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SCSL-03-01-A
(9906 - 10402)

THE SPECIAL COURT FOR SIERRA LEONE

THE APPEALS CHAMBER

Before: Justice Shireen Avis Fisher, Presiding Judge
Justice Emmanuel Ayoola
Justice George Gelaga King
Justice Renate Winter
Justice Jon M. Kamanda
Justice Philip Nyamu Waki, Alternate Judge

Registrar: Ms. Binta Mansaray

Date: 30 November 2012

Case No.: SCSL-2003-01-A

THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC WITH BOOK OF AUTHORITIES, CONFIDENTIAL ANNEXES A AND B AND PUBLIC ANNEX C

SUBMISSIONS IN REPLY OF CHARLES GHANKAY TAYLOR

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I. OVERVIEW

A. INTRODUCTION

1. This Reply,[1] given the time available for its preparation and the applicable page-limit,[2] addresses only the most glaring misstatements of the evidence, errors of logic and interpretation, and erroneous statements of law presented in the Prosecution Response Brief.[3] The errors and misstatements that are identified in this Reply suggest that the Prosecution Response Brief should be anxiously scrutinized for accuracy. No quotations are given in respect of many propositions, which in itself warrants caution.

2. This is an Appeal from a Judgement of 2,500 pages. The Prosecution often seeks to remedy deficiencies in the Judgement by asserting an interpretation or relying on evidence that is not set out in this multi-tome judgement. This is not a case, given the volume of both the evidence and the Judgement itself, where the Appeals Chamber can, or should, lightly remedy the profound and serious deficiencies in the Trial Judgement. An appeal is not and should not be a retrial: the serious *lacunae* in the Judgement should not be plugged by resorting to far-flung reaches of the trial record that were not, in many cases, considered significant enough to be expressly relied upon by the Chamber itself. On the other hand, some of the factual errors in the Trial Judgement are so severe and glaring that not even the most rose-coloured approach can obscure its flaws.

3. The Defence stands by all the representations in its Appeal Brief. Where submissions are not advanced under a particular Ground of Appeal, this is a result of the limited page allocation and should not be understood as a withdrawal of any aspect of the Appeal Brief. The Judgement is carefully and fairly represented in that Appeal Brief, contrary to the aspersions cast by the Prosecution. The errors infecting the Trial Judgement are serious:

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[1] Filed pursuant to Rule 113 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone, as amended on 31 May 2012 ("Rules") and Article 20 of the Statute of the Special Court for Sierra Leone ("Statute"). The subject-matter of these submissions are *Prosecutor v. Taylor*, SCSL-03-01-T-1283, Judgement, dated 18 May 2012, filed 30 May 2012 ("Judgement") and *Prosecutor v. Taylor*, SCSL-03-01-T-1285, Sentencing Judgement, 30 May 2012 ("Sentencing Judgement") rendered by Trial Chamber II of the Special Court for Sierra Leone ("Trial Chamber" or "Chamber"). On 1 October 2012, the Defence filed ("Defence Appellant's Submissions"), which was corrected on 8 October 2012 There are three annexes appended to this filing. Confidential Annex A contains submissions referring to the identities of protected witnesses. Confidential Annex B and Public Annex C both contain hard copies of excerpts from referenced material in this filing; the former contains excerpts of confidential documents. The Book of Authorities contains a list of all the abbreviations and short-form citations used in this Reply.

[2] Practice Direction on dealing with Documents in The Hague - Sub-Office, as amended on 25 April 2008, Article 6(E); *Prosecutor v. Taylor*, SCSL-03-01-A-1315, Decision on Prosecution and Defence Motions for Extension of Time and Page Limits for Written Submissions Pursuant to Rules 111, 112 and 113, 7 August 2012, para. 31.

[3] *Prosecutor v. Taylor*, SCSL-03-01-A-1350, Prosecution Respondent's Submissions, 23 November 2012 ("Prosecution Response Brief").

substantial and systematic errors in evaluating the evidence; a serious misapprehension of the concept of planning, as well as the evidence on which the conviction for planning was based; a casual acceptance of excessively broad definition of aiding and abetting that has no meaningful basis in customary international law, and a fundamental failure to properly assess whether the assistance imputed to Mr. Taylor substantially assisted any crime; serious allegations of impropriety by one of the Judges who was supposed to be a participant in the fact-finding process; and a manifestly excessive sentence.

II. REPLY TO PROSECUTION RESPONDENT'S SUBMISSIONS

PART I: ERRORS IN THE EVALUATION OF EVIDENCE

A. GROUND 5

4. The Defence does not assert that the *ad hoc* courts consider payments as a sole factor that might render a witness' testimony unreliable.[4] Nor is it asserted that the Trial Chamber failed to address the issue of payments and benefits received.[5] The error, rather, is the Chamber's failure to apply automatic caution in cases where the Prosecution gave direct payments and/or benefits to witnesses;[6] a correct approach which reflects the impossibility of determining the purely subjective question of the extent to which such benefits coloured the testimony of witnesses.

5. Merely summarising the Chamber's credibility assessments of each of the impugned Prosecution witnesses does not respond to the identified error.[7] The Prosecution asserts that witness credibility assessments involve numerous "subjective determinations" such as witness demeanour, the plausibility and clarity of a witness' testimony, and whether the witness had motivation to lie.[8] These examples are not purely subjective; demeanour can be observed, a witness' testimony can be objectively implausible. The Prosecution arguments in fact reinforce the difference between these determinations, and the utter impossibility of assessing – in the absence of an explicit confession from the witnesses – whether testimony

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[4] Prosecution Response Brief, para. 39.
[5] Prosecution Response Brief, para. 39.
[6] See Defence Appellant's Submission's, paras. 65 citing *Martić* TJ (there is significant doubt as to the credibility of both witnesses), 66 citing *Karemera* TJ (such evidence must be assessed with appropriate caution), 67 citing *Bizimungu* TJ (the possibility that witness D is motivated to provide evidence favourable to the Prosecution in order to ensure continued benefits cannot be ignored), 68 citing *Zigiranyirazo* TJ (such benefits warrant additional caution).
[7] Prosecution Response Brief, paras. 44-50.
[8] Prosecution Response Brief, para. 41.

was influenced by an unconscious or conscious loyalty to the witness's benefactor. The *ad hoc* tribunals have recognised the impossibility of this task and have automatically applied caution to witnesses in receipt of notable benefits. The Chamber erred in failing to also adopt this approach.

6. The Prosecution argues against a *de novo* assessment of evidence by the Appeals Chamber,[9] and repeats that the Chamber has discretion to rely on uncorroborated, but otherwise credible, witness testimony.[10] The Defence neither requested a *de novo* assessment of the evidence in question,[11] nor contests the Chamber's discretion with regard of acceptance of uncorroborated but otherwise credible evidence.[12]

PART II: ERRORS IN THE PLANNING CONVICTION

A. GROUND 6

7. The Chamber found that the Prosecution successfully challenged Adjudicated Fact 15 ("AF15") through a single paragraph in its Final Trial Brief, warranting its re-consideration. The Prosecution and the Defence are united in their disagreement with this finding, albeit for different reasons. The Prosecution contends that it did not wait for its Final Trial Brief to challenge AF15, but challenged it through its objection to the Defence Motion for the admission of AF15; its Response to the Defence 98*bis* motion; the cross-examination of Defence witnesses; and its case in chief. [13]

8. The assertions would define adjudicated facts out of existence. An adjudicated fact can be rebutted by leading reliable and credible evidence to the contrary[14] and expressly requesting the Chamber to consider this challenge.[15] First, opposing a motion for admission of an adjudicated fact does not itself suffice.[16] If it did, no party could ever rely on an adjudicated fact if the other party had objected to its admission. Second, Rule 98*bis* submissions are not evidence.[17] Third, to assert that it adduced "reliable and credible"

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[9] Prosecution Response Brief, para. 54.
[10] Prosecution Response Brief, para. 55.
[11] Defence Appellant's Submission's, para. 76.
[12] See e.g. Defence Appellant's Submission's, para. 64.
[13] Prosecution Response Brief, para. 64.
[14] The Prosecution recognises this: Prosecution Response Brief, paras. 65, 73.
[15] *Krajišnik* Adjudicated Facts Decision, para. 17; see Defence Appellant's Submissions, para. 89.
[16] Prosecution Response Brief, para. 64.
[17] See Rule 98 of the Rules; The Prosecution similarly acknowledged that the "submissions in its Closing Brief simply summarised its position": Prosecution Response Brief, para. 64. Further, it is hard to see how citing back to evidence led before the taking of judicial notice can revive it back to life by mere reference; the Chamber had considered this evidence before taking judicial notice of AF15.

evidence through cross-examination of Defence witnesses, the Prosecution cites (only) to its questioning of Sesay and Ngebeh.[18] This is startling, given its rampant criticism of Sesay's credibility,[19] and given that Ngebeh's testimony unequivocally corroborates AF15.[20] In any event, the Chamber expressly found this evidence to be unreliable and did not seek to rely on it in making its factual finding,[21] nor did it find the Prosecution cross-examination of these two witnesses sufficient to challenge the truth of AF15, relying only on paragraph 540 of the Final Trial Brief. Finally, the Prosecution's assertion that it had retrospectively challenged AF15 during its case in chief[22] is undermined by the Chamber's original decision, in which it rejected the Defence assertion that evidence from the Prosecution's case in chief could be used in this way, and instead held that the Prosecution could challenge adjudicated facts by "cross-examining Defence witnesses or by calling rebuttal evidence."[23] The Prosecution did neither.

9. That the Chamber did not dismiss the charges related to the Freetown attack at the 98*bis* state has no bearing on the present issue; Mr. Taylor's potential liability at trial for the Freetown invasion did not rest entirely on the question of whether RUF troops made it into the city (the Prosecution was still running its JCE case, for example).[24] The Chamber's failure to dismiss charges relating to Freetown at the 98*bis* stage did not indicate that the Defence could not rely on AF15 as dispensing with the issue. Agreed Fact 31[25] is irrelevant, as it concerns the identity of fighters who made it into Freetown with Gullit on 6 January, and not the alleged entry of Rambo Red Goat some 2 weeks later.[26]

10. Finally, the RUF and AFRC Judgements were not cited as evidence[27] but to highlight the Prosecution's habit of advancing conflicting versions of the truth by selective use of

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[18] Prosecution Response Brief, paras. 64, 71.
[19] See, *inter alia,* Prosecution Final Trial Brief, para. 544.
[20] Prosecution Response Brief, paras. 64, 71, citing TT. Negbeh, 12 Apr. 2012, p. 38682.
[21] See Judgement, paras. 3377-8, 3429-35.
[22] Prosecution Response Brief, para. 64.
[23] AFRC Adjudicated Facts Decision, para. 32.
[24] The Prosecution in fact asserted that "even if it were not true that RUF were actually among those who entered Freetown, liability would still lie for the crimes committed in Freetown because of the continuing existence of the alliance of the participants in this joint criminal enterprise including AFRC and the RUF": TT, Rule 98 Hearing, 9 Apr. 2009, p. 24156.
[25] Agreed Facts, p. 6, para. 31, see Prosecution Response Brief, para. 61.
[26] Exh. P-149 states that it was agreed on 15 January that RUF forces would attempt to conduct a joint operation on Jui and Kosso Town, and Bobson Sesay put the arrival of Rambo Red Goat at "some time before the third week of January" (See Judgement, paras. 3423, 3425, 3434-5).
[27] Prosecution Response Brief, para. 60.

witnesses in different cases; a practice which is impossible to reconcile with its duty to act as a minister of justice.[28]

B. GROUND 7

11. The thrust of the response is that the Trial Chamber should be given the benefit of the doubt; that it should be "presumed" that the Chamber assessed or weighed evidence or took inconsistencies into account in the absence of any indication that it did.[29] In support, the Prosecution selectively quotes from *Kvočka*,[30] ignoring the later pronouncement that:

> It is to be presumed that the Trial Chamber evaluated all the evidence presented to it, *as long as there is no indication that Trial Chamber completely disregarded any particular piece of evidence.*[31]

12. This Appeals Chamber clarified that "such disregard is shown 'when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning.'"[32] Accordingly, even though the Prosecution asserts that "a fact finder need not articulate every step of its reasoning for each particular finding"[33] a Chamber's reasoning must not ignore clearly relevant evidence, which happened in this case.[34] A Chamber's discretion to "evaluate inconsistencies and to accept or reject 'fundamental features' of the evidence"[35] is tempered by its duty to provide a reasoned opinion.[36]

13. The reliance on *Krajišnik* is misplaced;[37] it concerned witnesses of doubtful credibility[38] whereas TF1-371, Kanneh and Mongor were considered generally credible. *Setako* AJ does not stand for the proposition the Prosecution claims; what the Prosecution quoted as authoritative was an unendorsed summary of the *Setako* TJ's finding.[39]

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[28] As noted by Antonio Cassese on behalf of the Trial Chamber in *Kupreškić*, "the Prosecutor... is not, or not only, a Party to adversarial proceedings, but is... an organ of international criminal justice whose object is not simply to secure a conviction but to present the case for the Prosecution, which includes not only inculpatory, but also exculpatory evidence, in order to assist the Chamber to discover the truth in judicial setting." *Kupreškić* Decision on Communications between the Parties and their Witnesses, p. 2.
[29] See, for example, Prosecution Response Brief, paras. 90, 91, 104.
[30] Prosecution Response Brief, para. 90. Relied on in paras. 90, 91, 104.
[31] *Kvočka* AJ, para. 23 (emphasis added).
[32] *RUF* AJ, para. 39, citing *Strugar* AJ, para. 24; *Limaj* AJ, para. 86.
[33] Prosecution Response Brief, para. 85, citing *RUF* AJ, para. 345; *Krajišnik* AJ, 139; *Musema* AJ, para. 18. Relied on in paras. 85, 91, 97. See also Prosecution Response Brief, para. 90, citing *Nchamihigo* AJ, para. 165; *Musema* AJ, para. 20; *Krajišnik* AJ, para. 139. Relied on in paras. 90, 97.
[34] See Defence Appellant's Submissions, paras. 119-20, 123, 126-7.
[35] Prosecution Response Brief, para. 103, citing Judgement, para. 172.
[36] *Kupreškić* AJ, paras. 31-2 (the right to a reasoned opinion is also a component of a fair trial).
[37] Prosecution Response Brief, para. 88.
[38] *Krajišnik* AJ,paras. 145, 149, 151.
[39] Prosecution Response Brief, para. 103, citing *Setako* AJ, para. 97.

