlich begangenen gewerbsmäßigen unerlaubten Handeltreibens mit Betäubungsmitteln in nicht geringer Menge in zwei Fällen zu einer Gesamtfreiheitsstrafe von sieben Jahren verurteilt, weil er (jeweils zusammen mit einem Mitangeklagten) am 15. Oktober 1992 telefonisch den Ankauf von drei Kilogramm Heroin vereinbart und am 1. August 1993 ein Kilogramm Heroin entgegen genommen hatte. Daneben verhängte das Landgericht gegen den Beschwerdeführer Maßregeln gemäß § 69, § 69a StGB und bestimmte außerdem, dass ein auf seinem Sparkonto vorhandenes Guthaben in Höhe von 42.520,18 DM dem erweiterten Verfall unterliege und eingezogen werde.

28

Die Kammer war zu der Überzeugung gelangt, dass dieses Geld aus anderen, ihr nicht bekannten Rauschgiftgeschäften des Beschwerdeführers stamme. Er habe es angesichts seines dauerhaft geringen Durchschnittseinkommens von 850 DM monatlich und der von ihm neben seinen allgemeinen Lebenshaltungskosten und den laufenden Kosten eines Autos zu bestreitenden monatlichen Miete von zuletzt 600 DM nicht aus legalen Mitteln ersparen können; also komme nur ein strafbarer Erwerb in Betracht. Die beiden abgeurteilten, jeweils gewerbsmäßig begangenen BtM-Straftaten zeigten - auch wenn aus ihnen kein Gewinn erzielt worden sei (in dem einen Fall, weil das Geschäft nicht zu Stande kam, in dem anderen Fall, weil das erworbene Rauschgift beschlagnahmt wurde) -, dass er mit Drogen gehandelt habe, während es an Anhaltspunkten für irgendwelche anderen strafbaren Verhaltensweisen des Beschwerdeführers fehle. Nach Überzeugung der Kammer konnte er das Geld daher nur aus anderen Betäubungsmittelstraftaten erlangt haben.

29

2. Die vom Beschwerdeführer gegen das Urteil mit der Rüge einer Verletzung formellen und materiellen Rechts eingelegte Revision verwarf der Bundesgerichtshof unter Hinweis auf die als zutreffend erachteten Ausführungen des Generalbundesanwalts gemäß § 349 Abs. 2 StPO (BGHSt 40, 371). Die gegen den Beschwerdeführer ergangene Anordnung des erweiterten Verfalls beruhe auf einer wirksamen Rechtsgrundlage. Im Schrifttum erhobene Bedenken gegen die Vereinbarkeit des § 73d StGB mit der Unschuldsvermutung und der Eigentumsgarantie könnten durch eine verfassungskonforme Auslegung vermieden werden:

30

Die in § 73d Abs. 1 Satz 1 StGB für die Anordnung des erweiterten Verfalls (nur) verlangte "ganz hohe Wahrscheinlichkeit", dass "Gegenstände für rechtswidrige Taten oder aus ihnen erlangt worden sind", setze das Institut des erweiterten Verfalls dem verfassungsrechtlichen Bedenken aus, es beruhe auf einer Unterstellung von Straftaten. Deshalb sei das normativ wertende Element "wenn die Umstände die Annahme rechtfertigen" in § 73d Abs. 1 Satz 1 StGB - dem nach dem Willen des Gesetzgebers die Aufgabe zukomme, bei der Gesamtbewertung des Sachverhalts auch die Grundrechtsverbürgungen zu berücksichtigen - verfassungskonform einengend auszulegen. Die Anordnung des erweiterten Verfalls komme nur in Betracht, wenn der Tatrichter auf Grund erschöpfender Beweiserhebung und -würdigung die uneingeschränkte Überzeugung gewonnen habe, dass der Angeklagte die von der Anordnung erfassten Gegenstände aus rechtswidrigen Taten erlangt habe. Ermittlungen und Feststellungen zu diesen Taten im Einzelnen seien jedoch nicht erforderlich. An die Überzeugungsbildung dürften keine überspannten Anforderungen gestellt werden. Vor allem sei das Gericht nicht gehindert, sondern vielmehr gehalten, die festgestellten Anlasstaten in seine Überzeugungsbildung mit einzubeziehen - wie es das Landgericht getan habe -, auch wenn aus ihnen kein Gewinn erlangt worden sei. Diesen Anforderungen würden die Darlegungen der persönlichen und wirtschaftlichen Verhältnisse des Beschwerdeführers in den Gründen des landgerichtlichen Urteils noch gerecht.

III.

31

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§ 46 Grundsätze der Strafzumessung

(1) Die Schuld des Täters ist Grundlage für die Zumessung der Strafe. Die Wirkungen, die von der Strafe für das künftige Leben des Täters in der Gesellschaft zu erwarten sind, sind zu berücksichtigen.
(2) Bei der Zumessung wägt das Gericht die Umstände, die für und gegen den Täter sprechen, gegeneinander ab. Dabei kommen namentlich in Betracht:

die Beweggründe und die Ziele des Täters,
die Gesinnung, die aus der Tat spricht, und der bei der Tat aufgewendete Wille,
das Maß der Pflichtwidrigkeit,
die Art der Ausführung und die verschuldeten Auswirkungen der Tat,
das Vorleben des Täters, seine persönlichen und wirtschaftlichen Verhältnisse sowie
sein Verhalten nach der Tat, besonders sein Bemühen, den Schaden wiedergutzumachen, sowie das Bemühen des Täters, einen Ausgleich mit dem Verletzten zu erreichen.

(3) Umstände, die schon Merkmale des gesetzlichen Tatbestandes sind, dürfen nicht berücksichtigt werden.

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§ 15 Vorsätzliches und fahrlässiges Handeln

Strafbar ist nur vorsätzliches Handeln, wenn nicht das Gesetz fahrlässiges Handeln ausdrücklich mit Strafe bedroht.

zum Seitenanfang Datenschutz Seite ausdrucken

Gegen das Urteil des Landgerichts und den Beschluss des Bundesgerichtshofs richtet sich die Verfassungsbeschwerde, mit der der Beschwerdeführer eine Verletzung seiner Grundrechte und grundrechtsgleichen Rechte aus Art. 14, 20 Abs. 3 und 103 Abs. 2 GG rügt. Mittelbar wendet sich die Verfassungsbeschwerde gegen die Vorschrift des § 73d StGB über den erweiterten Verfall, der nach Auffassung des Beschwerdeführers den Charakter einer Strafe hat.

32

§ 73d StGB knüpfe die Anordnung des Verfalls lediglich an die Voraussetzung, dass "Umstände die Annahme rechtfertigen, dass Gegenstände für rechtswidrige Taten oder aus ihnen erlangt worden sind". Die Vorschrift verlange also den vollen Nachweis weder dafür, dass der betroffene Gegenstand aus einer schuldhaft begangenen Straftat stammt, noch dafür, dass dieser gemeinschaftswidrig gebraucht wurde oder ein solcher Eigentumsmissbrauch in konkretem Zusammenhang zu der abzuurteilenden Anknüpfungstat steht. Damit verstoße er gegen das Schuldprinzip und - wegen der Unterstellung von Straftaten - gegen die Unschuldsvermutung des Art. 6 Abs. 2 der Konvention zum Schutze der Menschenrechte und Grundfreiheiten vom 4. November 1950 (EMRK), außerdem gegen das Bestimmtheitsgebot. Auf Grund dieser Mängel verletze § 73d StGB zugleich die Eigentumsgewährleistung des Art. 14 GG und - mangels Begrenzung des Zugriffs - den Verhältnismäßigkeitsgrundsatz.

33

Der vom Bundesgerichtshof vorgenommenen verfassungskonformen Auslegung stehe der Gesetzeswortlaut entgegen. Unabhängig davon werde die landgerichtliche Entscheidung den vom Bundesgerichtshof aufgestellten erhöhten Beweisanforderungen nicht gerecht. Vor allem habe es die Strafkammer versäumt, über die Eröffnung und Führung des Sparkontos, über die Höhe der zwischenzeitlich erfolgten Einzahlungen und Abhebungen sowie über weitere Konten des Beschwerdeführers Beweis zu erheben. Dabei hätte sich ergeben, dass das Guthaben auf dem Sparkonto durch Einzahlungen von anderen, schon früher bestehenden, Konten des Beschwerdeführers entstanden sei. Insoweit liege auch ein Verstoß gegen das Rückwirkungsverbot des Art. 103 Abs. 2 GG vor; die Anordnung des Verfalls erstrecke sich auf Vermögensgegenstände, die er vor Inkrafttreten des § 73d StGB erworben habe.

IV.

34

Zu der Verfassungsbeschwerde haben sich namens der Bundesregierung das Bundesministerium der Justiz sowie das Bayerische Staatsministerium der Justiz, die Vorsitzenden des 1., 2., 3. und 5. Strafsenats des Bundesgerichtshofs und der Generalbundesanwalt geäußert.

35

1. Nach Auffassung des Bundesministeriums der Justiz widerspricht die einengende Auslegung des § 73d Abs. 1 StGB durch den Bundesgerichtshof im Ausgangsverfahren dem in den Gesetzesmaterialien zum Ausdruck gebrachten Willen des Gesetzgebers, den Nachweis der Herkunft eines Gegenstands aus rechtswidrigen Taten zu erleichtern. Auch mit dieser Beweiserleichterung stehe die Regelung über den erweiterten Verfall, die mit der Formulierung "rechtfertigen" eine Wertung im Einzelfall verlange, mit dem Grundgesetz in Einklang.