14. The clarification of what Mongor meant by "NPFL fighters" reinforces the identified contradiction.[40] Kanneh said Bockarie "rejected the idea of support from Mr Taylor's troops"[41] while Mongor said he expected to receive Mr. Taylor's men in Zimmi.[42]

15. The Defence did not misstate the evidence.[43] The Judgement does indeed say that the "inner core" bedroom lunch meeting occurred halfway through the Waterworks briefing.[44] In fact, the Prosecution interpretation of TF1-371's sequence of events[45] is precisely that which the Defence states and argues is inconsistent with Kanneh's evidence.[46] The Prosecution then highlights yet another contradiction by claiming that Mongor's evidence suggests that he *was* at the senior officers' meeting[47] whereas Kanneh explicitly testified he *was not*.[48]

16. Lastly, in paras. 115-20, the Prosecution argues everything but the issue at hand: that the Chamber failed to assess the reliability of Bockarie as the source of the hearsay. The Prosecution arguments on the reliability of TF1-371, Kanneh and Mongor[49] and its attempt to provide retrospective reasoning on behalf of the Chamber[50] should be dismissed.

C. GROUND 9

17. The Prosecution concedes that "TF1-371, Mongor, Kanneh and TF1-585 differ as to the details of the plan".[51] This is the key point. The Prosecution does not even attempt to assert that the "details of the plan" are minor, despite its reliance on *Rukundo* and *Munyakazi*

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[40] Prosecution Response Brief, para. 95.
[41] TT, Karmoh Kanneh, 13 May 2008, pp. 9726-7.
[42] Prosecution Response Brief, para. 95, citing TT, Isaac Mongor, 11 March 2008, p. 5798.
[43] Prosecution Response Brief, para. 99.
[44] See Judgement, paras. 2961-3. Para. 2961 states, "[w]hen Bockarie returned to Buedu he off-loaded the materials into his warehouse and gathered the witness and the other RUF members he left behind for a forum at Waterworks to brief them about the trip." Without a break in the description of the briefing, para. 2963 states, "[h]alfway through the briefing, Bockarie and a smaller group including the witness, Eddie Kanneh, Sesay, Kallon, Jungle and one or two others went to eat lunch in Bockarie's bedroom."
[45] Prosecution Response Brief, para. 99.
[46] Defence Appellant's Submissions, para. 131. See also, paras. 128-35, 137-9. Compare Kanneh's evidence that there was one meeting in the middle of the night at Bockarie's house after which everyone went to sleep with TF1-371's evidence that there was a meeting attended by "[m]ost of the [RUF and AFRC] senior commanders" (TT, TF1-371, 28 Jan. 2008, p. 2410), in the middle of which six individuals had lunch in Bockarie's bedroom and after which they prepared for their various assignments. No reasonable trier of fact could conclude that the evidence shared any "fundamental features".
[47] Prosecution Response Brief, para. 100.
[48] TT, Karmoh Kanneh, 13 May 2008, pp. 9707-08. The Prosecution argues that Kanneh meant specifically that Mongor was not at the bedroom meeting as opposed to the senior officer's meeting in Bockarie's house (Response Brief, para. 105). However, Kanneh's testimony does not refer to Bockarie's bedroom: he stated that Mongor was not present in context of the meeting held at *Bockarie's house* (see TT, Karmoh Kanneh, 13 May 2008, pp. 9700-1).
[49] Prosecution Response Brief, paras. 115-7.
[50] Prosecution Response Brief, paras. 118-20.
[51] Prosecution Response Brief, para. 125.

which deem only "minor inconsistencies" to be forgivable.[52] The Prosecution itself attempts to patch-up the Chamber's error by explaining away these inconsistencies,[53] thereby effectively demonstrating the Chamber's failure to give sufficient reasons.[54]

18. The Prosecution unreasonably asserts that three "generally credible" witnesses[55] not mentioning an attack on Freetown is "not incompatible" with those whose description of the plan had Freetown as the ultimate destination.[56] The inclusion of an attack on the capital is such a central and memorable aspect, it is unreasonable to assert that nothing can be made of "generally credible" witnesses[57] not mentioning it. The Defence, of course, agrees that "none of the three said that the plan *did not* include Freetown".[58] How could a witness testify about an aspect of a plan about which he had no knowledge?

19. If the omission of Freetown "can reasonably be explained"[59] by the witnesses' vantage points, the Chamber should have done so. It is not for the Prosecution to provide reasoning the Chamber *could* have given, then imply that the Chamber did not err because such reasoning exists.[60] Even had the three witnesses omitted Freetown because of their vantage points[61] (which the Prosecution does not substantiate), this does not respond to the Defence submission; the Chamber erred in accepting the testimony of these three witnesses, while also finding "beyond reasonable doubt" that Freetown was the ultimate destination.

D. GROUND 8

20. The Prosecution states that, for liability through planning, it is *irrelevant* whether the individuals who implemented the plan were those intended (or even contemplated) by the accused.[62] This assertion, for which no legal basis is provided, is necessary to sidestep the fact that the Freetown offensive in December 1998 was carried out by SAJ Musa's troops, under Gullit's command,[63] who had recently and violently split from the RUF after a bitter

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[52] Prosecution Response Brief, para. 125, referring to *Rukundo* AJ, para. 81; *Munyakazi* AJ, para. 103.
[53] Prosecution Response Brief, para. 125 (this attempt fails dismally due to the divergences between the testimonies which deprive them of any corroborative character).
[54] Defence Appellant's Submissions, para. 156.
[55] Judgement, para. 3092.
[56] Prosecution Response Brief, paras. 129-30, citing *Nahimana* AJ, para. 428: "corroboration may exist even when some details differ between testimonies, provided that no credible testimony describes the facts in question in a way which is not compatible with the description given in another credible testimony"; See also *Setako* AJ, para. 31.
[57] Judgement, para. 3092.
[58] Prosecution Response Brief, para. 130.
[59] Prosecution Response Brief, para. 130.
[60] Prosecution Response Brief, para. 130.
[61] Prosecution Response Brief, para. 130.
[62] Prosecution Response Brief, paras. 142, 155, 161.
[63] Judgement, para. 61; Decision on Judicial Notice of AFRC Adjudicated Facts, Annex A, Facts 14, 15.

dispute.[64] In effect, the Prosecution is asserting that an accused can plan an offensive in another state, but before his troops can arrive, a different group (even if adverse to the accused) reach the designated target, implement the plan, and that this is *irrelevant* to the accused's liability, even if this eventuality had *not even been contemplated.* This suggests an "inchoate" aspect to this mode of liability not recognised in international criminal law.[65] It is also inconsistent with the requirement that perpetrators must be sufficiently identified.[66] It also undermines that the accused's plan "substantially contributed" to the attack, as it is being carried out by troops who were not even contemplated as being part of his plan.

21. The Chamber, for its part, recognised that this was not the position. It recognised that it was necessary to link the perpetrators to the "Bockarie/Taylor plan" before convicting Mr. Taylor for planning. This led to its logic-defying leaps to find that Mr. Taylor had somehow foreseen that SAJ Musa's *deputy* would end up following their plan, despite SAJ Musa's virulent opposition to doing so.[67] This link between the perpetrators and the plan is not "irrelevant";[68] without it there was no link between Mr. Taylor and Gullit's troops, or between the plan and the crimes committed in Freetown.

22. In arguing in the alternative that the "contemplation" theory was the only reasonable conclusion, the Prosecution misrepresents Defence arguments.[69] The Defence did not impugn the reliance on Mongor and Kanneh's evidence because it was circumstantial, uncorroborated hearsay.[70] The identified error was the Chamber's reliance in the absence of the requisite scrutiny or caution.[71] The Prosecution undermines its insistence that the Chamber properly assessed this evidence[72] by spending two pages identifying "circumstantial guarantees of trustworthiness" on the Chamber's behalf, albeit unconvincingly,[73] This exercise emphasises

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[64] Judgement, para. 55.
[65] See, for example, *Akayesu* TJ, para. 473: "However, the principle of individual criminal responsibility as provided for in Article 6(1) implies that the planning or preparation of the crime actually leads to its commission; *Galić* TJ, para. 168: "and the crime was actually committed within the framework of that design": See also *Nahimana* AJ para. 479; *Kordić and Čerkez* AJ, para. 26; *Gatete* TJ, para. 573; *Haradinaj* TJ (2008), para. 141; *Limaj* TJ, para. 513.
[66] *Boškoski and Tarčulovski* AJ, para. 75, citing, *inter alia*, *Blaškić* AJ, paras. 588, 597; *Gacumbitsi* AJ, paras. 184-7; *Semanza* AJ, para. 363. *Contra* Prosecution Response Brief, para. 142, citing, *inter alia*, TT, Isaac Mongor, 7 April 2008, p. 6720-1.
[67] See Judgement, para. 3480, 3486, 3611 (xii), 3617.
[68] Prosecution Response Brief, para. 155.
[69] Prosecution Response Brief, paras. 155-60.
[70] Prosecution Response Brief, para. 145.
[71] Defence Appellant's Submissions, para. 179.
[72] Prosecution Response Brief, para. 151.
[73] Prosecution Response Brief, paras. 146-9.

the extent of the Chamber's failure to provide the requisite "fully reasoned opinion"[74] for accepting uncorroborated hearsay in support of a critical adverse finding.

23. The Prosecution's insistence that the Chamber was relying on Kanneh's evidence in paragraph 3120 of the Judgement cannot trump the Chamber's unequivocal statement that it was relying (erroneously) on Mongor's.[75] The Chamber's resounding silence on TF1-371's failure to mention the SAJ Musa contact, despite his presence at this same small meeting, is brushed over by the now-tiresome repetition that a trial chamber is presumed to have considered all evidence.[76] This proposition is not a panacea to excuse every occasion on which a Chamber disregards relevant evidence. *Kvočka* qualifies that "there may be an indication of disregard when evidence which is clearly relevant to the findings is not addressed".[77] The evidence of another participant at a small meeting who makes no mention of the approach to SAJ Musa's (particularly when questioned at length as to the content of the meeting)[78] was clearly relevant and should have been addressed, particularly when the Chamber is otherwise relying on the uncorroborated hearsay of *one* participant at the same meeting for a critical adverse finding against Mr. Taylor.

24. The self-serving assertion that when Mr. Taylor and Bockarie contemplated that SAJ Musa may implement the plan, they also contemplated that Gullit would participate[79] is rampant speculation. The Prosecution points to no evidence to show that Mr. Taylor even knew who "Gullit" was, at that time.[80] The evidence that apparently "supports a conclusion that Bockarie and Taylor contemplated Gullit's possible participation" relates only to Bockarie and fails to demonstrates any contemplation on Mr. Taylor's part.[81]

E. GROUND 10

25. The allegation of relitigation is unfounded.[82] The Chamber's "abandonment" theory entails Gullit's 1000 troops, having recently and violently split from the RUF, uniformly abandoning the SAJ Musa plan (which they had been following for several weeks if not months) for the RUF "Bockarie/Taylor plan" while engaged in a chaotic attack on a capital. This theory lends itself to many adjectives, one of which is "novel". The Prosecution does

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[74] Defence Appellant's Submissions, para. 179, citing *Kordić and Čerkez* AJ, para. 274.
[75] Prosecution Response Brief, para. 153.
[76] Prosecution Response Brief, para. 154.
[77] *Kvočka* AJ, para. 23.
[78] TT, TF1-371, 28 January 2008, pp. 2409-15.
[79] Prosecution Response Brief, para, para. 155.
[80] TT, Charles Taylor, 17 September 2009, p. 29266.
[81] Prosecution Response Brief, para. 156.
[82] Prosecution Response Brief, paras. 162, 170, 172.

not allege to have argued it at trial. Had it done so, and the Defence was countering this allegation for a second time through the same evidence, the Prosecution criticism might be valid. Rather, this is the first opportunity Mr. Taylor has had to address this theory, and the Defence engaged in a valid exercise of demonstrating that it was "unsupported by evidence"[83] and that "no reasonable trial chamber could have devised [it] based on the evidence."[84]

26. There is a "need for an evidentiary basis for the Trial Chamber's conclusions".[85] The Prosecution asserts that the evidentiary lacunae shown by the Defence,[86] does not mean relevant evidence did not exist.[87] Its failure to point to any such evidence, speaks volumes. The Prosecution insists that the Chamber could differentiate the two plans on the basis of their goals and criminal nature. Yet merely repeating that SAJ Musa ordered his troops not to commit crimes does not address the Defence argument that regardless, they did.[88] The arguments concerning the overlapping and corresponding goals similarly go unanswered.[89]

27. The Prosecution mistakenly or disingenuously asserts that the Defence advances "four" examples to show that the plan was not abandoned.[90] While the Defence pointed to at least 10 pieces of testimonial and documentary evidence, the Prosecution's attempt to dismiss the majority of this evidence as re-litigation of issues at trial[91] is incorrect, and means the Prosecution does not respond to the substance of the Defence appeal.

F. GROUND 11

28. Liability for planning arises when an accused designs the commission of "a particular crime" or "a statutory crime".[92] The cases relied upon by the Prosecution do not support a

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[83] Defence Appellant's Submissions, paras. 185-93, 205-6.
[84] Defence Appellant's Submissions, paras. 194-206. See in particular, paras. 205-6: "The finding that Gullit "abandoned" SAJ Musa's plan is artificial, unsupported by evidence, and undermined by a wealth of evidence... The Chamber's "abandonment theory" was certainly not the only reasonable conclusion available on the evidence. No reasonable trier of fact could have devised the abandonment theory based on the evidence... Holding Mr. Taylor criminally responsible for "planning" the crimes of Gullit's forces in Freetown on this basis is a miscarriage of justice, and warrants the quashing of the planning convictions based on the crimes committed during the Freetown invasion and subsequent retreat." *See also* para. 201: "This evidence does not support a finding that Gullit's troops were carrying out the "Bockarie/Taylor plan"; *See also* para. 203: "No reasonable trier of fact, having heard this evidence, could have found that the only reasonable conclusion was that SAJ Musa's plan had been abandoned, and Gullit's movements were incorporated into the "Bockarie/Taylor plan".
[85] *Gotovina* AJ, para. 61.
[86] Defence Appellant's Submissions, para. 187.
[87] Prosecution Response Brief, para. 164.
[88] Defence Appellant's Submissions, para. 92.
[89] Defence Appellant's Submissions, paras. 189-91.
[90] Prosecution Response Brief, paras. 168-73.
[91] Prosecution Response Brief, para. 170.
[92] Defence Appellant's Submissions, para. 209, citing *Semanza* TJ, para. 380; *Limaj* TJ, para. 513. See also *Kordić and Čerkez* AJ, para. 26; *Brđanin* TJ, para. 268; *Krštić* TJ, para. 601; *Galić* TJ, para. 168; *Boškoski* TJ,

broader approach.[93] In *Kordić*, the accused was held liable for planning *crimes* he directly intended, (e.g. killing, destruction of houses) and for those *crimes* for which he was aware were substantially likely to occur (e.g. unlawful detention, plunder).[94] In *Boškoski*, the Appeals Chamber held that Tarčulovski planned conduct constituting *crimes* (indiscriminate attacks on Albanian villagers and property).[95] The Prosecution does not point to one analogous example. The lengthy arguments that a criminal *modus operandi* could be inferred from the use of the terms "fearful" and "by all means"[96] are premised on these findings remaining undisturbed on appeal.[97] Even if these two phrases were considered as part of the *actus reus*, the Prosecution does not demonstrate their sufficiency to support a finding that the operation was a plan to commit the 11 concrete crimes for which Mr. Taylor was convicted, nor distinguish an ICTY acquittal on this same basis.[98]

29. The Chamber was unequivocal that the plan *evolved* from that designed by Bockarie and Taylor, to one encompassing Gullit's troops; the term "evolution" was included in the critical paragraph finding Mr. Taylor's culpability for planning. It was used to denote a definitive change in the plan as formulated.[99] By simply denying this was the case, the Prosecution fails to respond to substantive arguments on the legal errors identified.

30. In asserting that crimes were committed in Kono and Makeni, the Prosecution cited only two *findings*,[100] neither of which demonstrate that crimes were committed pursuant to the Bockarie/Taylor plan in those locations.[101] In the alternative, the Prosecution seeks to maintain a conviction which does not reflect the findings of the Chamber, demonstrating a troubling and single-minded prioritisation: the maintenance of convictions above all.

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para. 398; *Nahimana* AJ, para. 479; Cassese, Antonio, *International Criminal Law*, Oxford University Press (Oxford 2003), p. 192.

[93] Prosecution Response Brief, para. 177.

[94] Prosecution Response Brief, para. 177, citing *Kordić and Čerkez* AJ, paras. 31, 976. The Prosecution also cites at fn. 486 to paragraphs 26 and 30 of the same judgment. However, paragraph 26 reads: The *actus reus* of "planning" requires that one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated." Paragraph 30 refers to the *mens rea* for ordering.

[95] Prosecution Response Brief, para. 177, citing *Boškoski and Tarčulovski* AJ, paras. 169-72.

[96] Prosecution Response Brief, paras. 179-86.

[97] Defence Appellant's Submissions, Grounds of Appeal 14 and 15.

[98] Defence Appellant's Submissions, para. 210.

[99] Prosecution Response Brief, para. 189.

[100] Prosecution Response Brief, para. 190, citing Judgement, para. 1424 (for Kono) and 1540 (for Makeni). The rest of footnotes 526 and 527 lists – as the Prosecution concedes – evidence on trial record for which the Chamber made no finding.

[101] With regard to the finding in relation to Count 9 in Kono (Judgement, para. 1424), the witness explained that the training base was only established "when Kono was 'cleared'" (Judgement, para. 1423); i.e. *after* the attacks on Kono. The crime found was therefore not committed pursuant to the Bockarie/Taylor plan of an attack *on* Kono. With regard to the finding in relation to Count 9 in Bombali District (Judgement, para. 1540), it is clear that the crimes in which the witness was involved in Makeni had nothing to do with the Bockarie/Taylor plan as he was fighting with SAJ Musa's troops (Judgement, para. 1538).

31. The Prosecution does not substantiate its claim that arguments were not contained in the Notice of Appeal. A Notice of Appeal "does not need to detail the arguments that the parties intend to use in support of the grounds of appeal, as this has to be done in an appellant's brief." [102] The Defence submits that it provided adequate notice of the arguments to be advanced,[103] which fit easily under the substantive error alleged. In the alternative, the Defence submits that the decisive element is whether there was prejudice to the opposing party.[104] The Prosecution has responded in full to all arguments, undermining any claim of prejudice suffered. The Defence submits this warrants consideration of the impugned arguments, and respectfully requests the Appeals Chamber to do so in the interests of justice.

G. GROUND 12

32. The Chamber's factual path to the planning conviction is undeniably complicated. Previous convictions have been comparatively straightforward; an accused plans the commission of a crime or crimes, which he intends, which then occur. In this case, the Chamber found[105] that the participation of troops who ultimately carried out the planned military offensive had been "contemplated" (*not* planned).[106] And while this was not part of the plan, the door remained open for it to *become* part of the plan, or for the plan to "evolve" to capture their participation. However, the Chamber recognized that the "evolved" plan would not be attributable to the accused unless he knew about it. Planning is not JCE III.

33. This gap was filled when the Chamber held that Mr. Taylor, via daily communication with Bockarie, "was aware of its continuing evolution."[107] This is where the Prosecution's main objection appears to lie. It makes the brazen assertion that "the Chamber did not find that the plan "evolved".[108] The Chamber's finding cannot be read in any other way. The Chamber used the world "evolution" precisely to connote a change, and not a linear

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[102] *Boškoski and Tarčulovski* AJ, para. 246, citing *Mrkšić* Decision of 26 August 2008 [*sic*], para. 8 (It is sufficient that the Notice of Appeal "focus the mind of the Respondent...on the arguments which will be developed".)

[103] Both arguments in Prosecution Response Brief, fn. 481, are adequately covered by the notice that Ground 11 challenges the error in the findings of crimes in relation to the implementation of the plan (Notice of Appeal, paras. 35-6).

[104] See Transcript, Statute Conference, 25 October 2012, p. 49827 to p. 49830 at line 7. See especially p. 49829 lines 18-29 to p. 49830, lines 1-7 where the Presiding Judge makes clear that the key test regarding the redress of a violation of the Practice Directions on Grounds of Appeal is prejudice to the opposing Party, as, well as whether the opposing Party was prevented from answering the Ground due to the violation.

[105] Erroneously, as discussed above.

[106] See generally, Defence Appellant's Submissions, paras. 162-81; Judgement, paras. 3118-24, 3480, 3486, 3611(xii), 3616-7, 6958-71.

[107] Judgement, para. 6966.

[108] Prosecution Response Brief, para. 195.

"progression" or "unfolding".[109] The claim that this paragraph has no impact on the *actus reus* of planning (but merely serves to establish a clearer picture of Taylor's involvement)[110] is further undermined by the fact that it is one of only eleven paragraphs dealing with the *actus reus* of planning, summarizing a discussion of some 200 pages and found under the heading 'Findings on the Physical Elements of Planning'.[111] Complicated a path though it may be, Mr. Taylor's knowledge of the evolving plan was a critical component in the Chamber's reasoning.[112]

34. The Chamber held the daily communication came either directly from Bockarie or through Yeaten.[113] The Defence was entitled to demonstrate the lack of credible evidence in support both of these individual propositions.[114] Although not every example can be highlighted, the Prosecution distorts or misrepresents the Defence arguments on many occasions: the Defence *did not* claim, for example, that Fornie's was the sole evidence of Yeaten's contact with Bockarie.[115] The paragraph cited refers to Yeaten's contact with *Mr. Taylor*.[116] Generally, the Prosecution implies that the Chamber was entitled to consider contact between Bockarie and Yeaten as the equivalent of contact between Bockarie and Mr. Taylor.[117] This is undermined by the distinction drawn by the Chamber itself[118] and the lack of findings as to the regularity of contact between Yeaten and Mr Taylor[119] or any specific findings that Yeaten reported the content of discussions with Bockarie to Mr. Taylor.