36

a) Die Vorschrift verstoße nicht gegen den Schuldgrundsatz oder die Unschuldsvermutung, weil eine Anordnung des Verfalls nach § 73d Abs. 1 StGB keine Strafe oder strafähnliche Sanktion sei und deshalb keine Schuldfeststellung voraussetze. Als Sonderform des Verfalls bezwecke der erweiterte Verfall den Ausgleich unrechtmäßiger Vermögensverschiebungen. Dieser Zweck bestimme die Rechtsnatur des Instituts, bei dem es sich um eine Abschöpfung eigener Art des aus der Straftat Erlangten handele.

37

b) § 73d StGB verletze auch nicht die verfassungsrechtlich geschützte Selbstbezichtigungsfreiheit des Beschuldigten. Dieser sei rechtlich nicht gezwungen, zur Abwendung einer Anordnung des Verfalls Angaben über eigene strafrechtlich erhebliche Verhaltensweisen zu machen.

38

c) Die Regelung über den erweiterten Verfall verstoße auch nicht gegen die Eigentumsgewährleistung des Art. 14 GG. Eine Anordnung des Verfalls entziehe zwar nach § 73d StGB konkrete Rechtspositionen und greife damit in den Schutzbereich des Eigentumsgrundrechts ein. Die Vorschrift bilde aber eine vom Grundgesetz stillschweigend zugelassene Eigentumsschranke. Der erweiterte Verfall diene der Bekämpfung der organisierten Kriminalität, insbesondere des illegalen Betäubungsmittelhandels, und damit dem Schutz elementarer Rechtsgüter. Er finde – wie in der Entscheidung des Bundesverfassungsgerichts vom 12. Dezember 1967 (BVerfGE 22, 387 <422>) verlangt – eine Rechtfertigung in der Verfassung und entspreche darüber hinaus dem Grundsatz der Verhältnismäßigkeit. Er sei geeignet, die Gewinne aus dem Drogenhandel abzuschöpfen und den Straftätern die Mittel für weitere Straftaten zu entziehen.

39

Der erweiterte Verfall sei hierzu auch erforderlich. Vor Einführung des erweiterten Verfalls sei die Abschöpfung deliktisch erzielter Gewinne häufig daran gescheitert, dass die für die Anordnung eines (einfachen) Verfalls gemäß § 73 Abs. 1 StGB erforderliche sichere Zuordnung beim Beschuldigten vorgefundener Vermögensgegenstände zu einer bestimmten Tat nicht möglich gewesen sei. Gegen eine deswegen in Polizeikreisen, aber auch international – etwa in Art. 5 Abs. 7 des Übereinkommens der Vereinten Nationen vom 20. Dezember 1988 gegen den unerlaubten Verkehr mit Suchtstoffen und psychotropen Stoffen (vgl. BTDrucks 12/3346) – geforderte Beweislast des Beschuldigten für den redlichen Erwerb verdächtiger Vermögenswerte habe die Bundesregierung verfassungsrechtliche Bedenken gehabt. Die anstelle einer solchen Beweislastumkehr in § 73d StGB vorgesehene Beweiserleichterung sei das mildeste Mittel gewesen, um die Zugriffsmöglichkeiten auf Tatgewinne zu erweitern.

40

Der mit dem erweiterten Verfall verbundene Eingriff stehe auch nicht außer Verhältnis zur Bedeutung der Sache. Der Verfall diene dem Ausgleich unrechtmäßiger Vermögensverschiebung und müsse daher vom Betroffenen grundsätzlich hingenommen werden. Unzumutbare Ergebnisse würden durch die Härtevorschrift des § 73c StGB vermieden.

41

2. Das Bayerische Staatsministerium der Justiz hat keine verfassungsrechtlichen Bedenken gegen die Regelung des § 73d StGB.

42

a) Sie sei mit der Unschuldsvermutung und dem Schuldgrundsatz vereinbar. Beim erweiterten Verfall handele es sich grundsätzlich nicht um eine Strafe oder strafähnliche Sanktion, sondern um eine quasi-kondiktionelle Ausgleichsmaßnahme, deren Anwendung gemäß § 73d StGB die Feststellung von Schuld nicht voraussetze.

43

b) Der Eigentumsgewährleistung des Grundgesetzes werde § 73d StGB hinreichend gerecht. Nach der Rechtsprechung des Bundesverfassungsgerichts sei die Entziehung von Eigentum als Nebenfolge einer strafrechtlichen Verurteilung vom Grundgesetz als traditionelle Eigentumsschranke stillschweigend zugelassen. Die aus Art. 14 Abs. 1 Satz 2 GG in Verbindung mit Art. 14 Abs. 2 GG herzuleitende Zulässigkeit von Eigentumssanktionen rechtfertige sich aus dem Gedanken des Missbrauchs: Wer einen Vermögensvorteil auf strafbare Weise erlange, gebrauche das Eigentum in einer vom Grundgesetz nicht gebilligten Weise. Er verwirke deshalb insoweit sein Eigentumsrecht. Der entsprechend dem Missbrauchsgedanken erforderliche konkrete Zusammenhang zwischen der die Verwirkung auslösenden strafbaren Handlung und dem zu entziehenden Vermögensgegenstand werde von § 73d StGB vorausgesetzt. Die vorgesehene Beweiserleichterung sei mit Art. 14 Abs. 1 GG vereinbar. An der Bekämpfung der organisierten Kriminalität bestehe ein ganz erhebliches Allgemeininteresse, welches das Interesse des Einzelnen am Schutz seines Eigentums überwiegen könne.

44

§ 73d StGB beruhe auf der Erfahrung, dass die organisierte Kriminalität mit dem herkömmlichen strafrechtlichen Instrumentarium nicht erfolgreich bekämpft werden könne. Es falle in die Einschätzungsprärogative des Gesetzgebers, ob eine effektivere Abschöpfung der aus der Begehung von Straftaten erzielten Gewinne zu einer wirksameren Bekämpfung dieser Art der Kriminalität beitragen werde.

45

Die Beweiserleichterung entspreche auch dem Grundsatz der Verhältnismäßigkeit. Sie sei geeignet, die Abschöpfung von illegalen Gewinnen und damit das Ziel einer effektiveren Bekämpfung der organisierten Kriminalität zu fördern. Sie sei auch erforderlich, da nicht ersichtlich sei, in welcher die Eigentumsgarantie schonenderen Weise die Abschöpfung illegaler Gewinne erleichtert werden könnte. Schließlich sei die Regelung mit dem Übermaßverbot vereinbar, auch wenn sie die Gefahr einer Einziehung legal erworbener Gegenstände in sich berge. Diese Gefahr sei angesichts des in § 73d Abs. 1 StGB verlangten hohen Wahrscheinlichkeitsgrades sehr gering und angesichts des mit dieser Vorschrift verfolgten besonders gewichtigen Allgemeininteresses hinzunehmen.

46

c) Ein Verstoß gegen das Bestimmtheitsgebot des Art. 103 Abs. 2 GG liege nicht vor, weil § 73d StGB keine Strafe anordne.

47

3. Nach Ansicht des 1. Strafsenats des Bundesgerichtshofs ist die verfassungskonforme Auslegung des § 73d StGB durch den 4. Strafsenat des Bundesgerichtshofs im Ausgangsverfahren mit dem Wortlaut der Vorschrift und der Intention des Gesetzgebers, "eine ganz hohe Wahrscheinlichkeit" der deliktischen Herkunft für die Anordnung des erweiterten Verfalls genügen zu lassen, unvereinbar. Unüberwindliche Bedenken gegen die Verfassungsmäßigkeit der Regelung hätten daher die Einholung einer verfassungsgerichtlichen Entscheidung gemäß Art. 100 Abs. 1 GG nahe gelegt.

48

Der 3. Strafsenat hat sich der vom 4. Strafsenat im Ausgangsverfahren vertretenen Auffassung angeschlossen, die Anordnung des erweiterten Verfalls gemäß § 73d Abs. 1 StGB setze die volle Überzeugung des Tatrichters von der deliktischen Herkunft der erfassten Gegenstände voraus. Im Übrigen haben die Strafsenate auf ihre Rechtsprechung Bezug genommen.

49

4. Der Generalbundesanwalt hält § 73d StGB in der verfassungskonformen Auslegung des Bundesgerichtshofs und seine Anwendung im Ausgangsverfahren für verfassungsrechtlich unbedenklich.

50

a) Die Regelung verstoße nicht gegen die Unschuldsvermutung oder gegen das Schuldprinzip. Die kondiktionsähnliche Abschöpfung bemakelten Vermögens zwecks Prävention sei etwas wesensverschieden Anderes als eine straftypische, konkret schuldbezogene Nachteilszufügung. Schuldfeststellungen vor Schuldspruchreife hinsichtlich der Herkunftstaten seien mit einer Anordnung des Verfalls gemäß § 73d StGB nicht verbunden.

51

b) § 73d StGB verletze die Eigentumsgewährleistung nicht. Der mit dem erweiterten Verfall ermöglichte Zugriff auf das Vermögen organisiert vorgehender Täter sei geeignet, kriminellen Organisationen das "Investitionskapital" für weitere Straftaten zu entziehen, und diene damit der präventiven Sicherung überragender Gemeinschaftsbelange. Dagegen könne das Belassen solcher Gewinne das Rechtsbewusstsein der Bevölkerung untergraben. Mit dem Institut des erweiterten Verfalls verbundene Eigentumsbeeinträchtigungen stünden nicht außer Verhältnis zu dem mit ihm erreichbaren Zuwachs an Rechtsgüterschutz, zumal man dem Täter keine wohlerworbenen, sondern durch rechtswidrige Taten bemakelte Positionen nehme. Unbillige Härten könnten im Einzelfall gemäß § 73d Abs. 4 StGB in Verbindung mit § 73c StGB vermieden werden. Die in § 73d StGB vorgesehene Beweiserleichterung unterliege keinen verfassungsrechtlichen Bedenken, da das Grundgesetz keine ausdrücklichen Regeln zur Beweisführung und Überzeugungsbildung enthalte.