H. GROUND 13

35. The Prosecution argues that the Chamber was not required to find that Bockarie exercised command responsibility over Gullit.[120] Even if correct, the Prosecution cannot ignore the link made *by the Chamber* between Bockarie's command of Gullit and the liability of Mr. Taylor for planning. That Bockarie "commanded" Gullit was not an offhand comment buried in the 2500-page judgement, and taken out of context. The Chamber repeated and was

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[109] Prosecution Response Brief, para. 189.
[110] Prosecution Response Brief, para. 194.
[111] Contrary to the Prosecution's submissions on the "context" in which those words are used: Prosecution Response Brief, para. 189.
[112] See Prosecution Response Brief, paras. 189, 192-5.
[113] Judgement, para. 6966.
[114] Prosecution Response Brief, para. 207.
[115] Prosecution Response Brief, para. 208.
[116] Defence Appellant's Submissions, para. 249.
[117] Prosecution Response Brief, paras. 215-9.
[118] Judgement, para. 6966.
[119] Judgement, paras. 2621-9.
[120] Prosecution Response Brief, para. 221; "the legal elements of superior responsibility have no place": Prosecution Response Brief, paras. 223-4.

unequivocal throughout both the deliberations and findings sections that Bockarie assumed "effective control" over Gullit,[121] who was under Bockarie's "command"[122] as his "subordinate".[123] The argument that the Chamber was simply using "effective control" in a factual sense[124] does not explain the repeated use of other terms and concepts unique to Article 6(3) of the Statute. The Chamber concluded that the plan "substantially contributed to the commission of crimes...**while Gullit was operating under Bockarie's command**".[125] In the mind (and language) of the Chamber, Mr. Taylor's planning liability was contingent on Bockarie's command of Gullit. The Chamber could not have been clearer: "what is relevant to the responsibility of the Accused is whether Bockarie was effectively in command of a concerted and coordinated effort...with Gullit as his subordinate".[126]

36. The Prosecution need not to accept that a command finding was necessary but it cannot deny that this was the Chamber's reasoning. The Chamber was searching for a legal construct to attempt to solidify the link between Gullit's troops in Freetown, and Mr. Taylor in Liberia. Bockarie's command responsibility over Gullit was its choice. Even if the Prosecution is correct that this is unnecessary for planning, the Chamber is clear that its finding of "substantial contribution" is contingent on Gullit "operating under Bockarie's command".[127] As such, the Chamber's error in finding a relationship of effective control without considering whether Bockarie could prevent or punish Gullit's actions undermines its finding of command responsibility,[128] which then undermines its finding of a substantial contribution of the "Bockarie/Taylor plan" to the crimes committed by Gullit's troops.[129]

I. GROUND 14

37. The Prosecution and Defence disagree on the *mens rea* for planning. The Prosecution, citing no jurisprudence in support, asserts it has no obligation to establish the *mens rea* for each crime for which it seeks a conviction through planning.[130] The Defence submits that the accused must either intend or be aware of a substantial likelihood that a particular crime will

[121] Judgement, paras. 3464, 3485, 3611(xii), 3617.
[122] Judgement, para. 6965.
[123] Judgement, para. 3479.
[124] Prosecution Response Brief, para. 223.
[125] Judgement, para. 6965 (emphasis added).
[126] Judgement, para. 3479.
[127] Judgement, para. 6965.
[128] Defence Appellant's Submissions, para. 282, citing Judgement, para. 493, *AFRC* TJ, para. 782; *RUF* TJ, para. 287, *AFRC* AJ, paras. 257, 298; *Delalić* AJ, para. 256; *Bagilishema* AJ, para. 50; *Hadžihasanović* 98*bis* Decision, para. 164; *Halilović* AJ, para. 59.
[129] Judgement, para. 6965.
[130] Prosecution Response Brief, para. 237.

occur in order to be liable for planning that crime.[131] This position is supported by the appellate jurisprudence cited and basic principles of individual criminal responsibility.[132]

38. The Prosecution misconstrues Defence arguments; the law does not require a separate *mens rea* finding for each individual act of murder, or each individual act of pillage;[133]but intent or awareness of the substantial likelihood that "murder" or "pillage" will occur. Insistence that the Chamber's blanket approach that Mr. Taylor intended all crimes in Counts one to eleven of the Indictment was correct[134] does not respond to the Defence arguments that *mens rea* must be established for each of the charged crimes.[135] The *mens rea* requirement does not differ as between accused nor does it depend on the number of crimes for which the Prosecution seeks a conviction.[136]

39. The exercise of re-stating the Chamber's findings[137] does not respond to the identified failure to find that Mr. Taylor had the requisite knowledge at the time he formulated the plan.[138] The Chamber did not find, nor does the evidence support a finding that Mr. Taylor was "continuously aware" of the crimes being committed by the ARFC/RUF.[139] *Bagilishema* and *Hadžihasanović*[140] do not stand for the proposition that a general reference to knowledge of past "crimes" is sufficient to infer knowledge of future crimes - in fact they stand for the opposite.[141] The Defence did not assert that intent cannot be proven through inference;[142] the Prosecution fails to respond to the error that *general* reference to past "crimes" is insufficient to demonstrate constructive knowledge that a *particular* crime will be committed.[143]

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[131] Defence Appellant's Submissions, paras. 288-95.
[132] Defence Appellant's Submissions, paras. 288-95, citing *Nahimana* AJ, para. 479; *Kordić and Čerkez* AJ, paras. 976, 1092; *Naletilić* AJ, para. 114; *Tadić* AJ, para. 271.
[133] Prosecution Response Brief, para. 237.
[134] Prosecution Response Brief, para.
[135] *Kordić and Čerkez* AJ, paras. 976, 1092; To be convicted of a war crime, the principle of individual guilt requires that "fundamental characteristics of a war crime be mirrored in the perpetrator's mind", *Naletilić* AJ, para. 114. For a crime against humanity, the accused must have known of the fundamental characteristics, namely that the accused knew that his crimes were related to an attack on a civilian population: *Tadić* AJ, para. 271; *Krajišnik* AJ, paras. 175-8, 203; *Vasiljević* AJ, paras. 131-2. See also *Orić* AJ, paras. 47, 53, 56, 60.
[136] Prosecution Response Brief, para. 238.
[137] Prosecution Response Brief, para. 240. See, on this point, the submissions under Ground 17 below.
[138] Defence Appellant's Submissions, para. 298.
[139] Prosecution Response Brief, para. 240.
[140] Prosecution Response Brief, paras. 242-3.
[141] Defence Appellant's Submissions, paras. 297, 299.
[142] Prosecution Response Brief, para. 241.
[143] Prosecution Response Brief, para. 242. See Defence Appellant's Submissions, para. 299.

J. GROUND 15

40. **"Fearful"**: The Chamber "considers" Mongor's evidence that Bockarie said that Mr. Taylor said "fearful" in one sentence.[144] The Prosecution's insistence that the Chamber took into account numerous factors, such as "circumstantial guarantees of trustworthiness" and "totality of the circumstances"[145] have no basis. The lengthy discussion of "circumstantial trustworthiness" of Mongor's "fearful" testimony does not respond to (and in fact reinforces) that the Chamber failed to exercise sufficient caution or give remotely adequate reasons.[146]

41. It is correct that the Chamber found Mongor to be a "generally credible" witness[147] despite declining to rely on numerous and significant parts of testimony.[148] His "general credibility" rating is not the issue. There is no indication, nor does the Prosecution demonstrate, that any caution was taken in accepting *this part* of Mongor's testimony,[149] one of the very few (albeit second-hand hearsay) examples of Mr. Taylor's alleged words. Setting out the correct standard at the beginning of a 2,500 page judgement does not demonstrate that the Chamber exercised appropriate caution in respect of *this aspect* of the testimony,[150] particularly in the circumstances outlined by the Defence.[151] It is inaccurate that the Defence did not cross-examine Mongor about the operation being fearful; in cross-examination he gave no indication that the plan was a criminal one.[152] Cross-examination of a witness does not relieve the Chamber of its burden to examine the reliability of the hearsay's source; [153] in this case the famously uncontrollable and belligerent Sam Bockarie.[154] This was not done.

42. The Defence did not assert that Mongor's testimony as to *when* he was told about the alleged fearful instruction was inconsistent.[155] Rather, the fact that Mongor testified that Bockarie repeated the *same thing* the next day to a group of commanders, none of whom heard it, casts further doubt on the reliability of his testimony, and compounds the Chamber's inadequate assessment.[156] TF1-367's evidence makes no link between any fearful instruction

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[144] Judgement, para. 3116.
[145] Prosecution Response Brief, para. 247.
[146] Prosecution Response Brief, paras. 249-50.
[147] Prosecution Response Brief, para. 254.
[148] Mongor was not believed, for example, in respect of his evidence that Johnny Paul Koroma contacted SAJ Musa to ask him to run the operation to capture Freetown. The Chamber determined that, "in light of the evidence concerning related events", Mongor's evidence was "inaccurate". Further examples include Judgement, paras. 2367, 2559, 3119, 3383-4, 3412, 5384-5, 5395-6.
[149] Prosecution Response Brief, para. 247.
[150] Prosecution Response Brief, para. 247.
[151] Defence Appellant's Submissions, paras. 302-7.
[152] TT, Isaac Mongor, 7 Apr. 2008, p. 6721.
[153] Prosecution Response Brief, para. 248.
[154] See, for example, Judgement, para. 6782, 6560; TT, Fayia Musa, 15 Apr. 2010, pp. 39136-7.
[155] Prosecution Response Brief, para. 255.
[156] Defence Appellant's Submissions, para. 305.

and Mr. Taylor, in fact he testified that this phrase was used by Issa Sesay at an alleged meeting in Kono, not Waterworks.[157]

43. **By All Means**: The weight and significance ascribed to Mr. Taylor's alleged use of an inherently innocuous phrase is momentous, particularly when the evidence did not come from the maker of the statement, or even from anyone who heard him. It was relayed by Sam Bockarie, through TF1-371, to the Chamber, almost a decade after it was allegedly uttered. In such circumstances, recalling the correct approach to the assessment of evidence at the start of a Judgement does not indicate that sufficient caution was exercised.[158] Unable to point to any inherently aspersive meaning, the Prosecution attempts to buttress the Chamber's malign interpretation of "by all means" by misrepresenting that after hearing these instructions, Bockarie *immediately* coined the name "Operation No Living Thing".[159] There is no immediacy in the Chamber's findings concerning this name, [160] which had no link back to Mr. Taylor.[161] The Prosecution's attempts to provide *post facto* justification for the Chamber's assessment of this evidence do not respond to the identified error.

PART III: ERRORS INVALIDATING THE AIDING AND ABETTING CONVICTIONS

A. GROUND 16: THE TRIAL CHAMBER'S DEFINITION OF THE *MENS REA* OF AIDING AND ABETTING WAS ERRONEOUS

(i) *The United Nations Has Never Accepted That The Decisions of Post World War II National Military Courts Reflect Customary International Law*

44. The U.N. has not once suggested that pronouncements of national military courts – such as the American and British tribunals that decided *Flick* and *Zyklon B* – are reflective of customary international law. U.N. General Assembly Resolution 95(1) of 11 December 1946 merely affirms the principles set out in the IMT Charter and its first judgement – neither of which say a word about the elements of aiding and abetting. The IMT Charter says only that "[l]eaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are

[157] Prosecution Response Brief, para. 256.
[158] Prosecution Response Brief, para. 260.
[159] Prosecution Response Brief, para. 266.
[160] Prosecution Response Brief, para. 266, fn. 753, citing Judgement, paras. 3130, 3115, 3611(vii), 3615.
[161] Prosecution Response Brief, paras. 266-7.

responsible for all acts performed in execution of such plan."[162] No definition is given of "accomplices", much less the subset of complicity liability known as aiding and abetting. Resolution 95(1) called for "a general codification" of those principles, a task subsequently taken over by the ILC.[163] This led to the promulgation of the "Nürnberg Principles," which again say nothing about aiding and abetting.[164] Even this vague affirmation was never adopted by the U.N.

45. The Prosecution refers to a definition of aiding and abetting propounded by an organization called the "United Nations War Crimes Commission."[165] This commission was created by the Allied powers before the U.N. had been created. It never had a mandate from the U.N. General Assembly to codify, much less pronounce upon, the content of customary international law. The UN General Assembly conferred that task exclusively on the ILC. The ILC took 50 years to come up with its Draft Crimes which, in addition to never being ratified by States in any form, were superseded by the State negotiations leading to the ICC Statute. The Prosecution's misrepresentation of both Resolution 95(1) and the task assigned to the UNWCC are nothing less than an attempt to usurp the will of States, and undermine the process by which customary international law is developed.

(ii) *The Post-World War II Cases Cited by the Prosecution Reflect no Settled Definition of Aiding and Abetting, Let Alone a Settled Definition in State Practice, Let Alone a Definition Resembling That Adopted by the Trial Chamber*

46. The Prosecution trawls selectively through post-World War II cases for the word "knowledge" without regard to whether it relates to aiding and abetting or not. Roechling, for example, was convicted for the "execution of the force labour program" in the factories in which they worked, and as being "coresponsible for the deportation of all those workers."[166] The liability of Weizsaecker and Woermann was similarly based on their role in executing, *inter alia* through the giving of legal advice and their negotiations with foreign governments on behalf of the Third Reich, the plan to arrest, deport and exterminate Jews from various

[162] IMT Charter, Art. 6.
[163] U.N. General Assembly Resolution, 177 (II), 21 November 1947.
[164] The Nürnberg Principles, in respect of complicity liability, say only that "Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set out in Principle IV is a crime under international law".
[165] Prosecution Response Brief, fn. 771.
[166] *Roechling* AJ, para. 1130; Prosecution Response Brief, para. 284.

countries.[167] Knowledge is expressly cited as a precondition of both commission and aiding and abetting: "The question is whether they knew of the program and whether in any substantial manner they aided, abetted, or implemented it."[168] The statement therefore merely affirms that knowledge is required whether the mode of liability is co-perpetration (i.e. direct intent) or aiding and abetting.[169] The Prosecution misleadingly offers only the first half of the sentence, stopping the quotation after the word "program,"[170] thereby twisting the sentence to the service of a proposition that it in no way supports. Indeed, Roechling, Weiszaecker and Roechling were all convicted for what appears to be direct commission or co-perpetration, not aiding and abetting or accessorial liability more generally.

47. The Prosecution's explanation of Rasche's acquittal[171] is specious. The Prosecution's view, apparently, is that the court was required to ask "can a person be found liable...?" rather than "is it a crime...?"[172] Apparently judges are not permitted even the slightest rhetorical licence without their language being taken out of context, mangled and misinterpreted for the absurd proposition that loans to criminal organizations would need to be separately and specifically criminalized before liability could be imposed. If that is truly the Prosecution's position, then Mr. Taylor must be acquitted because the forms of support he is supposed to have provided are likewise not specifically prohibited. Otherwise, the Prosecution cannot escape that the court evidently acquitted Rasche based on his lack of criminal participation.

48. The Prosecution's Response Brief establishes no more than that knowledge is a necessary, but not necessarily sufficient, condition of liability; ignores the *Hechingen* case; and does not address what body of liability principles were being applied by the British and American military courts that decided the *Zyklon B* or *Flick* cases, respectively. There is nothing wrong with "victor's justice", especially if it is applied on the basis of a fair and proper trial; but granting these pronouncements by Allied courts sitting in Europe significant weight as declaratory of customary international law, binding on and adhered to by all states by consensus, does a disservice to other members of the international community. None of

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[167] See e.g. *Ministries* Case, paras. 504 (Weizsaecker's response to a request from the Embassy in Paris concerning "the disposition to be made of foreign Jews who had been arrested by the military commanders in France"). Weiszaecker and Woermann, notably, were both acquitted not in respect of any difference in the mens rea between committing and aiding and abetting but rather in respect of those events "in which they did not substantially participate" (e.g. pp. 507).

[168] *Ministries* Case, p. 478.

[169] Indeed, all three of these individuals – Roechling, Weizsaecker and Woermann – appear to have been convicted of committing the crimes in question, which necessarily entails full intent.

[170] Prosecution Response Brief, para. 286.

[171] Prosecution Response Brief, para. 286.

[172] *Ministries* Case, p. 622.

the axis powers, the Soviet Union, nor many other countries, in any way expressed their adherence to – much less awareness of – these pronouncements. Customary international law requires more than a few isolated, obscure and ambiguous pronouncements by national military courts, even when pronounced on foreign soil, for the crystallization of a norm.

(iii) *The Prosecution Misrepresents the Argument Concerning the Negotiation of the ICC Statute*

49. The Prosecution asserts that the Defence relies "wholly" on the argument that Article 25(3)(c) "codifies" the minimum standard for aiding and abetting liability in customary international law.[173] That is false. The argument, instead, is that the vigorous and contested negotiations surrounding Article 25(3)(c) show beyond any possible doubt that no consensus in State practice had emerged, at least as of 1998, around a pure "knowledge" standard for aiding and abetting.[174] The onus is not on the Defence to show that the "purpose" standard has crystallized as a matter of customary international law; it is rather for the Prosecution to show that a knowledge standard has crystallized. This is a fundamental misapprehension in the Prosecution's submissions.

(iv) *The Prosecution's Reliance on Article 25(3)(d) is Misplaced and its Interpretation of that Provision is Erroneous*

50. The Prosecution asserts that the *mens rea* of aiding and abetting liability should be assessed with reference to Article 25(3)(d). This is unfounded and illegitimate. Article 25(3)(d) does not concern aiding and abetting liability, but rather a fundamentally different and separate form of liability. The Prosecution's attempt to infer State practice in respect of aiding and abetting on the basis of Article 25(3)(d) ignores that aiding and abetting is already addressed in a different provision. There could have been no confusion or doubt about the distinction given the wording of the provisions.

51. Second, the Prosecution's breezy interpretation[175] that Article 25(3)(d) requires only knowledge does not accord with the plain language of Article 25(3)(d): "[s]uch contribution

[173] Prosecution Response Brief, paras. 300-1.
[174] Defence Appellant's Submissions, para. 338-9 ("No practice or *opinio juris* of States has crystallized around the *mens rea* standard applied by the Chamber ... the clearest indication of an absence of practice and *opinio juris* is the ICC's provision on aiding and abetting, Article 25(3)(c) .... The salient issue, it must be recalled, is not whether Article 25(3)(c) declares customary international law; the issues, rather, is whether there is any evidence to justify the Chamber's pronouncement that the knowledge standard reflected customary international law as of the date of the alleged criminal activity.")
[175] Prosecution Response Brief, para. 304.

shall be intentional and shall either...", followed by two additional conditions.[176] The *Furundžija* Trial Judgement (on which the Prosecution heavily relies) specifically interprets Article 25(3)(d) as pertaining to "co-perpetrators who participate in a joint criminal enterprise."[177] This interpretation has now been fortified by ICC Chambers' restrictive interpretation of Article 25(3)(a) as covering only co-perpetrators who play a role that is "essential",[178] whereas a participant in a JCE need make only a contribution that is "significant".[179] Article 25(3)(a) can therefore be differentiated from Article 25(3)(d) on the basis of the intensity of *actus reus*, and need not be interpreted as differentiated on the basis of *mens rea*. This interpretation accords with the drafting history of the provision, which initially started out as a typical common law conspiracy provision, and was then modified in order to reflect the concept of joint criminal enterprise – which requires an intent to accomplish the crime.[180]

(v) *The Prosecution is Wrong that the "Specific Direction" or "Specifically Aimed" Element of Actus Reus has, in Substance, been Abandoned*

52. The ICTY Appeals Chamber recently invited submissions from the parties in *Perišić* on the following issues: "1. How the Appeals Chamber should address the issue of 'specific direction' in the context of aiding and abetting liability; 2. Whether aid that is not 'specifically directed' towards a particular crime can have the substantial effect required to enter a conviction for aiding and abetting; and 3. Whether the aid facilitated by Perišić met the requirements of 'specific direction', if any, in the context of aiding and abetting liability."[181] The Prosecution's claim that the "specific direction" requirement has been definitively abandoned[182] is evidently wrong. The key question is not whether "specific direction" is recognized as a distinct and separate element of the *actus reus*, but rather how it

[176] ICC Statute, Art. 25(3)(d) (emphasis added).
[177] *Furundžija* TJ, para. 216.
[178] See *Lubanga* TJ, para. 999 (requiring that a co-perpetrator's contribution to, or role in, the crime must be "essential").
[179] *Gotovina* AJ, para. 89; *Krajišnik* AJ, para. 215; *Brđanin* AJ, para 430.
[180] Ambos in Triffterer, pp. 757-8 ("The whole subparagraph (d) is an almost literal copy of a 1998 Anti-terrorism convention and present a compromise with earlier 'conspiracy' provisions, which since Nuremberg have been controversial. The 1991 ILC Draft Code held punishable an individual who 'conspires in' the commission of a crime, thereby converting conspiracy into a form of 'participation in a common plan for the commission of a crime against the peace and security of mankind'. The 1996 Draft Code extends to a person who 'directly participates in planning or conspiring to commit such a crime which in fact occurs.'")
[181] *Perišić* Addendum to Scheduling Order, p. 1.
[182] Prosecution Response Brief, paras. 294-9.

is incorporated within the notion of "substantial contribution". The Defence maintains,[183] and the questions posed by the *Perišić* Appeal bench suggest, that "specific direction" continues to be a component of "substantial contribution."

(vi) *The Prosecution Misunderstands the Argument Concerning the Relationship between Specific Direction and the Mens Rea of Purpose*

53. The Defence is well aware, and does not disagree, that ICTY and ICTR caselaw has often purported to adopt a knowledge-standard of *mens rea* while at the same time insisting upon a "specific direction" requirement as part of the "substantial contribution" threshold under the *actus reus*.[184] The Prosecution's arguments are non-responsive to the arguments set out in the Defence Appellant's Submissions, and require no refutation.[185]

(vii) *The "Knowledge of a Probability Standard" is not, and has Never Been, Accepted in Any Case Before the ICTY or ICTR*

54. The threshold *mens rea* as defined by the Chamber was "aware[ness] of the substantial likelihood that his acts would assist the commission of underlying offence" ("First Prong"); and "aware[ness] of the essential elements of the crime committed by the principal offender", including his state of mind ("Second Prong"). The first prong concerns the assisting character of one's own acts; the second prong concerns the awareness that the crime is being, or is going to be, committed. The Chamber's definition of the first prong departs markedly from the standard at the U.N. Tribunals, which is that the "accused needs to know that his or her acts assist the commission of the crime."[186] The ICTY Appeals Chamber, in respect of the passage quoted by the Prosecution at paragraph 309 of its Response, expressly stated that "the *Blaškić* Appeal Judgement did not extend the definition of *mens rea* of aiding and abetting."[187] The only – even arguable – expansion of ICTY and ICTR caselaw towards awareness of a probability has been confined to the Second Prong in respect of which one out of several crimes may ultimately be committed.[188] ICTY and ICTR caselaw has never entertained the possibility that the First Prong should also be assessed according to an "awareness of a probability."

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[183] See e.g. Defence Appellant's Submissions, paras. 448-457, 461, 469, 471-474, 479, 509-511, 525-530, 583-584, 599, 618, 646, 665, 682, 694.
[184] Prosecution Response Brief, paras. 291, 293-9.
[185] Defence Appellant's Submissions, paras. 354-9.
[186] *Popović* TJ, para. 1016.
[187] *Blagojević* AJ, para. 222.
[188] See e.g. *Karera* AJ, para. 321; *Haradinaj* TJ (2008), para. 145.

(viii) *As a General Principle of Law, Mens Rea Must Correspond to the Actus Reus*

55. As a general principle of law, *mens rea*, whatever the standard may be, is always defined in relation to each of the material elements of the crime. This is sometimes called "the correspondence principle."

56. The ICC Elements of Crimes states: "As stated in article 30, unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge."[189] The Elements of Crimes does not even define *mens rea* separately in the definition of the crimes, except where a chapeau or specific intent needs to be proven in addition to the mental state in respect of each of the material elements. This provision, while not prescribing which mental state applies, determines that it must always be assessed with reference to the material elements.

57. This principle is stated in the law of numerous States: "[e]xcept as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, reckless, or negligently, as the law may require, with respect to each material element of the offence" (United States);[190] "[w]hoever upon commission of the act is unaware of a circumstance which is a statutory element of the offense does not act intentionally. Punishability for negligent commission remains unaffected" (Germany);[191] "[b]efore intent can come into being, first, an actor must be aware of objective facts corresponding to the constituent elements of the crime ... Objective facts corresponding to constituent elements of a crime comprehend acts ... consequences, and the cause-and-effect relationship between the two" (Japan);[192] "the requirement of fault as an element of liability means, among other things, that fault must exist in respect of each and every element of the crime with which the accused has been charged" (South Africa);[193] "[g]enerally, the defendant must intend, or be reckless as to, the consequences of the *actus reus* of the offence in question as it is described in the definition of the offence ... this is called the correspondence principle") (England).[194] The possibility of committing murder by way of intent to cause grievous bodily harm is

[189] ICC Elements of Crimes, General Introduction, para. 2 (emphasis added).
[190] U.S. Model Penal Mode, s. 2.02(1) (emphasis added).
[191] German Penal Code, s. 16(1) (emphasis added).
[192] Shigemetsu Dando, The Criminal Law of Japan, p. 152.
[193] J. Burchell, Principles of Criminal Law, p. 457.
[194] R. Card, Criminal Law, p. 94. See A. Ashworth, Principles of Criminal Law (2nd ed.), p. 85 ("Not only should it be established that the defendant had the required fault, in terms of *mens rea* or belief; it should also be established that the defendant's intention, knowledge or recklessness related to the proscribed harm.")

merely a reflection of the applicability of the recklessness *mens rea* standard to that offence, not a deviation from the correspondence principle.

58. Legislatures are not bound by this principle and may, and sometimes do, define offences otherwise (e.g. the controversial felony-murder rule); but as the ICC Statute shows, customary international law brooks no undefined exceptions to the principle.

(ix) *The Prosecution's Characterization of the Argument about the Scope of State Responsibility Are Insulting and Wrong*

59. The Prosecution knows perfectly well that the Defence has not argued that there is any "right of heads of states to aid and abet atrocities."[195] The arguments presented merit no response, and stand in stark contrast to the absence of any submissions on important issues such as the methodology of ascertaining customary international law; the need for this Appeals Chamber to independently ascertain its content; and the state of domestic law as possible contextual evidence of the content of international customary law.