B.

52

Die Verfassungsbeschwerde ist nur teilweise zulässig.

53

Soweit der Beschwerdeführer rügt, das Landgericht habe gegen das Rückwirkungsverbot des Art. 103 Abs. 2 GG verstoßen, weil es die Anordnung des Verfalls – mangels hinreichender Sachverhaltsaufklärung – auf Vermögensgegenstände erstreckt habe, die er schon vor Inkrafttreten des § 73d StGB erworben habe, steht einer Berücksichtigung dieses Vortrags der Grundsatz der materiellen Subsidiarität der Verfassungsbeschwerde entgegen. Der in § 90 Abs. 2 Satz 1 BVerfGG zum Ausdruck kommende Grundsatz der Subsidiarität der Verfassungsbeschwerde verlangt neben der formalen Erschöpfung des Rechtswegs, dass der Beschwerdeführer alle fachgerichtlichen Möglichkeiten genutzt hat, um die geltend gemachte Grundrechtsverletzung zu verhindern oder zu beseitigen (vgl. BVerfGE 95, 163 <171>; stRspr). Der Beschwerdeführer hat es insoweit versäumt, im Revisionsverfahren eine zulässige Aufklärungsrüge zu erheben.

C.

54

Soweit die Verfassungsbeschwerde zulässig ist, ist sie unbegründet.

I.

55

§ 73d StGB ist in der Auslegung des Bundesgerichtshofs mit dem Grundgesetz vereinbar.

56

1. § 73d StGB verstößt nicht gegen den Schuldgrundsatz.

57

a) Der Grundsatz "Keine Strafe ohne Schuld" (nulla poena sine culpa) ist in der Garantie der Würde und Eigenverantwortlichkeit des Menschen (Art. 1 Abs. 1 GG und Art. 2 Abs. 1 GG) sowie im Rechtsstaatsprinzip verankert. Er gebietet, dass Strafen oder strafähnliche Sanktionen in einem gerechten Verhältnis zur Schwere der Tat und zum Verschulden des Täters stehen. Straftatbestand und Strafrechtsfolge müssen sachgerecht aufeinander abgestimmt sein. Insoweit deckt sich der Schuldgrundsatz in seinen die Strafe begrenzenden Auswirkungen mit dem Verfassungsgrundsatz des Übermaßverbots. Er schließt die strafende oder strafähnliche Ahndung einer Tat ohne Schuld des Täters aus (vgl. BVerfGE 20, 323 <331>; 45, 187 <228>; 50, 125 <133>; 50, 205 <214 f.>; 81, 228 <237>; 86, 288 <313>; siehe auch Urteil des Zweiten Senats des Bundesverfassungsgerichts vom 5. Februar 2004 - 2 BvR 2029/01 -).

58

Strafe ist die Auferlegung eines Rechtsnachteils wegen einer schuldhaft begangenen rechtswidrigen Tat. Sie ist - neben ihrer Aufgabe abzuschrecken und zu resozialisieren - eine angemessene Antwort auf strafrechtlich verbotenes Verhalten (vgl. BVerfGE 21, 378 <383>; 21, 391 <404>; 22, 125 <132>; 45, 187 <253 f.>; 95, 96 <140>). Mit der Strafe wird ein rechtswidriges sozial-ethisches Fehlverhalten vergolten. Das dem Täter auferlegte Strafübel soll den schuldhaften Normverstoß ausgleichen; es ist Ausdruck vergeltender Gerechtigkeit (vgl. BVerfGE 9, 167 <171>; 22, 49 <79 f.>; 95, 96 <140>; 96, 10 <25>).

59

Dem Schuldgrundsatz unterliegen auch Sanktionen, die wie eine Strafe wirken (vgl. BVerfGE 22, 125 <131>; 27, 36 <40 ff.>; 35, 311 <320>; 74, 358 <375 f.>). Strafähnlich ist eine Maßnahme freilich nicht schon dann, wenn sie mit einer Einbuße an Freiheit oder Vermögen verbunden ist und damit faktisch die Wirkung eines Übels entfaltet. Bei der Beurteilung des pönalen Charakters einer Rechtsfolge sind vielmehr weitere, wertende, Kriterien heranzuziehen, insbesondere der Rechtsgrund der Anordnung und der vom Gesetzgeber mit ihr verfolgte Zweck (vgl. BVerfGE 9, 137 <144 ff.>; 21, 378 <383 ff.>; 21, 391 <403 ff.>; 22, 125 <131>; 23, 113 <126>; 27, 36 <40 ff.>; 80, 109 <120 ff.>; Urteil des Zweiten Senats des Bundesverfassungsgerichts vom 5. Februar 2004 - 2 BvR 2029/01 - <C. III. 2.>; siehe auch Volk, ZStW 1971, S. 405 ff.). So hat das Bundesverfassungsgericht den in § 890 Abs. 1 ZPO geregelten Zwangsmaßnahmen, die neben der Disziplinierung des Schuldners auch Sühne für eine begangene Zuwiderhandlung bezwecken, strafähnliche Wirkung beigemessen (vgl. BVerfGE 20, 323 <330 ff.>; 58, 159 <162>; 84, 82 <87>); dagegen hat es die Anordnung von Untersuchungshaft im

Ermittlungsverfahren und die Unterbringung drogenabhängiger Täter in einer Entziehungsanstalt gemäß § 64 StGB wegen des sichernden Charakters dieser Maßnahmen nicht als strafähnlich angesehen (vgl. BVerfGE 19, 342 <347 f.> und BVerfGE 91, 1 <27 ff.>).

60

b) Das Rechtsinstitut des erweiterten Verfalls gerät mit dem Schuldgrundsatz nicht in Konflikt, weil es keinen strafenden oder strafähnlichen Charakter hat. Eine an Wortlaut, Systematik und Entstehungsgeschichte des § 73d StGB orientierte Auslegung ergibt, dass die in der Vorschrift angeordnete Entziehung deliktisch erlangter Vermögensvorteile nicht bezweckt, dem Betroffenen die Begehung der Herkunftstat als Fehlverhalten vorzuwerfen und ihm deswegen vergeltend ein Übel zuzufügen (aa). Vielmehr verfolgt die Regelung des § 73d StGB vermögensordnende und normstabilisierende Ziele (bb). Das beim erweiterten Verfall geltende Bruttoprinzip ändert hieran nichts (cc).

61

aa) Das Strafgesetzbuch bezeichnet Verfall und erweiterten Verfall nicht als "Strafen", sondern als "Maßnahmen", zu denen es gemäß § 11 Abs. 1 Nr. 8 StGB auch die in § 61 StGB aufgeführten Maßregeln der Besserung und Sicherung zählt. Die Verfallvorschriften sind zusammen mit der Regelung der Einziehung (§§ 74 ff. StGB) in einen eigenen, den Siebenten Titel des Dritten Abschnitts eingeordnet und dadurch von den im Ersten Titel des Dritten Abschnitts geregelten, als "Strafen" bezeichneten, Rechtsfolgen der Tat geschieden. Die begriffliche Abgrenzung des Verfalls von den im Strafgesetzbuch vorgesehenen Strafen und seine systematische Zusammenfassung mit anderen präventiv ausgerichteten Maßnahmen sprechen gegen einen strafenden oder strafähnlichen Charakter des § 73d StGB. Auch die Regelung des § 76a StGB, wonach der erweiterte Verfall unabhängig von der strafrechtlichen Verfolgung einer Person angeordnet werden kann, ist nur bei einer nichtpönalen Natur des Rechtsinstituts verständlich.

62

Die Entstehungsgeschichte des § 73d StGB bestätigt, dass der Gesetzgeber mit dem erweiterten Verfall ein Instrument der Gewinnabschöpfung ohne Strafcharakter schaffen wollte.

63

Die Abschöpfung rechtswidrig erzielter Gewinne ist nicht notwendig eine vergeltende Sanktion (vgl. BVerfGE 81, 228 <237 f.>). Der Gesetzgeber kann weitgehend frei darüber entscheiden, ob und auf welche Weise er rechtswidrig erlangte wirtschaftliche Vorteile entziehen will. So kann er die Vorteilsentziehung selbständig neben der Festsetzung einer - entsprechend dem Schuldgrundsatz - nur am Verschulden des Täters orientierten pönalen Sanktion vorsehen oder, in Fällen, in denen eine solche Sanktion nicht verhängt werden kann, auch als Inhalt einer in einem objektiven Verfahren ergehenden gesonderten Anordnung. Ebenso steht es ihm offen, eine strafende Sanktion so zu bemessen, dass mit ihr zugleich die Abschöpfung des Gewinns sichergestellt wird (a.a.O., S. 238). Es liegt mithin in der Entscheidung des Gesetzgebers, ob er mit einer gewinnabschöpfenden Maßnahme zugleich Strafzwecke verfolgen will oder nicht.

64

Mit der Vorschrift des § 73d StGB bezweckt der Gesetzgeber keine pönale Rechtsfolge. Seiner Auffassung nach teilt der erweiterte Verfall die Rechtsnatur des einfachen Verfalls nach § 73 StGB (vgl. BTDrucks 11/6623, S. 6 und 7 sowie die Begründung des Entwurfs eines Gesetzes zur Bekämpfung des illegalen Rauschgifthandels und anderer Erscheinungsformen der Organisierten Kriminalität <OrgKG> vom 25. Juli 1991, BTDrucks 12/989, S. 23: "Eigenständige Erscheinungsform des Verfalls"). Ausweislich der Gesetzesmaterialien zu § 73 StGB soll die Abschöpfung deliktisch erzielter Vermögensvorteile als gesonderte Rechtsfolge neben die Strafe treten und vor allem das Tagessatzsystem ergänzen. Der Gesetzgeber hält es nicht für sinnvoll, den Täter zu bestrafen und ihm zugleich das aus der Tat unrechtmäßig Erlangte zu belassen; dies könne geradezu als Anreiz zur Begehung weiterer entgelt- und gewinneinbringender Straftaten wirken (vgl. die Begründung des Entwurfs eines Strafgesetzbuches <StGB> E 1962 vom 4. Oktober 1962, BTDrucks IV/650, S. 241 und 245 sowie das Protokoll der 28. Sitzung des Bundestags-Sonderausschusses für die Strafrechtsreform vom 22. September 1966, S. 542 <Göhler>).