B. GROUND 17: THE CHAMBER ERRED IN FINDING A "CONTINUOUS OPERATIONAL STRATEGY" AND A CORRELATIVE MENS REA OF MR. TAYLOR THROUGHOUT THE INDICTMENT PERIOD

60. The Prosecution wrongly asserts that the Defence has imposed "artificial timeframes"[196] on the Chamber's findings about the evolution of Mr. Taylor's knowledge throughout the indictment period. The Appeal Brief, on the contrary, carefully, fully and directly sets out the Chamber's own findings, and the basis on which they were made. The analysis is drawn directly, and in context, from the only section of the Judgement that addresses "Knowledge of the Accused".[197] That section discusses Mr. Taylor's knowledge: (i) in respect of 1997, at paragraphs 6881-6882 of the Judgement; (ii) "after 1997"[198] based on various reports of which Mr. Taylor is alleged to have known about, at paragraph 6883 of the Judgement; and (iii) at paragraph 6884, Taylor's state of mind "by April 1998".[199] Indeed, the Prosecution itself acknowledges the difference between these categories, conceding that the Chamber changes its language from knowledge that assistance "could"

[195] Prosecution Response Brief, para. 314.
[196] Prosecution Response Brief, paras. 324, 326.
[197] Judgement, paras. 6877-86.
[198] Judgement, para. 6883.
[199] Judgement, para. 6884.

facilitate crimes in 1997, to a finding of knowledge that assistance "would" facilitate crimes in 1998.[200] To the extent that the Prosecution's complaint is that the Judgement itself is vague or ambiguous, the Defence agrees that this was a failure by the Chamber to give adequate reasons, and is an ancillary reason to set aside those findings.

61. The Prosecution submissions that challenge arguments unrelated to Ground 17,[201] and those that are based on a failure to read the Appeal Brief merit no response.[202]

62. The Prosecution claims that the Chamber's use of the term "could" - implying only a possibility, rather than a substantial likelihood that assistance would contribute to crimes - was intended to refer only to the knowledge of "the international community in general" and not Mr. Taylor.[203] This claim is belied by the very next paragraph[204] which is, at the very least, ambiguous as to whether Taylor had any information that would not also have been available to the "ECOWAS Committee of Five." The Chamber did not distinguish Mr. Taylor's state of knowledge from that of his counterparts in the ECOWAS Committee of Five.

63. The Prosecution tries to elide "substantial likelihood" (the threshold standard of liability adopted by the Chamber) with "likelihood" (the Chamber's finding in respect of the possibility of future crimes by the RUF/AFRC).[205] Even accepting that this leap could be made, this is not the key issue. The issue is whether Mr. Taylor knew that any assistance provided would, to a substantial likelihood (and beyond a reasonable doubt), make a contribution (or substantial contribution, as the Defence contends) to crimes. It cannot be disputed that the Chamber makes no such finding in its discussion of the "Knowledge of the Accused" in respect of any date prior to April 1998.

64. The Prosecution, apparently conceding the fallaciousness of the Chamber's approach, tries to downplay the Chamber's reliance on the fearsome names of operations to draw an inference about Mr. Taylor's knowledge.[206] Contrary to the Prosecution's claim, the Chamber placed uniquely heavy and direct reliance on that consideration at paragraph 6905 of the Judgement.

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[200] Prosecution Response Brief, para. 353.
[201] See e.g. Prosecution Response Brief, paras. 333-6.
[202] The Prosecution alleges, at paragraph 332 of its Response Brief, an ambiguity at paragraph 404 of the Defence Appellant's Submissions. Not only is there no ambiguity, but any such ambiguity as there might be is dispelled by paragraph 406, just two paragraphs later.
[203] Prosecution Response Brief, para. 353.
[204] Judgement, para. 6882.
[205] Prosecution Response Brief, para. 353; Judgement, para. 6882.
[206] Prosecution Response Brief, para. 359.

65. The Prosecution asserts in respect of the reports of which Mr. Taylor supposedly had notice that it does not matter whether he read them, because they are evidence of an organizational policy to commit crimes. The claim illustrates a serious misconception. The salient issue here is not whether there was, or was not, an organizational policy to commit crimes; the issue, rather, is whether Mr. Taylor *knew* that there was an organizational policy to commit crimes. Further, the issue is whether Mr. Taylor *knew* this to be the case at the moment he provided the assistance. Where this conclusion is based on circumstantial evidence, it must be the only reasonable inference. Some of the Prosecution's submissions reflect a disturbing misapprehension of this basic issue.

66. The Prosecution misapprehends the significance of the Chamber's finding that in late 1998 SAJ Musa ordered his faction to "proceed to Freetown without ... a campaign of terror."[207] The significance of this finding is that notwithstanding the horrible bloodletting and crimes in which SAJ Musa's forces must have participated in the course of 1998, nevertheless the Chamber acknowledged that, at least as far as SAJ Musa's faction was concerned, there was no "organizational policy" to commit crimes. In other words, military assistance provided to SAJ Musa, even as late as 1998, and even after all the crimes that must have been committed over the course of the previous months by his men, nevertheless would not attract aiding and abetting liability. This finding alone shows that the mere existence of crimes, even widespread crimes, does not necessarily lead to the inference that there must be an organizational policy to commit those crimes. As argued in the Appeal Brief, there were a host of factors that reasonably left open the possibility that Mr. Taylor did not know that there was such an organizational policy, even late in 1998, of the leadership of the AFRC/RUF – of which SAJ Musa was himself a member. Further doubt in that regard would have arisen from, as the Trial Chamber itself found, the absence of crimes committed in the course of the offensives on Kono and Makeni in 1998. The pattern of crimes discussed at length in the Appeal Brief demonstrates that the crimes were committed opportunistically and sporadically, and not as a systematic institutional policy from which a supplier of arms would *know* that any material supplied *would be used* in the commission of crimes.

[207] Defence Appellant's Submissions, para. 421-2.

C. GROUND 21: THE ASSISTING CHARACTER OF THE *ACTUS REUS* MUST BE ASSESSED WITH REFERENCE TO THE CRIME

67. The Prosecution offers no explanation as to how senior United States officials would not be guilty, under the definition adopted by the Chamber, of aiding and abetting crimes in Syria, Yemen, Libya, Afghanistan and other countries for providing support to government forces whom they know have previously engaged in a pattern of international crimes, and are likely to do so in the future. This is not a "hypothetical implication[]" that is "irrelevant and misplaced."[208] This is the ongoing real-world activity of States that would be directly encompassed by the standards that have been set out by the Chamber.

68. The supposed distinctions offered by the Prosecution are unsustainable. Whether the assistance is "State-to-State" or "State-to-rebels"[209] is irrelevant. It is not mentioned in the Judgement, has no place in international law, and would run directly contrary to international humanitarian law, which places both groups on an equal footing in relation to their standards of conduct. Whether the evidence of crimes comes from the UN or other sources[210] is, again, irrelevant; all that would matter is whether the reports are sufficiently reliable to give rise to knowledge of a "substantial likelihood" that the assistance may be used for military operations in the course of which crimes are substantially likely to be committed. The words "notorious"[211], "horrendous", or "horrific"[212] reflect no stable or cognizable legal standard and, in any event, could be easily applied to the situations in the countries described above.

69. The question thus remains: how does the standard set out by the Chamber not encompass the mental state of American officials in the circumstances previously mentioned? Or British or Chinese officials providing military assistance to Sudan? Or Russian officials providing assistance to the Government of Syria? Or Saudi Arabian, Qatari, American, and French officials authorizing support to the rebels in Syria whose members have been identified by the UN as engaging in repeated and extremely serious crimes? Or Rwandese and Ugandan officials providing military assistance to M23 or other factions fighting in Congo? The Prosecution invitation to the Appeals Chamber to be concerned "only with applying the law" begs the question: in the face of all this State practice, can this really be the state of international criminal law?

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[208] Prosecution Response Brief, para. 397.
[209] Prosecution Response Brief, para. 399-400.
[210] Prosecution Response Brief, para. 399.
[211] Prosecution Response Brief, para. 404.
[212] Prosecution Response Brief, paras. 404, 407.

70. The Prosecution wrongly downplays "the potential precedential effect of the Trial Judgement."[213] The Judgement of this Appeals Chamber on the issues before it will have momentous significance on the future development of international criminal law. It will affect state relations. It will affect the legitimacy of international criminal law. And it will have a major impact on the viability of international criminal law as a universal enterprise, applicable to all, rather than as a tool of international power.

71. The Prosecution is wrong to characterize as "outlandish" the argument that the Chamber has relied improperly on organizational responsibility.[214] The Chamber found that Taylor was not part of any JCE. The Chamber nevertheless imputed to him responsibility for crimes based on the conduct of the RUF/AFRC as an organization, and without making any specific findings as to the perpetrator of whom he was allegedly an aider and abettor. This was a clear legal error.

D. GROUND 22: THE PROSECUTION'S ARGUMENTS CONCERNING THE CAPTURED SUPPLIES ILLUSTRATES THE OVER-BREADTH OF THE NOTION OF AIDING AND ABETTING ADOPTED BY THE CHAMBER

72. The Prosecution defends the Chamber's finding that Mr. Taylor is guilty as an aider and abettor of crimes committed with captured weapons, arguing that "Taylor fails to cite any authority to support his contention that providing arms and ammunition which are used to capture additional materiel that is used in the commission of crimes does not amount to substantial contribution."[215] The reason there is no such precedent to cite is that no international case has ever come close to suggesting such broad liability. Disturbingly, the Prosecution appears to believe that as long as there is no precise precedent against the extension of liability to such an unwarranted degree, it should be accepted. That approach is wrong in principle, wrong in methodology, and wrong as a matter of common sense.

E. GROUND 23: CHARLES TAYLOR WAS NOT INVOLVED IN ARMS SHIPMENTS; EVEN ASSUMING THE CONTRARY, NONE OF THE SHIPMENTS IN QUESTION HAD A SUBSTANTIAL EFFECT ON THE CRIMES

(i) *The Magburaka Shipment*

[213] Prosecution Response Brief, para. 398.
[214] Prosecution Response Brief, para. 404.
[215] Prosecution Response Brief, para. 420.

73. Contrary to the Prosecution's claims, the testimonies of TF1-371, Mongor and Kargbo are not corroborative.[216] The Prosecution asserts that Mongor and Kargbo both mentioning Bah's role (albeit very different roles), and mentioning Mr. Taylor (albeit in very different ways) is sufficient to constitute corroboration. That is false. The material fact found by the Chamber was that Bah acted as Mr. Taylor's agent, and secondly, that Bah arranged the shipment in the course of that agency. Mongor and Kargbo do not corroborate one another in that regard. Indeed, they are hardly consistent in *any* regard, except when viewed through the most unfocused lens. Bah was JP Koroma's agent according to Kargbo, recommended to him by Bockarie;[217] Bah was Mr. Taylor's agent according to Mongor, but only in conveying the appeal that the RUF and AFRC should work together.[218] Their testimony concerning the origins and delivery of the shipment are widely divergent,[219] and do not corroborate TF1-371's evidence on the central points in issue.[220]

74. [Please see paragraph 2 in Confidential Annex A.]

75. The Prosecution is unable to dispute that the Chamber never found beyond a reasonable that the Magburaka shipment was used in the commission of crimes, much less that it made a substantial contribution to those crimes.[221] The Chamber's language is fairly and fully presented in the Defence submissions.[222] The Prosecution's list of findings suggesting merely that it was likely the RUF/AFRC used materiel from the shipment in early 1998 do no more than add to this point: the conclusion was not the only reasonable conclusion based on the circumstantial evidence available. It is also wrong to assert that there was any direct evidence that the shipment was used in the commission of crimes, or to support the commission of crimes.[223] The Prosecution's reliance on P-066 to claim that the RUF/AFRC had no other source of supplies until June 1998 and had no source other than the Magburaka shipment[224] is manifestly false. The letter states only that the RUF/AFRC had exhausted its supply: it never mentions that the supply in question was that of Magburaka, or that the Magburaka supply had run out in June.[225] In any event, P-066 cannot be relied upon

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[216] Prosecution Response Brief, para. 431; Defence Appellant's Submissions, paras. 485-8.
[217] Judgement, para. 5390, pp. 1875-6.
[218] TT, TF1-532, 11 Mar. 2008, pp. 5712-14; Judgement, para. 5390, pp. 1875-76; Defence Appellant's Submissions, para. 487.
[219] Defence Appellant's Submissions, paras. 485-8.
[220] Defence Appellant's Submissions, paras. 485-8.
[221] Prosecution Response Brief, para. 442.
[222] Judgement, para. 5551, p. 1937.
[223] Prosecution Response Brief, para. 443.
[224] Prosecution Response Brief, para. 444.
[225] Exhibit P-066.

as an accurate reflection of the actual state of affairs, given that the Prosecution's own evidence disputes this contention.[226]

(ii) *The Burkina Faso Shipment*

76. The Prosecution claims that evidence about Mr. Taylor's involvement in the Burkina Faso shipment was not obtained solely through witnesses who received their information through Bockarie,[227] offering four alleged alternative sources of information.[228] The argument is false: (i) Mongor merely witnessed the sending of a letter to Mr. Taylor; his knowledge of Mr. Taylor's role in the shipment came solely from what Bockarie later told him;[229] (ii) TF1-567 may have received his information from Issa Sesay, but Sesay received his from Bockarie (thus making TF1-567's hearsay evidence even more remote than Mongor's);[230] (iii) Karmoh Kanneh also received his information from Bockarie,[231] and Tamba spoke only after Bockarie and did not say that Taylor had facilitated the shipment;[232] (iv) Fornie may have travelled with Bockarie to Liberia and witnessed materiel being loaded onto two trucks, but his evidence that Mr. Taylor was behind this shipment rests entirely on what he was told by Bockarie.[233] The Prosecution's submissions only reinforce the Defence argument that the evidence that Taylor facilitated the shipment rested only on the untested hearsay evidence of Bockarie.[234]

77. The Prosecution strains to find any findings in the 2,500 page Judgement of crimes committed after the Burkina Faso shipment in Kono and Makeni, finding only two such instances: the recruitment of child soldiers and the enslavement of civilians at Yengema.[235] The Chamber expressly found, however, that it could not be sure about the date of these crimes,[236] which raises a reasonable doubt as to whether any arms or ammunition from the Burkina Faso shipment had any role whatsoever, much less a "substantial effect" on the commission of these crimes.

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[226] Judgement, paras. 5815-23.
[227] Prosecution Response Brief, para. 468.
[228] Prosecution Response Brief, para. 468.
[229] Judgement, paras. 5432-5; TT, TF1-532, 11 Mar. 2008, pp. 5790-1.
[230] Sesay remained in Sierra Leone and was briefed by Bockarie on the trip at the same meeting as Mongor: TT, TF1-532, 11 Mar. 2008, pp. 5797-8. Indeed, Sesay was explicit in telling TF1-567 that he received his information from Bockarie: TF1-567, 2 July 2008, p. 12913.
[231] Judgement, paras. 5451-2; TT, Karmoh Kanneh, 9 May 2008, p. 9424-33.
[232] Judgement, paras. 5451-4; TT, Karmoh Kanneh, 9 May 2008, p. 9424-33.
[233] Defence Appellant's Submissions, para. 545; Judgement, paras. 5425-7.
[234] Defence Appellant's Submissions, paras. 545-6.
[235] Prosecution Response Brief, para. 477.
[236] Judgement, para. 1424 ("approximately December 1998"); para. 1540 ("approximately August through December 1998"); para. 1694 ("approximately December 1998 onwards").

(iii) *The March 1999 Shipment*

78. The Prosecution's arguments are non-responsive.[237] The Chamber unreasonably relied on Karmoh Kanneh, TF1-567 and TF1-585 as corroborating the supply of the shipment by Mr. Taylor when, in fact, they must surely refer to other shipments.[238] The Chamber's finding rests solely on an inference based on TF1-371's uncorroborated hearsay.[239] The Prosecution repeats the Trial Chamber's analysis that Kanneh's evidence referred to the March 1999 shipment on the basis that the shipment came after LURD attacked Lofa,[240] but ignores that there were numerous LURD offensives on Lofa.[241] Equally, Kanneh was unlikely to be referring to the March 1999 shipment, since, whereas the Chamber found the March 1999 shipment to be one of the largest shipments the RUF/AFRC received, the shipment Kanneh described the delivery of only "few" supplies.[242]

79. Contrary to the Prosecution's claims,[243] the Chamber was not able to determine whether the March 1999 substantially contributed to any crime.[244] In support of its position, the Prosecution references the Chamber's finding that Mr. Taylor's support was critical in enabling the RUF/AFRC to carry out offensives and maintain territory.[245] This is irrelevant: the finding neither refers specifically to this period, nor to the commission of crimes. The Prosecution was unable to connect any crimes committed in this period to materiel purportedly supplied by Mr. Taylor.

F. GROUND 24: NO ASSISTANCE TO CRIMES, SUBSTANTIAL OR OTHERWISE, IN PROVIDING MILITARY PERSONNEL

80. Contrary to the Prosecution's contention, the Chamber's ultimate finding in respect of Senegalese is that his role "is unclear". It did *not* find that Senegalese had any connection to Mr. Taylor.[246] Evidence on the role of Senegalese was therefore not corroborative of Pyne's second-hand hearsay allegation that Senegalese was sent by Mr. Taylor.[247] These same men

[237] Prosecution Response Brief, paras. 482-6.
[238] Defence Appellant's Submission, paras. 566-8.
[239] Defence Appellant's Submission, para. 569.
[240] Prosecution Response Brief, para. 484.
[241] Defence Appellant's Submission, para. 567.
[242] Defence Appellant's Submission, para. 567.
[243] Prosecution Response Brief, para. 499.
[244] Defence Appellant's Submissions, paras. 583-7.
[245] Prosecution Response Brief, para. 499.
[246] Judgement, paras. 4380-1.
[247] See Prosecution Response Brief, para. 503.

ostensibly identified themselves just a couple of days earlier as "STF", [248] rendering her evidence of no incriminating value in respect of Mr. Taylor.

81. The Chamber did not find Bobson Sesay's testimony to be corroborative on the question of *whether Mr. Taylor sent 20 Liberian fighters with Senegalese.*[249] Bobson Sesay's evidence was considered in relation to the question of whether there were any Liberian fighters in Colonel Eddie Town.[250] Bobson Sesay testified, as the Prosecution acknowledges,[251] that those fighters were brought by Superman from Kailahun without Mr. Taylor or Senegalese playing any role whatsoever.

82. The Prosecution misconstrues the import of the Defence submissions on the likelihood of the fighters being STF, rather than former NPFL.[252] Whether Pyne genuinely believed these men to be former NPFL, rather than STF, is irrelevant. Pyne conveyed three hearsay accounts as to their identity,[253] as well as the basis for her own conjecture: the languages she thought various groups would generally speak.[254] The Chamber had no independent means to verify these claims. No reasonable trier of fact could have safely found that these men were former NPFL.

83. Turning to the Chamber's "cumulative calculus" of substantial effect on the commission of crimes, the lack of contribution of the remaining elements to the arithmetic has been addressed.[255] Considering the contribution of the Scorpion Unit specifically,[256] the Defence notes that the only crime charged in the Indictment for this period in Kenema is Count 9 (Child Soldiers),[257] and there are no applicable criminal findings.

G. GROUND 25: NO EFFECT, SUBSTANTIAL OR OTHERWISE, IN PROVIDING "SAFE HAVEN" OR RETURNING DESERTERS

84. The return of four SLA soldiers and two deserters, and the provision of safe-haven to soldiers, cannot on any reasonable interpretation be deemed to have had any, much less a "substantial", effect on the commission of crimes.[258] It is irrelevant, for the purposes of Mr.

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[248] See Defence Appellant's Submissions, para. 594.
[249] See Prosecution Response Brief, para. 505. The Chamber relies on Alice Pyne and TF1-375: Judgement, para. 4379.
[250] Judgement, para. 4369.
[251] Prosecution Response Brief, para. 505.
[252] Prosecution Response Brief, paras. 507-9.
[253] Defence Appellant's Submissions, paras. 596-8.
[254] Prosecution Response Brief, paras. 508-9.
[255] See Defence Appellant's Submissions, paras. 605-10, 613-6, 617-20.
[256] Prosecution Response Brief, para. 514.
[257] Indictment, para. 22.
[258] Judgement, paras. 6920, 6922-4, 6935-6.

Taylor's liability whether, following their disarmament by the ICRC,[259] some fighters rejoined the RUF during the Indictment period.[260] Similarly, Mr. Taylor's acceptance into Liberia of a belligerent Sam Bockarie and his armed fighters - a public and sanctioned assistance to the implementation of the Lomé Peace Accord[261] - fails to support the Prosecution's contention that Fonti Kanu and DAF could not have been expelled as illegal aliens.[262]

H. GROUND 34: NO SUBSTANTIAL EFFECT IN THE ABSENCE OF SHOWING ANY EFFECT AT ALL ON THE COMMISSION OF CRIMES

85. The Defence has argued in respect of each and every *actus reus* ground that the Chamber erred in law and in fact in failing to make findings that the alleged assistance or facilitation had a substantial effect on the crimes themselves.[263] This requirement does not depend on whether "specific direction" is recognized as a separate element of aiding and abetting; it is inherent in the concept of "substantial contribution" as consistently interpreted. The Defence maintains this as a separate ground in order to provide the Appeals Chamber with the opportunity to address the issue separately or within individual grounds, as considered appropriate.

PART IV: ISSUES RELATING TO IRREGULARITIES IN THE JUDICIAL PROCESS

A. GROUND 36

86. The Prosecution alleges that the Defence has not established an error of law or procedure that invalidated the verdict or occasioned a miscarriage of justice. This is not the case. The Defence has expressly set out the errors of law and procedure made by the Chamber and the factual basis for those errors in this ground.[264] The Defence has also

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[259] Defence Appellant's Response, para. 620.
[260] Prosecution Response, para. 521. The Prosecution cites only to TF1-371's testimony that he rejoined the RUF on the promise of "negotiation and disarmament and peace": TT, 29 January 2008, pp. 2555-6 (CS).
[261] Exh. D-277, Exh. D-228, p. 1; see also, TT, Charles Taylor, 17 August 2009, pp. 26859.
[262] See Prosecution Response, para. 524.
[263] See e.g. Defence Appellant's Submissions, paras. 448-57, 461, 469, 471-4, 479, 509-11, 525-30, 583-4, 599, 618, 646, 665, 682, 694.
[264] Defence Appellant's Submissions, Ground 36 and in particular paras. 714-8; 720-7 for errors of law and procedure.

demonstrated in accordance with the applicable legal standard,[265] that the errors occasioned a miscarriage of justice because they breached the fair trial rights of Mr. Taylor.[266]

87. The Prosecution submits that the Defence does not explain how a Judgment of such size and detail was finalised without deliberations and which particular conclusions were reached by persons other than the three judges voting judgments. It relies on *Krajišnik* for the proposition that a party must adduce sufficient evidence to rebut this presumption that judges act in accordance with their oath, and that there must be direct evidence of a failure to deliberate or a clear basis on which to infer that the deliberations were corrupted.[267]

88. The fact that a judgement is long and detailed is not conclusive proof of the fact that deliberations occurred pursuant to the Rules of the Special Court in the face of direct and first hand evidence from a Judge who was obliged to be present at those deliberations and whose statement evidences that they were not conducted lawfully. At the very least, this direct evidence constitutes a clear basis upon which to infer that the deliberation process was corrupted. It is precisely such direct evidence from a fellow judge that can serve to rebut any presumption that his colleagues on the trial bench have not acted pursuant to their solemn oath. In *Krajišnik*, the appeal failed because it was based on an implication arising from the length of deliberations. There was no direct evidence in that case. In this case, such direct evidence exists.[268]

89. The Defence does not seek to cure alleged deficiencies in its arguments by way of a Rule 115 Motion, because its arguments are not deficient.[269] It is, however, entitled to apply to present additional evidence pursuant to this Rule in order to provide an additional basis for this ground. Moreover, the Statement of Justice Sow does carry substantial probative weight.[270] The Prosecution alleges "it is misleading" for Taylor to conclude that the Trial Chamber failed to deliberate pursuant to the Rules completely disregarding the elision in the sentence regarding "no ^ deliberations".[271] This allegation is both unfair and unfounded. The Defence has been scrupulous in reporting and referring to Justice Sow's words exactly as they were recorded by the court reporters.

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[265] *CDF* AJ, para. 35.
[266] Defence Appellant's Submissions, Brief Ground 36, and in particular paras. 714, 718. Also see paras. 733-7, incorporated by reference in para. 718.
[267] Prosecution Response Brief, paras. 642-5.
[268] Defence Appellant's Submissions, paras. 719-29.
[269] Prosecution Response Brief, paras. 644, 654 and 670.
[270] Prosecution Response Brief, para. 646; Defence Appellant's Submissions, paras. 719-29.
[271] Prosecution Response Brief, para. 647.

90. The Prosecution's argument that Rule 87 does not require the physical presence of Judges during deliberations but that they can be conducted via teleconference or email,[272] is undermined by plain meaning of the term 'deliberate' and by Rule 87.[273] A trial chamber is obliged to deliberate, which means that the Judges of the Chamber must consider the guilt or innocence of the accused *together*. While this process may be facilitated by the preparation and exchange of drafts, evidently the judges must discuss and consider the guilt of the accused as a group.