65

Der Gesetzgeber sieht in der Gewinnabschöpfung also nicht die Zufügung eines Übels, sondern die Beseitigung eines Vorteils, dessen Verbleib den Täter zu weiteren Taten verlocken könnte. Auch die Entwurfsbegründungen zu § 73d StGB betonen, der erweiterte Verfall sei keine Strafsanktion, sondern eine Maßnahme eigener Art mit "kondiktionsähnlichem Charakter" (vgl. BTDrucks 11/6623, S. 4, 5 ff. und 8, BTDrucks 12/989, S. 1, 23, sowie die Beschlussempfehlung des Rechtsausschusses des Deutschen Bundestags vom 4. Juni 1992, BTDrucks 12/2720, S. 42 f.). Demnach hat der Gesetzgeber den erweiterten Verfall als selbständige, nicht-pönale Maßnahme neben die Strafe gestellt.

66

bb) Eine von den Vorstellungen des Gesetzgebers abweichende Einordnung (vgl. dazu BVerfGE 22, 125 <131>) des erweiterten Verfalls als Strafe oder strafähnliche Maßnahme folgt auch nicht aus den mit der Regelung des § 73d StGB verfolgten weiteren Zwecken.

67

(1) Die strafrechtliche Gewinnabschöpfung soll einen "ordnenden Zugriff" des Rechts zur Korrektur einer deliktisch zu Stande gekommenen Vermögenszuordnung ermöglichen (so BTDrucks 11/6623, S. 7 und 8). Der Gesetzgeber misst dem erweiterten Verfall in erster Linie eine vermögensordnende Aufgabe zu: Das Bürgerliche Recht kann deliktische Vermögensveränderungen nur zum Teil unterbinden, indem es verbotenen Rechtsgeschäften - etwa im Bereich des illegalen Betäubungsmittelhandels - die zivilrechtliche Wirksamkeit versagt (§ 134 BGB, vgl. BGHSt 31, 145 ff.; Mayer-Maly/Armbrüster, in: MünchKommBGB, 4. Aufl., § 134 Rn. 10; Sack, in: Staudinger, BGB, 2003, § 134 Rn. 223, jeweils m.w.N.). Es verhindert nicht, dass ein Straftäter durch die Begehung rechtswidriger Taten faktisch Vermögensvorteile erlangt, etwa Gewinne aus der Weiterveräußerung von Drogen. Der Gesetzgeber sieht in einem solchen deliktischen Vermögenserwerb eine korrekturbedürftige Störung der Rechtsordnung, die die Strafgerichte im Wege der Gewinnabschöpfung beseitigen sollen. Er weist dem Verfallrecht der §§ 73 ff. StGB die Aufgabe zu, einen rechtswidrigen Zustand durch ordnenden Zugriff von hoher Hand zu beenden.

68

Die vermögensordnende Funktion macht den erweiterten Verfall nicht zu einem strafähnlichen Rechtsinstitut. Die Beseitigung einer bereits eingetretenen Störung der Vermögensordnung setzt zwar vergangenheitsbezogene Feststellungen voraus und ist insoweit retrospektiv. Der korrigierende Eingriff aber, mit dem der Staat auf eine deliktisch entstandene Vermögenslage reagiert, ist nicht notwendig repressiv. Auch das öffentliche Gefahrenabwehrrecht erlaubt hoheitliche Maßnahmen, um Störungen zu beseitigen. Gefahrenabwehr endet nicht dort, wo gegen eine Vorschrift verstoßen und hierdurch eine Störung der öffentlichen Sicherheit bewirkt wurde. Sie umfasst auch die Aufgabe, eine Fortdauer der Störung zu verhindern (vgl. etwa Friauf, in: Badura u.a., Besonderes Verwaltungsrecht, 11. Aufl., S. 138; Würtenberger, in: Achterberg u.a., Besonderes Verwaltungsrecht, Band II, 2. Aufl., S. 445; Götz, Allgemeines Polizei- und Ordnungsrecht, 13. Aufl., S. 63, jeweils m.w.N.).

69

Maßnahmen der Störungsbeseitigung sind ein Fall der Gefahrenabwehr. Sie knüpfen zwar an in der Vergangenheit begründete Zustände an, sind in ihrer Zielrichtung aber zukunftsbezogen. Sie wollen nicht ein normwidriges Verhalten öffentlich missbilligen und sühnen, sondern verhindern, dass eine bereits eingetretene Störung der Rechtsordnung in Zukunft andauert. Dementsprechend sollte eine auf § 21f Abs. 2 Satz 3 BNatSchG a.F. gestützte Einziehung von Elfenbein, das ohne die erforderliche Genehmigung in die Bundesrepublik Deutschland eingeführt worden war, einen Verstoß gegen die für Elfenbein geltenden Handelsbeschränkungen beseitigen (vgl. den Beschluss der 3. Kammer des Zweiten Senats des Bundesverfassungsgerichts vom 19. Januar 1989 - 2 BvR 554/88 -, NJW 1990, S. 1229). § 21f Abs. 2 Satz 3 BNatSchG a.F. zielte nicht auf Repression und Vergeltung für ein rechtswidriges Verhalten, sondern diente als Teil eines Systems von Handelsbeschränkungen, die die wirtschaftliche Nutzung gefährdeter Arten eindämmen sollen, der Gefahrenabwehr (a.a.O., S. 1229).

70

Auch § 73d StGB verfolgt einen solchen präventiven Zweck. Der erweiterte Verfall ist zwar nicht systematisch als Sicherungsmaßregel ausgestaltet, die eine drohende Reinvestition von Deliktsgewinnen durch kriminelle Organisationen verhindern soll und sich auf eine entsprechende Gefahrenprognose stützt. Die Erwägung des

Gesetzgebers, die strafrechtliche Gewinnabschöpfung könne auch sichernde Wirkungen erzielen (vgl. BTDrucks 11/6623, S. 7 und BTDrucks 12/989, S. 1), hat in der Regelung des § 73d StGB nicht unmittelbar Niederschlag gefunden (vgl. Weßlau, StV 1991, S. 226, 232 f.; Wallschläger, Die strafrechtlichen Verfallsvorschriften, 2002, S. 158). Die vermögensordnende Zielsetzung der Vorschrift ist aber klar zukunftsbezogen und präventiv. Der betroffene Straftäter soll deliktisch erlangte Gegenstände nicht behalten; die mit der Bereicherung des Täters verbundene Störung der Rechtsordnung soll nicht auf Dauer bestehen bleiben; die Gewinnabschöpfung soll verhindern, dass die bereits eingetretene Störung der Vermögensordnung auch zukünftig fortdauert.

71

Mit dieser präventiven Zielsetzung wirkt der erweiterte Verfall nicht wie eine Strafsanktion. Seine Anordnung erfolgt nicht, um dem Betroffenen die Begehung der Herkunftstat vorzuhalten und über sie ein sozialethisches Unwerturteil zu sprechen. Sie zielt vielmehr darauf, einen rechtswidrigen Zustand für die Zukunft zu beseitigen. Die Entziehung deliktisch erlangten Vermögens ist nicht Ausdruck vergeltender, sondern ordnender Gerechtigkeit (ähnlich BGH, NStZ 1995, S. 491; Güntert, Gewinnabschöpfung als strafrechtliche Sanktion, 1983, S. 11 ff., 17; Schmidt, in: LKStGB, 11. Aufl., § 73 Rn. 8; Jekewitz, GA 1998, S. 276, 277).

72

(2) Der mit der Regelung des § 73d StGB beabsichtigte vermögensordnende Zugriff soll nach dem Willen des Gesetzgebers zugleich Anreize für gewinnorientierte Delikte reduzieren. Auch dieses in der Begründung des Entwurfs eines ... Strafrechtsänderungsgesetzes - Erweiterter Verfall - (... StrÄndG) vom 9. März 1990 (BTDrucks 11/6623, S. 4) als generalpräventiv bezeichnete Ziel der Gewinnabschöpfung verleiht dem erweiterten Verfall keinen strafähnlichen Charakter.

73

Der Entziehung deliktisch erzielter Vermögensvorteile wird zwar zu Recht eine strafergänzende Funktion beigemessen. Denn die übelszufügende und damit abschreckende Wirkung einer Strafe kann sich mindern, wenn der materielle Tatvorteil in der Hand des Täters verbleibt (vgl. Eser, Die strafrechtlichen Sanktionen gegen das Eigentum, 1969, S. 86 und S. 284). Dies wird vor allem bei Geldstrafen deutlich, die der Täter aus dem Tatgewinn bestreiten könnte. Ein möglicher negativer Einfluss unterbliebener Gewinnabschöpfung auf die Nachdrücklichkeit einer Strafe bedeutet aber nicht, dass die Gewinnabschöpfung selbst strafende Wirkung erzielt oder intendiert (vgl. Güntert, Gewinnabschöpfung als strafrechtliche Sanktion, 1983, S. 15 ff.).

74

Eine Abschreckungswirkung im Sinne der negativen Generalprävention ist mit dem erweiterten Verfall ausweislich der Gesetzesmaterialien nicht beabsichtigt. In der Begründung des Entwurfs eines Gesetzes zur Bekämpfung des illegalen Rauschgifthandels und anderer Erscheinungsformen der Organisierten Kriminalität (OrgKG) heißt es im Anschluss an die Darstellung der mit der Gewinnabschöpfung verfolgten Ziele, der Entwurf sehe neben der Gewinnabschöpfung auch Strafschärfungen zur Erhöhung der Abschreckungswirkung bei Straftaten der organisierten Kriminalität vor (vgl. BTDrucks 12/989, S. 1). Der Gesetzgeber hat damit die Ziele der Gewinnabschöpfung ausdrücklich vom Abschreckungszweck erhöhter Strafandrohungen unterschieden (siehe auch BTDrucks 12/989, S. 21 sub B.).

75

Die mit den strafrechtlichen Verfallvorschriften beabsichtigte generalpräventive Wirkung soll nach dem Willen des Gesetzgebers auf andere Weise erzielt werden: Indem der Staat dem Täter deliktisch Erlangtes wegnimmt, führt er ihm, wie auch der Rechtsgemeinschaft, vor Augen, dass strafrechtswidrige Bereicherungen nicht geduldet werden und Straftaten sich nicht lohnen. Der vermögensordnende Eingriff soll die Unverbrüchlichkeit und die Gerechtigkeit der Rechtsordnung erweisen und so die Rechtstreue der Bevölkerung stärken.

76

Diese auch als positiver Aspekt strafrechtlicher Generalprävention anerkannte Zielsetzung (vgl. BVerfGE 45, 187 <256>) ist - wie die Ausführungen zum Gefahrenabwehrrecht gezeigt haben - kein Spezifikum strafrechtlicher Vorschriften (vgl. BVerfGE 22, 125 <132>). Soweit es um die Abschöpfung deliktisch erlangten Vermögens geht, deckt sie sich mit einem alle Rechtsgebiete übergreifenden Grundsatz, wonach eine mit der Rechtsordnung nicht übereinstimmende Vermögenslage auszugleichen ist (vgl. Güntert, Gewinnabschöpfung als strafrechtliche

Sanktion, 1983, S. 11 m.w.N.). Die normbestätigende Zielsetzung des § 73d StGB charakterisiert den erweiterten Verfall daher nicht zwingend als pönale Maßnahme (vgl. BGHSt 47, 369 <373 ff.>; Güntert, Gewinnabschöpfung als strafrechtliche Sanktion, 1983, S. 17; Schmidt, in: LKStGB, 11. Aufl., § 73 Rn. 8; Eberbach, NStZ 1987, S. 486, 489 f.; Groth, Verdeckte Ermittlung im Strafverfahren und Gewinnabschöpfung, 1995, S. 151; anders Schultehinrichs, Gewinnabschöpfung bei Betäubungsmitteldelikten - Zur Problematik der geplanten Vorschrift über den erweiterten Verfall, 1991, S. 153 f.; wohl auch Weßlau, StV 1991, S. 226, 231 f., und Hoyer, GA 1993, S. 406, 417 ff., 421).

77

cc) Schließlich hat das Rechtsinstitut des Verfalls auch nicht deshalb strafähnlichen Charakter angenommen, weil der Gesetzgeber parallel zur Neuregelung des § 73d StGB das bis dahin im Verfallrecht geltende Nettoprinzip (Abschöpfung des Taterlöses abzüglich der Tatkosten) durch das Bruttoprinzip (Abschöpfung des erlangten "Etwes", des Taterlöses ohne Abzug für die Tat geleisteter Aufwendungen, vgl. BGH, NStZ 1994, S. 123 f.; BGHSt 47, 369 <371 ff.>) ersetzt hat. Die Auffassung, der Verfall sei nur noch der Form nach eine Maßnahme, dem Inhalt nach dagegen eine tatvergeltende Zufügung eines Übels, weil das Gesetz nunmehr dem deliktisch bereicherten Täter - über die bloße Kondiktion hinaus - eine wirtschaftliche Einbuße zumute (vgl. Nachw. bei Eser, in: Schönke/Schröder, StGB, 26. Aufl., § 73d Rn. 2 ff., § 73 Rn. 18 ff.; Fischer, in: Tröndle/Fischer, StGB, 51. Aufl., § 73d Rn. 4 ff., § 73 Rn. 3; Lackner, in: Lackner/Kühl, StGB, 24. Aufl., § 73 Rn. 4 ff.; Jescheck/Weigend, Lehrbuch des Strafrechts, 5. Aufl., S. 793; Horn, in: SKStGB, § 73 Rn. 5; Herzog, in: NomosStGB, § 73 Rn. 10 ff.; anders BGH, NStZ 1995, S. 491; Schmidt, in: LKStGB, 11. Aufl., § 73d Rn. 4, § 73 Rn. 8; Katholnigg, JR 1994, S. 353, 354; Baumann/Weber/Mitsch, Strafrecht, Allgemeiner Teil, 10. Aufl., S. 716; Goos, wistra 2001, S. 313, 315), ist nicht zwingend. Das Bruttoprinzip lässt sich auch anders und in größerer Nähe zum Willen des Gesetzgebers sowie zum systematischen Ort des Verfalls einordnen:

78

Der Gesetzgeber hat dem Rechtsinstitut des Verfalls durch die Einführung des Bruttoprinzips den kondiktionsähnlichen Charakter nicht genommen. Vielmehr hat er sich eine an Wortlaut und Gesetzessystematik der §§ 812 ff. BGB orientierte Sichtweise des zivilrechtlichen Bereicherungsrechts zu Eigen gemacht. Danach beschränkt sich die Funktion der §§ 812 ff. BGB nicht auf die Abschöpfung noch vorhandener Vermögenswerte; vielmehr ist die Kondiktion ein eigenständiges Instrument zur Korrektur irregulärer Vermögenszuordnungen, das allein den gutgläubigen Bereicherungsschuldner vor Vermögenseinbußen schützt (§ 818 Abs. 3 BGB), während es dem Bösgläubigen wirtschaftliche Verlustrisiken zuweist (§ 818 Abs. 4, § 819 BGB; vgl. BGHZ 53, 144 <147 f.>; 55, 128 <135> und 57, 137 <146 ff.>; Lieb, in: MünchKommBGB, 3. Aufl., § 818 Rn. 47 ff.; Lorenz, in: Staudinger, BGB, 1999, § 818 Rn. 1; Sprau, in: Palandt, BGB, 62. Aufl., § 818 Rn. 27 ff.; H.P. Westermann, in: Erman, BGB, 10. Aufl., § 818 Rn. 2; zur risikozuweisenden Wirkung des Bruttoprinzips im strafrechtlichen Verfallrecht vgl. Katholnigg, JR 1994, S. 353, 356 und BayObLG, NStZ-RR 1997, S. 339).

79

Ausweislich der Gesetzesmaterialien soll die Einführung des Bruttoprinzips das Verfallrecht der §§ 73 ff. StGB an die im zivilrechtlichen Bereicherungsrecht vorgefundene Risikozuweisung angleichen. In der Begründung des Entwurfs eines Gesetzes zur Änderung des Außenwirtschaftsgesetzes, des Strafgesetzbuchs und anderer Gesetze vom 10. September 1991 (BTDrucks 12/1134, S. 12) heißt es hierzu, die mit der Nettoabschöpfung verbundene Saldierung habe zu Wertungswidersprüchen innerhalb der Gesamtrechtsordnung geführt, weil das Zivilrecht demjenigen, der sich außerhalb der Rechtsordnung stelle, in § 817 Satz 2 BGB die Zuhilfenahme der Gerichte bei der Rückabwicklung seines zweifelhaften Geschäfts versage. Der Rechtsgedanke des § 817 Satz 2 BGB, wonach das in ein verbotenes Geschäft Investierte unwiederbringlich verloren sei, solle deshalb auch beim Verfall Anwendung finden.

80

Mit seinem Bezug auf den der Regelung des § 817 Satz 2 BGB nach überwiegender Meinung zu Grunde liegenden Gedanken der Rechtsschutzverweigerung (vgl. BGHZ 44, 1 <6>; Lorenz, in: Staudinger, BGB, 1999, § 817 Rn. 4 f.; Honsell, Die Rückabwicklung sittenwidriger oder verbotener Geschäfte, 1974, S. 58 ff.; Canaris, in: Festschrift für Steindorff, 1990, S. 519, 523 ff.; Dauner, JZ 1980, S. 495, 499; Lieb, in: MünchKommBGB, 3. Aufl., § 817 Rn. 9) hat der Gesetzgeber klargestellt, dass er dem von einer Anordnung des Verfalls Betroffenen lediglich eine rechtliche Begünstigung versagen und damit die im zivilrechtlichen Bereicherungsrecht vorgefundene

Risikozuweisung übernehmen, nicht aber eine neue pönale Rechtsfolge schaffen wollte.

81

Insgesamt betrachtet ist die Gewinnabschöpfung gemäß § 73d StGB keine pönale Reaktion auf ein früheres normwidriges Verhalten des Betroffenen. Vielmehr antwortet sie auf eine gegenwärtige Störung der Vermögensordnung mit einem korrigierenden und normbekräftigenden Eingriff. Der erweiterte Verfall verfolgt nicht repressiv-vergeltende, sondern präventiv-ordnende Ziele und ist daher keine dem Schuldgrundsatz unterliegende strafähnliche Maßnahme. Die verschuldensunabhängige Ausgestaltung des erweiterten Verfalls begegnet insoweit keinen verfassungsrechtlichen Bedenken.

82

2. § 73d StGB ist mit der Unschuldsvermutung vereinbar.

83

a) Die Unschuldsvermutung ist eine besondere Ausprägung des Rechtsstaatsprinzips. Sie muss in einem prozessordnungsgemäßen Verfahren widerlegt werden, bevor wegen eines Tatvorwurfs Entscheidungen getroffen werden, die die Feststellung von Schuld erfordern. Sie schützt den Beschuldigten vor Nachteilen, die Schuldspruch oder Strafe gleichkommen, denen aber kein rechtsstaatliches, prozessordnungsgemäßes Verfahren zur Schuldfeststellung und Strafbemessung vorausgegangen ist (vgl. BVerfGE 19, 342 <347 f.>; 35, 311 <320>; 74, 358 <369 ff.>; 82, 106 <118 ff.>).

84

b) Das Rechtsinstitut des erweiterten Verfalls verletzt die Unschuldsvermutung nicht.

85

§ 73d StGB sieht die Entziehung von Vermögenswerten vor, die der Beschuldigte aus rechtswidrigen, aber nicht notwendig schuldhaft begangenen, Taten erlangt hat. Die Anordnung des erweiterten Verfalls setzt die Feststellung von Schuld nicht voraus. Sie ist daher von Gesetzes wegen auch nicht mit einer gerichtlichen Schuldzuweisung verbunden (vgl. BTDrucks 11/6623, S. 5 und BTDrucks 12/2720, S. 42 f.). Eine strafgleiche Rechtsfolge ordnet § 73d StGB - wie unter C. I. 1. ausgeführt - ebenfalls nicht an (vgl. auch das Urteil des Europäischen Gerichtshofs für Menschenrechte vom 24. Oktober 1986 - Nr. 14/1984/86/133 -, EuGRZ 1988, S. 513, 519 zu einer zollrechtlichen Verfallerklärung). Die Unschuldsvermutung steht einer Anordnung des erweiterten Verfalls ohne gesetzlichen Schuldnachweis daher nicht entgegen.

86

3. Die Vorschrift des § 73d StGB verstößt in der Auslegung des Bundesgerichtshofs auch nicht gegen die Eigentumsgarantie des Art. 14 Abs. 1 GG.

87

a) Soweit § 73d StGB den Zugriff auf Vermögenswerte erlaubt, die dem unmittelbar Betroffenen wegen eines Verstoßes gegen strafrechtliche Vorschriften zivilrechtlich nicht zustehen (vgl. § 134, § 935 BGB), ist dessen Eigentumsgrundrecht schon mangels einer schutzfähigen Rechtsposition nicht berührt (vgl. BVerfGE 83, 201 <209>; 95, 267 <300>). Dies betrifft vor allem die Entziehung von Gewinnen aus illegalen Drogengeschäften. Denn wegen des strafrechtlichen Verbots des Handeltreibens mit Betäubungsmitteln ist gemäß § 134 BGB neben dem schuldrechtlichen Verpflichtungsgeschäft zugleich die Übereignung sowohl der Drogen als auch des für sie als Kaufpreis gezahlten Geldes zivilrechtlich unwirksam (vgl. BGH, NJW 1983, S. 636; Mayer-Maly/Armbrüster, in: MünchKommBGB, 4. Aufl., § 134 Rn. 10; Sack, in: Staudinger, BGB, 2003, § 134 Rn. 223, jeweils m.w.N.). Einer unveröffentlichten Erhebung des Statistischen Bundesamts zufolge ergehen gut acht von zehn Anordnungen des erweiterten Verfalls im Bereich der Betäubungsmitteldelikte. Auch nahmen die Gerichte in den zu § 33 Abs. 1 BtMG veröffentlichten Entscheidungen regelmäßig - wie das Landgericht im Ausgangsverfahren - an, die für verfallen erklärten Vermögenswerte stammten ihrerseits aus Betäubungsmittelstraftaten (vgl. die bei Gradowski/Ziegler, Geldwäsche, Gewinnabschöpfung, 1997, S. 82 ff. referierten Fälle sowie BGH, NStZ 1995, S. 540; StV 1995, S. 633; NStZ-RR 1998, S. 297; NStZ 2001, S. 531; NStZ-RR 2003, S. 75; OLG Stuttgart, NJW 2000, S. 2598, 2599). Demnach berühren die meisten Anwendungsfälle des § 73d StGB kein durch Art. 14 Abs. 1 GG geschütztes Eigentum. Die Geltung des Bruttoprinzips ändert hieran nichts. Es versagt dem Betroffenen lediglich eine Erstattung seiner Tataufwendungen (vgl. C. I. 1. b) cc) sowie Katholnigg, JR 1994, S. 353, 356).

88

b) Soweit § 73d StGB die Entziehung von Gegenständen anordnet, die der Betroffene zwar deliktisch, aber gleichwohl zivilrechtlich wirksam erworben hat, enthält er eine Inhalts- und Schrankenbestimmung des Eigentums im Sinne des Art. 14 Abs. 1 Satz 2 GG. Diese genügt in der Auslegung des Bundesgerichtshofs den verfassungsrechtlichen Anforderungen.

89

aa) Das Bundesverfassungsgericht hat schon im Beschluss vom 12. Dezember 1967 (BVerfGE 22, 387 <422>) klargestellt, dass der Verlust von Eigentum als Nebenfolge einer strafrechtlichen Verurteilung zu den traditionellen Schranken des Eigentums gehört. Das Grundgesetz hat dem Gesetzgeber in Art. 14 Abs. 1 Satz 2 die Aufgabe übertragen, den Inhalt und die Schranken des Eigentums zu bestimmen. Die das Eigentum ausformenden Vorschriften des bürgerlichen und des öffentlichen Rechts legen generell und abstrakt Rechte und Pflichten hinsichtlich solcher Rechtsgüter fest, die als Eigentum im Sinne der Verfassung zu verstehen sind (vgl. BVerfGE 52, 1 <27 f.>; 58, 137 <144 f.>; 58, 300 <330>; 70, 191 <200>; 72, 66 <76>; 100, 226 <240>). Solche Vorschriften bleiben Inhalts- und Schrankenbestimmungen des Eigentums auch dann, wenn sie konkrete Vermögenspositionen ganz oder teilweise entziehen oder hierzu für den Einzelfall die Grundlage bilden (vgl. BVerfGE 58, 300 <351>; 70, 191 <200>; 83, 201 <212>; 100, 226 <240>).

90

bb) § 73d StGB setzt dem Eigentum Schranken; die Vorschrift spricht deliktisch erlangten Rechtspositionen in der Hand des Täters oder Teilnehmers den Schutz als Eigentum ab und ordnet ihre Entziehung an.

91

(1) Schon mit der Einführung des einfachen Verfalls gemäß § 73 StGB hat der Gesetzgeber bestimmt, dass der Inhaber deliktisch erlangten Vermögens die damit verbundenen Befugnisse nicht nach eigener Entscheidung zu seinem Nutzen soll ausüben können. Die Vorschrift regelt abstrakt-generell, dass deliktisch erlangte Vermögensgegenstände und deren Surrogate dem Tatbeteiligten von hoher Hand entzogen werden sollen. Zugleich bestimmt § 73 StGB die Voraussetzungen für den Vollzug der Eigentumsbeschränkung.

92

(2) Die Regelung über den erweiterten Verfall lockert die Voraussetzungen für die Entziehung deliktisch erzielter Gewinne und Entgelte. § 73d Abs. 1 Satz 1 StGB erlaubt den Zugriff auf deliktisch erlangte Vermögensgegenstände in der Hand des Täters oder Teilnehmers auch dann, wenn sie nicht aus der abgeurteilten Tat, sondern aus anderen, möglicherweise nicht mehr verfolgbaren, rechtswidrigen Taten stammen; der erweiterte Verfall eines Gegenstands ist gemäß § 73d Abs. 1 Satz 1 StGB anzuordnen, wenn die Umstände die Annahme rechtfertigen, dass der Gegenstand für eine rechtswidrige Tat oder aus ihr erlangt worden ist. Nach § 73d Abs. 1 Satz 2 StGB unterliegen auch solche Gegenstände dem erweiterten Verfall, die dem Betroffenen wegen ihrer deliktischen Erlangung nicht gehören oder zustehen. Die Anordnung des Verfalls erstreckt sich auf Nutzungen und Surrogate (§ 73d Abs. 1 Satz 3, § 73 Abs. 2 StGB) sowie auf den Geldwert nicht oder nicht mehr entziehbarer Vermögensvorteile (§ 73d Abs. 2, § 73a StGB). Sie unterbleibt, soweit sie für den Betroffenen eine unbillige Härte wäre (§ 73d Abs. 4, § 73c StGB).

93

cc) Nach der vom Bundesgerichtshof im Ausgangsverfahren vertretenen Auffassung ist die Annahme der deliktischen Herkunft eines Gegenstands nur dann im Sinne des § 73d Abs. 1 Satz 1 StGB gerechtfertigt, wenn sich der Tatrichter durch Ausschöpfung der vorhandenen Beweismittel von ihr überzeugt hat. Für eine solche Überzeugungsbildung verlangt der Bundesgerichtshof keine Feststellungen über konkrete Herkunftstaten. Auch sei der Tatrichter nicht gehindert, sondern gehalten, die nachgewiesenen Anlasstaten in seine Überzeugungsbildung einzubeziehen, selbst wenn aus ihnen kein Gewinn erzielt worden sei. Insgesamt dürften die Anforderungen an den Herkunftsnachweis nicht überspannt werden (BGHSt 40, 371 ff.).

94

Diese Auslegung des § 73d Abs. 1 Satz 1 StGB ist von Verfassungs wegen nicht zu beanstanden.

95

(1) Sie ist mit dem Wortlaut der Vorschrift vereinbar, die mit der Formulierung "wenn die Umstände die Annahme rechtfertigen" einen Spielraum zur Bestimmung des erforderlichen Beweismaßes eröffnet (zu den Grenzen zulässiger Gesetzesauslegung BVerfGE 8, 28 <34>; 49, 148 <157>; 54, 277 <299 f.>; 71, 81 <105>; 90, 263 <275>). Die Auffassung des Bundesgerichtshofs tritt auch nicht in Widerspruch zum Willen des Gesetzgebers. Ausweislich der Gesetzesmaterialien soll die Regelung des erweiterten Verfalls die strafrechtliche Gewinnabschöpfung erleichtern; nach bisherigem Recht scheitere sie häufig daran, dass "wegen des konspirativen Charakters des illegalen Betäubungsmittelhandels ... die Herkunft von Vermögensgegenständen des Täters aus bestimmten Straftaten nicht nachgewiesen werden" könne (vgl. BTDrucks 11/6623, S. 1). Die in § 73d Abs. 1 Satz 1 StGB vorgesehenen Beweiserleichterungen könnten der Schwierigkeit entgegenwirken, "dass bei den Tatbeteiligten Vermögenswerte angetroffen werden, deren kriminelle Herkunft zwar nahe liegt, sich jedoch nicht konkret fassbaren, womöglich gar den im anhängigen Strafverfahren zur Untersuchung gezogenen Straftaten zuordnen lassen" (vgl. BTDrucks 12/989, S. 22). Die Vorschrift solle einen Eigentumsentzug in Fällen ermöglichen, in denen die Herkunft des Gegenstands des Verfalls mit den Erkenntnismöglichkeiten des Gerichts nicht aufgeklärt werden könne, eine deliktische Erlangung jedoch angesichts der Einkommens- und Vermögenssituation des Täters sowie seines Vorlebens so hoch wahrscheinlich sei, dass sie sich für einen objektiven Betrachter geradezu aufdränge (vgl. BTDrucks 11/6623, S. 7). Dabei fordere und ermögliche das in dem Begriff "rechtfertigen" enthaltene normative Element eine Anwendung der Vorschrift, die in jedem Einzelfall der Eigentumsgewährleistung hinreichend gerecht werde (vgl. BTDrucks 11/6623, S. 5).

96

Diesen gesetzgeberischen Zielen trägt die Auslegung des § 73d Abs. 1 Satz 1 StGB durch den Bundesgerichtshof Rechnung. Sie erleichtert einerseits den für die strafrechtliche Gewinnabschöpfung erforderlichen Nachweis einer deliktischen Vermögenserlangung, indem sie auf die Feststellung einer konkreten Herkunftstat verzichtet und dem Tatrichter in weitem Umfang eine nur mittelbare Beweisführung erlaubt. Andererseits verlangt sie, dass Eingriffe in das verfassungsrechtlich geschützte Legalvermögen des Betroffenen vermieden werden, indem sich der Tatrichter zumindest vom "Ob" der deliktischen Vermögensherkunft überzeugt. Nach Ansicht des Bundesgerichtshofs wird eine Anwendung des § 73d Abs. 1 Satz 1 StGB nur bei dieser einschränkenden Normauslegung der Eigentumsgewährleistung hinreichend gerecht. Da der Gesetzgeber mit der Fassung des § 73d Abs. 1 Satz 1 StGB eine verfassungsgemäße Anwendung der Norm in jedem Fall sicherstellen wollte, war der Bundesgerichtshof nicht gehindert, zu diesem Zweck den möglichen Wortsinn der Vorschrift auszuschöpfen.

97

Die restriktive Auslegung des § 73d Abs. 1 Satz 1 StGB durch den Bundesgerichtshof entspricht auch den vom Gesetzgeber mit der Vorschrift verfolgten weitergehenden Zielen der Gewinnabschöpfung (vgl. dazu bereits oben C. I. 1. b) bb). Sie konzentriert den Anwendungsbereich des erweiterten Verfalls auf nachweisbar deliktisch erlangte Gegenstände und stellt damit sicher, dass die Eigentumsordnung nur dort korrigiert wird, wo dies erforderlich ist, um deliktisch verursachte Störungen zu beseitigen. Eine derartige Korrektur fehlerhafter Vermögenslagen verwirklicht zugleich das Ziel des Gesetzgebers, das Vertrauen der Bevölkerung in die Gerechtigkeit und die Unverbrüchlichkeit der Rechtsordnung zu stärken.

98

(2) Die Auslegung des Bundesgerichtshofs beruht auf sachbezogenen und nachvollziehbaren Erwägungen. Sie bietet keine Anhaltspunkte für den Vorwurf der Willkür oder für eine Verkennung der Bedeutung und Tragweite grundrechtlicher Gewährleistungen (zu diesem Prüfungsmaßstab BVerfGE 18, 85 <92 f.>; 60, 348 <357>; 70, 230 <239>).

99

dd) In der Auslegung des Bundesgerichtshofs beschränkt § 73d StGB den Inhalt des Eigentums in verfassungsrechtlich zulässiger Weise.

100

(1) Bei der Erfüllung des ihm gemäß Art. 14 Abs. 1 Satz 2 GG erteilten Auftrags, Inhalt und Schranken des Eigentums zu bestimmen, muss der Gesetzgeber die grundgesetzliche Anerkennung des Privateigentums durch Art. 14 Abs. 1 Satz 1 GG wie auch das Sozialgebot des Art. 14 Abs. 2 GG beachten (vgl. BVerfGE 52, 1 <29>;

71, 230 <246 f.>; 81, 208 <220>) und die schutzwürdigen Interessen des Eigentümers sowie die Belange des Gemeinwohls in einen gerechten Ausgleich und ein ausgewogenes Verhältnis bringen (BVerfGE 100, 226 <240>; stRspr). Dabei ist er an den Grundsatz der Verhältnismäßigkeit gebunden. Einschränkungen der Eigentümerbefugnisse müssen vom jeweiligen Sachbereich her geboten und auch in ihrer Ausgestaltung sachgerecht sein. Sie dürfen nicht weiter gehen als es ihr Grund, der Schutz des Gemeinwohls, erfordert (vgl. BVerfGE 20, 351 <361>; 52, 1 <29 f.>), und sie dürfen insbesondere auch nicht, gemessen am sozialen Bezug und an der sozialen Bedeutung des Eigentumsobjekts sowie im Blick auf den Regelungszweck, zu einer übermäßigen Belastung führen und den Eigentümer im vermögensrechtlichen Bereich unzumutbar treffen (vgl. BVerfGE 58, 137 <148>). Zudem muss eine Inhalts- und Schrankenbestimmung des Eigentums mit allen anderen Verfassungsnormen vereinbar sein, insbesondere mit dem Gleichheitsgrundsatz (vgl. BVerfGE 14, 263 <278>; 18, 121 <132>; 25, 112 <117>; 52, 1 <27>; 62, 169 <183>).

101

(2) Die Regelung über den erweiterten Verfall wird diesen Maßstäben gerecht. Sie enthält in der Auslegung des Bundesgerichtshofs eine sachgerechte Beschränkung der Eigentümerbefugnisse, die den Grundsatz der Verhältnismäßigkeit wahrt und auch sonst mit dem Grundgesetz vereinbar ist.

102

(a) Der Gesetzgeber will mit der strafrechtlichen Gewinnabschöpfung eine Störung der Vermögensordnung beseitigen und so der materiellen Rechtsordnung Geltung verschaffen. Das in §§ 73 ff. StGB geregelte Rechtsinstitut des Verfalls kann dazu beitragen, dieses legitime gesetzgeberische Ziel (vgl. BVerfGE 81, 228 <237 f.>) zu erreichen (zu den Anforderungen an die Geeignetheit einer gesetzlichen Regelung BVerfGE 30, 292 <316>; 33, 171 <187>; 67, 157 <173, 175>; 70, 278 <286>; 96, 10 <23>).

103

Das Vertrauen der Bevölkerung in die Gerechtigkeit und die Unverbrüchlichkeit der Rechtsordnung kann Schaden nehmen, wenn Straftäter deliktisch erlangte Vermögensvorteile dauerhaft behalten dürfen. Eine Duldung solcher strafrechtswidrigen Vermögenslagen durch den Staat könnte den Eindruck hervorrufen, kriminelles Verhalten zahle sich aus, und damit staatlich gesetzten Anreiz zur Begehung gewinnorientierter Delikte geben. Die strafrechtliche Gewinnabschöpfung ist ein geeignetes Mittel, um dies zu verhindern. Sie kann der Bevölkerung den Eindruck vermitteln, der Staat unternehme alles ihm rechtsstaatlich Mögliche, um eine Nutznießung von Verbrechensgewinnen zu unterbinden (vgl. Hoyer, GA 1993, S. 406, 412; Perron, JZ 1993, S. 918, 921, 922 f.; Julius, ZStW 1997, S. 58, 97). Indem § 73d StGB die Gewinnabschöpfung erleichtert, kann er den mit ihr verfolgten Zweck, der Rechtsordnung Geltung zu verschaffen, zusätzlich fördern.

104

(b) Ein im Vergleich zur Regelung des § 73d StGB milderes, aber gleich effektives Mittel zur Erreichung dieses Ziels der Gewinnabschöpfung ist nicht ersichtlich. Das gilt auch für die Erstreckung des erweiterten Verfalls auf die vom Täter anstelle des ursprünglichen Tatgewinns oder -entgelts erworbenen Surrogate gemäß § 73d Abs. 1 Satz 3, § 73 Abs. 2 StGB und für die in § 73d Abs. 2, § 73a StGB angeordnete Wertersatzpflicht; ohne sie könnte der Täter die mit der Vorschrift angestrebte Gewinnabschöpfung unterlaufen.

105

(c) Die Entziehung deliktisch erlangter Vermögenswerte im Wege des erweiterten Verfalls ist einem Tatbeteiligten grundsätzlich zumutbar. Unbillige Härten, die sich im Einzelfall aus der Wertersatzpflicht des § 73d Abs. 2 in Verbindung mit § 73a StGB und aus dem Bruttoprinzip ergeben können, sind von den Fachgerichten durch eine Anwendung der in § 73d Abs. 4, § 73c Abs. 1 StGB vorgesehenen Regelung auszuschließen. Eine Beeinträchtigung legal erworbener Vermögenspositionen des Betroffenen ist nach der vom Bundesgerichtshof im Ausgangsverfahren vorgenommenen Auslegung des § 73d Abs. 1 Satz 1 StGB nicht zu besorgen; diese stellt sicher, dass der Richter sich von der deliktischen Herkunft des Objekts des Verfalls überzeugt.

106

(d) § 73d Abs. 1 Satz 2 StGB ermöglicht unter anderem die Abschöpfung von Gewinnen aus illegalen Drogengeschäften, bei denen der Verkäufer nach der fachgerichtlichen Rechtsprechung gemäß § 134 BGB kein Eigentum an dem von dem Abnehmer als Kaufpreis gezahlten Geld erwerben kann (vgl. C. I. 3. a) sowie BTDrucks

11/6623, S. 7 f.). Die Vorschrift beschränkt zugleich in zulässiger Weise das Eigentumsrecht des an der Tat beteiligten Drogenkäufers. Seine für deliktische Zwecke freiwillig aufgegebene Vermögensposition verdient keinen verfassungsrechtlichen Schutz (vgl. auch den in § 817 Satz 2 BGB zum Ausdruck gekommenen Rechtsgedanken).

107

(e) Anordnungen des erweiterten Verfalls gemäß § 73d Abs. 1 Satz 1 und 2 StGB können jedoch vermögenswerte Rechtspositionen tatgeschädigter Dritter beeinträchtigen (vgl. Schultehinrichs, Gewinnabschöpfung bei Betäubungsmitteldelikten - Zur Problematik der geplanten Vorschrift über den erweiterten Verfall, 1991, S. 186 ff.; Fischer, in: Tröndle/Fischer, StGB, 50. Aufl., § 73d Rn. 5; Eser, in: Schönke/Schröder, StGB, 26. Aufl., § 73d Rn. 6 f.; Schmidt, in: LKStGB, 11. Aufl., § 73d Rn. 7). Denn anders als beim einfachen Verfall (§ 73 Abs. 1 Satz 2 StGB) hat der Gesetzgeber beim erweiterten Verfall Schadensersatzansprüchen von Tatopfern keinen Vorrang vor der strafrechtlichen Gewinnabschöpfung eingeräumt. Er sieht in dieser Ungleichbehandlung selbst einen Systembruch, der im Rahmen einer Gesamtüberarbeitung der §§ 73 ff. StGB behoben werden soll (vgl. den Entwurf eines Gesetzes zur verbesserten Abschöpfung von Vermögensvorteilen aus Straftaten vom 3. Februar 1998, BTDrucks 13/9742; er räumt Tatgeschädigten Erstattungsansprüche gegen den Staat ein, die in einem gesonderten Nachverfahren geltend zu machen sind).

108

In der Begründung des Entwurfs eines ... Strafrechtsänderungsgesetzes - Erweiterter Verfall - (... StrÄndG) vom 9. März 1990 (BTDrucks 11/6623, S. 7) heißt es hierzu, wegen des auf bestimmte Betäubungsmitteldelikte beschränkten Anwendungsbereichs des § 73d StGB sei eine Verkürzung der Rechte Tatgeschädigter äußerst unwahrscheinlich. Die gemäß § 73d Abs. 4 StGB entsprechend anwendbare Härteregelung des § 73c Abs. 1 StGB biete insoweit einen ausreichenden Schutz vor "unbilligen Ergebnissen".

109

Inzwischen hat der Gesetzgeber den erweiterten Verfall auf eine Reihe anderer Delikte, insbesondere auch auf Vermögensstraftaten wie Bandendiebstahl und -hehlerei erstreckt (vgl. A. I.). Auf der Grundlage dieser neuen Verweisungstatbestände sind nach einer Erhebung des Statistischen Bundesamts in den Jahren 1993 bis 2001 insgesamt 115 Anordnungen des erweiterten Verfalls ergangen. Damit ist eine Beeinträchtigung von Eigentumsrechten und Ersatzansprüchen Tatverletzter durch die Regelung des § 73d StGB wahrscheinlicher geworden. Die strafprozessuale "Zurückgewinnungshilfe" der §§ 111b ff. StPO, die Geschädigten die Durchsetzung ihrer aus der Straftat erwachsenen Ersatzansprüche erleichtern soll, bietet wegen der zeitlichen Begrenzung des in § 111i StPO vorgesehenen Zwangsvollstreckungsprivilegs nur einen unvollkommenen Opferschutz (vgl. Güntert, Gewinnabschöpfung als strafrechtliche Sanktion, 1983, S. 72 f.; Lenz, Einziehung und Verfall - de lege lata und de lege ferenda -, 1986, S. 289 ff.; Schäfer, in: LKStGB, 10. Aufl., § 73 Rn. 26, 28; Achenbach, in: Festschrift für Blau, 1985, S. 7, 15 f., 20). Daher hat der Gesetzgeber - auch unter sozialstaatlichen Aspekten - zu prüfen, ob die Rechte Tatgeschädigter beim erweiterten Verfall nach der Ausdehnung seines Anwendungsbereichs noch hinreichend gewahrt sind.

110

(f) § 73d Abs. 1 Satz 1 StGB schränkt in der Auslegung des Bundesgerichtshofs die im Rechtsstaatsprinzip verankerte Selbstbelastungsfreiheit des Angeklagten nicht ein. Dieser muß sich weder zu der angeklagten Anlasstat noch zu eventuellen anderen strafbaren Verhaltensweisen äußern, um eine Anordnung des erweiterten Verfalls zu vermeiden.

111

(g) Die angegriffene Regelung ist in der Auslegung des Bundesgerichtshofs auch hinreichend bestimmt. Sie erlaubt einen Zugriff auf alle vom Betroffenen deliktisch erlangten und durch dieses Kriterium von seinem verfassungsrechtlich geschützten Legalvermögen abgrenzbaren Gegenstände. Das vom Bundesgerichtshof hinsichtlich der deliktischen Vermögensherkunft geforderte Beweismaß der richterlichen Überzeugung macht eine Anordnung des erweiterten Verfalls für den Täter klar vorhersehbar.

112

(h) § 73d StGB verstößt nicht gegen das Rückwirkungsverbot. Nach Auffassung des Bundesgerichtshofs ist der

erweiterte Verfall von Gegenständen, die der Betroffene vor Inkrafttreten der auf § 73d StGB verweisenden Vorschrift erworben hat, gemäß § 2 Abs. 5 in Verbindung mit Abs. 1 StGB ausgeschlossen (vgl. BGHSt 41, 278; BGH, NStZ 2001, S. 419 und wistra 2003, S. 228 f.). Bei dieser verfassungsrechtlich unbedenklichen Gesetzesauslegung entfaltet die Vorschrift über den erweiterten Verfall keine Rückwirkung.

113

(i) Schließlich verstößt es nicht gegen das Gleichbehandlungsgebot des Art. 3 Abs. 1 GG, dass § 73d StGB die erleichterte Abschöpfung von Deliktsgewinnen auf bestimmte, dem "organisierten Verbrechen" zugerechnete Tätergruppen beschränkt. Die abweichende Behandlung dieser Tätergruppen ist durch besondere Beweisschwierigkeiten und durch die vom Gesetzgeber mit der Regelung des § 73d StGB verfolgten Gewinnabschöpfungsziele sachlich hinreichend gerechtfertigt (zum Maßstab BVerfGE 96, 315 <325>; 100, 138 <174>):

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Mit den in § 73d Abs. 1 Satz 1 StGB vorgesehenen Beweiserleichterungen will der Gesetzgeber einen Zugriff auf deliktisch erlangte Vermögensgegenstände auch dann ermöglichen, wenn deren Herkunft aus bestimmten Straftaten wegen des konspirativen Vorgehens des von der Vorschrift erfassten Täterkreises nicht aufgeklärt werden kann (vgl. oben C. I. 3. b) cc) (1) sowie BTDrucks 11/6623, S. 1). Außerdem soll eine effektivere Gewinnabschöpfung gerade denjenigen Tätern, die für die "organisierte Kriminalität" typische Delikte begangen haben, den Anreiz zur Begehung erneuter gewinnorientierter Straftaten nehmen.

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Die Einschätzung des Gesetzgebers, eine effektive Gewinnabschöpfung sei bei "organisiert" vorgehenden Straftätern wegen deren erfahrungsgemäß konspirativen Verhaltens nur unter den erleichterten Voraussetzungen des § 73d StGB möglich, ist nicht offensichtlich fehlsam und genügt daher den verfassungsrechtlichen Anforderungen. Auch die Typisierung der "organisierten Kriminalität" durch das Merkmal der banden- oder gewerbsmäßigen Tatbegehung wahrt die Grenzen des dem Gesetzgeber vom Grundgesetz zugebilligten Beurteilungsspielraums (vgl. dazu BVerfGE 8, 71 <80>; 30, 292 <317>).

II.

116

1. Die Rüge des Beschwerdeführers, das landgerichtliche Urteil verletze sein Eigentumsgrundrecht, weil es den vom Bundesgerichtshof in einengender Auslegung des § 73d Abs. 1 Satz 1 StGB aufgestellten Beweismaßanforderungen nicht genüge, ist unbegründet. Die Ausführungen des Landgerichts in den Gründen des angegriffenen Urteils belegen, dass es die Überzeugung gewonnen hat, das vom Beschwerdeführer auf einem Sparkonto angelegte Geld stamme aus verbotenen Drogengeschäften.

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2. Damit erweist sich auch der Einwand des Beschwerdeführers, der seine Revision verwerfende Beschluss des Bundesgerichtshofs halte den Verfassungsverstoß des Landgerichts aufrecht, als unbegründet.

Hassemer	Jentsch	Richter Broß ist an der Unterschrift verhindert.
Osterloh	Di Fabio	Mellinghoff
Lübbe-Wolff		Gerhardt