91. The Prosecution submits that the absence of an alternate Judge from some or all deliberations would be at most a technical violation of Rule 16*bis* with no prejudicial effect, unless the voting judge was called upon to replace one of the three voting judges,[274] and that while an alternate Judge must be present during deliberations, this does not afford him leave to participate in them or express his opinions in court.[275] These assertions are unsupported by authority, the plain meaning of Rule 16*bis* or the purpose for which alternate Judges are appointed. An alternate Judge is not an optional or technical adornment the absence of which has no effect. He actively participates in the work of the Chamber. His presence is mandatory during each stage of the trial[276] and deliberations.[277] He can ask questions through the Presiding Judge[278] and may perform any other functions assigned by the Presiding Judge, in consultation with the other Judges.[279] If the purpose of the alternate Judge is to replace another Judge who has been fully participating in a trial, then that alternate Judge must also have been fully participating in that trial, save for voting during deliberations.[280]

92. Finally, the Prosecution criticises the Defence for arguing that a failure to deliberate should lead to the reversal of adverse findings in the Judgement, whereas the Prosecution argues that this should also lead to a reversal of all the favourable findings for Mr. Taylor resulting in additional convictions.[281] This argument is profoundly misconceived. In respect of this and other irregularity grounds, Mr. Taylor has argued that these errors vitiate the proceedings, occasion a miscarriage of justice and invalidate the Judgement. As such they

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[272] Prosecution Response Brief, para. 648.
[273] Rule 87(A) states "the Trial Chamber shall deliberate in private. A finding of guilty may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt". See Defence Appellant's Submissions, paras. 715-7.
[274] Prosecution Response Brief, para. 648.
[275] Prosecution Response Brief, paras. 648-9.
[276] Rule 16*bis* (A).
[277] Rule 16*bis* (C).
[278] Rule 16*bis* (B).
[279] Rule 16*bis* (D).
[280] Rule 16*bis* (C).
[281] Prosecution Response Brief, para. 650; The Prosecution repeats a similar argument with respect to Ground 38: Prosecution Response Brief, para. 687.

should lead to a reversal of adverse findings, a quashing of convictions and a vacatur of the Judgements. The Defence submissions are focused on the adverse findings, because these findings are the ones being challenged on appeal. The Defence is not appealing and the Chamber is not seized of findings relating to acquittals in the Defence appeal.

B. GROUND 37

93. The Prosecution does not challenge the legal principles regarding the right to a fair and public trial. Nor does it challenge the underlying factual basis of this ground. The parties differ on the legal interpretation and consequences of those facts.

94. With respect to the Defence submissions relating to Justice Sow under this ground, the Prosecution accepts the underlying facts and actions taken by the Chamber and argues that they were done in the proper exercise of authority. More particularly, it argues that Justice Sow's statement did not appear on the official transcript and his name was omitted from the Trial Chamber's order and cover pages of the Judgement as a consequence of the direction issued by the Plenary of Judges that "he refrain from further sitting in the proceedings pending a decision by the appointing authority".[282] This argument fails to acknowledge that the Plenary of Judges did not authorise the particular action taken by the Chamber.

95. The Defence does not seek to appeal the disciplinary proceedings against Justice Sow,[283] nor does it seek a reconsideration of the disqualification decision.[284] The Defence submits the removal of important parts of the public record without notification or explanation by the Trial Chamber constitutes a breach of Mr. Taylor's right to a fair and *public* trial. This is not addressed by the Prosecution submissions. In so far as the Prosecution addresses the role of the Alternate Judge, the Defence refers to its reply on this issue under Ground 36.

C. GROUND 38

96. The Defence submits that the arguments in the Prosecutor's Response Brief with respect to this ground should be rejected on the basis of the Defence Appellant's Submissions and the following submissions the Defence makes in reply.

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[282] Prosecution Response Brief, para. 654.
[283] Prosecution Response Brief, para. 665.
[284] Prosecution Response Brief, para. 667.

97. The submissions made by the Prosecution regarding lack of impartiality[285] are irrelevant because the Defence has not alleged this. Contrary to the argument of the Prosecutor,[286] the Defence does not cite the statutes and rules of international courts to argue that there is an absolute prohibition on judges engaging in outside activities. Rather these authorities and the international instruments set out in the Defence submissions are the basis for the proposition that Judges must not engage in outside activities which may interfere with their judicial functions. Further, if they wish to engage in such activities they must notify the parties to cases before them and the relevant court or the appointing authority. This court or authority has the power to decide whether these activities are compatible with the judge's duties, and if so, on what basis. [287] Furthermore the Defence submits that the relevant authorities from other international courts establish that if judges wish to engage in outside activities they will be permitted to do so on the basis that they have sought, given and fulfilled undertakings that they will perform their judicial obligations conscientiously.[288]

98. The Prosecution agrees that "whether or not a judge meets all the requirements for service as a Judge of the Special Court is a matter for the President and/or Council or Plenary of Judges", but disagrees that this requires any party involvement, notification or consent.[289] With respect to the notice requirement, the Defence refers to its submissions on this matter.[290] The Defence submits that it is a requirement of basic fairness that an accused be formally and fully notified if a Judge sitting on his criminal trial has another contemporaneous judicial appointment which may interfere with their current judicial functions and about undertakings have been required by the court to ensure the fairness and integrity of the process. Such formal and full notice is also required because it gives the Defence a proper opportunity to raise any relevant objections.

99. In its response, the Prosecution argues that the Defence has failed to show that Judge Sebutinde did not obtain permission from the Special Court and did not give undertakings.[291] The Defence submits there is no evidence, either notified or otherwise on the public record, that Justice Sebutinde sought the permission of the Special Court to hold both judgeships contemporaneously and gave the required undertakings. In contrast Judge Sebutinde did seek and obtain such permission from the ICJ. In its response the Prosecution states that:

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[285] Response Brief, para. 675.
[286] Response Brief, paras. 676-678.
[287] Defence Appellant's Submissions, paras. 763-769.
[288] Defence Appellant's Submissions, paras. 770-779.
[289] Response Brief, para. 683.
[290] The Defence further notes that the Statute and Rules of the Special Court are silent on the issue of notice. They neither preclude nor mandate notice.
[291] Response Brief, paras. 683-685.

> ..at a reception for the Judges of Trial Chamber II on 31 May 2012 hosted by the President of the Special Court and attended by lead appeal Defence counsel, Justice Sebutinde thanked the President of the ICJ for allowing her to continue her work as a judge of Trial Chamber II[292]

100. The Defence notes that the Prosecution should not seek to introduce evidence by footnote. However the Defence accepts that Justice Sebutinde did seek and obtain permission from the ICJ continue sitting in the Trial of Mr. Taylor and made a brief and informal reference to this at a reception at the Special Court. However Her Honour did not extend similar thanks nor make any reference to seeking and obtaining the same permission from the Judges of the Special Court at that reception. Accordingly, Justice Sebutinde was aware that she had to obtain permission to hold two judgeships at the same time, but only sought to do so from the ICJ and not the Special Court. As such, Her Honour failed to comply with the applicable judicial standards as submitted by the Defence.

101. Finally, the Prosecution argues that the Defence failed to make a timely objection before the conclusion of the trial on this ground and this alleged failure underscores the lack of merit of this ground.[293] The Defence has not failed to make a timely objection or otherwise waived it rights with respect to this ground. The Defence has not been given formal and full notification by the Court or by the Judge the relevant facts underlying this ground, indeed the Prosecution's case as noted above, is that the Defence was not entitled to such notice. Furthermore, even though lead defence Counsel for the appeal was a member of the defence team, he was not lead counsel and did not have ultimate carriage of the trial. Accordingly, actions or lack thereof of previous lead defence counsel with respect to an objection on this ground cannot be ascribed to the current lead defence Counsel. Importantly, such actions or lack thereof should not be used to the detriment of Mr. Taylor. To do so would be to deny Mr. Taylor his right to a fair appeal on what is a fundament issue: the legal constitution of the Trial Chamber and conduct of a Judge who convicted him. Therefore, this ground should be considered on its merits in the interests of justice. In so far as the Prosecution criticised the relief sought under this ground[294] the Defence refers to its reply on this issue under Ground 36.

102. Finally, the Defence notes that paragraph 762 of the Defence Appellant's Submissions states that Justice Sebutinde was contemporaneously a Judge at the Special

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[292] Response Brief, fn.1995.
[293] Response Brief, para. 686.
[294] Response Brief, para. 687.

Court and at the ICJ "from 6 February *2011* up until 30 May *2011*". This is a typographical error and the correct years for both dates are 2012.

D. GROUND 39

103. The Prosecution asserts that the Chamber properly referred to Articles 13(1) and 15(1) of the Statute and was correct in dismissing the Defence Wikileaks Motion. The Prosecution argues that "the proper analysis is not whether there were communications (...) but whether instructions have been sought or given."[295] In so arguing, the Prosecution fails to address the specific argument advanced by the Defence.

104. Significantly, the Defence did not contend that Article 15 was actually violated. That is to say, the Defence did not allege that instructions were actually sought or received by an organ of the Court. Instead, the Defence argued that the second cable described inappropriate communications giving reason to believe that such instructions **may have been** sought or received. Accordingly, the Defence requested further investigations to determine whether an actual breach of Article15 occurred.[296] The Prosecution's reference to Article 15 is therefore premature and irrelevant.[297]

105. Furthermore, the Prosecution failed to address the Chamber's incorrect reliance on the *RUF* USG Agencies Decision. As pointed out by the Defence, there are significant differences between the *RUF* Decision and the issue at hand.[298] Without repeating the arguments already put forward, the Defence emphasizes that reliance on the *RUF* Decision by the Chamber was misplaced, leading to the application of an incorrect legal standard when deciding on the Wikileaks Motion.

106. Indeed, what the Defence was required to establish is a *prima facie* case that there **may have been** interference with the independence and impartiality of the Court.[299] In applying a higher legal standard, the Trial Chamber erroneously dismissed the Wikileaks Motion, occasioning a miscarriage of justice. The Prosecution failed to effectively address and to rebut the specific arguments advanced by the Defence.

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[295] Prosecution Response Brief, para. 692.
[296] Defence Appellant's Submission's, para. 791. See also Wikileaks Motion, paras. 19-21.
[297] Prosecution Response Brief, para. 692, fn. 2012.
[298] Defence Appellant's Submission's, paras. 791-2.
[299] Defence Appellant's Submission's, para. 788.

PART V: ERRORS UNDERMINING THE FAIRNESS OF THE PROCEEDING

A. GROUND 40

107. As rightly pointed out by the Prosecution, the Trial Chamber made "various specific findings" in relation to payments received by Prosecution witnesses.[300] This is not contested. However, the error advanced is the Chamber's failure to make specific findings as to whether the payments constituted an abuse of the Prosecution's discretion under Rule 39(ii), rather than to make various specific findings related to those payments.

108. The allegation of "relitigation" is without merit.[301] Indeed, the Chamber did summarize the Defence arguments regarding the issue at hand made throughout the trial.[302] Nevertheless, the Chamber erroneously failed to draw any specific conclusions as to whether payments constituted an abuse of the Prosecution's discretion under Rule 39(ii). In this connection, the Defence recalls the Chamber's observation that a possible abuse of the Prosecution's discretion under Rule 39(ii) would "only be considered at the stage of final deliberations."[303]

109. The "various specific findings"[304] made by the Chamber included assertions such as the information provided by the witness "does not appear to have been tailored" in order to ensure continued benefits[305], payments "did not appear to influence" the witness's testimony[306] and "these payments do not appear to be unreasonable."[307] No similar findings on the apparent (un)reasonableness of payments, or their influence on the witness, were made by the Chamber with respect to TF1-276[308] and TF1-548.[309] These ambiguous (rather than specific, as claimed by the Prosecution) findings cannot possibly be understood as being tantamount to an explicit conclusion as to whether payments provided by the WMU constituted an abuse of the Prosecution's discretion under Rule 39(ii).

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[300] Prosecution Response Brief, para. 700.
[301] Prosecution Response Brief, paras. 702, 707.
[302] Prosecution Response Brief, para. 702, fn. 2029; Judgement paras. 185-8.
[303] Contempt Decision, para. 40.
[304] Prosecution Response Brief, para. 700.
[305] Judgement, para. 260 (TF1-532).
[306] Judgement, para. 287 (TF1-334).
[307] Judgement, para. 357 (TF1-274).
[308] Judgement, para. 218.
[309] Judgement, para. 2222.

PART VI: MISCELLANEOUS GROUND

A. GROUND 41

110. The Prosecution argues that the *RUF* Trial Judgement, as cited by the Defence,[310] represents a departure from settled ICTY appeals jurisprudence which was endorsed by this Appeals Chamber.[311] This is incorrect.

111. Firstly, the *RUF* Trial Chamber's assertion that sexual slavery requires a distinct element from the crime of rape is fully in accordance with the *Čelebići* test.[312] The *RUF* Chamber's conclusion that in cases where the commission of sexual slavery in itself entails acts of rape is to be seen as an exception to the legal principle underlying the *Čelebići* test, rather than a departure from it. By acknowledging the crime of sexual slavery as being distinct from rape, the *RUF* Chamber endorsed the test established by the ICTY Appeals Chamber. The *RUF* Chamber's conclusion that situations where sexual slavery entails acts of rape should form an exception to the *Čelebići* test confirms, rather than denies, the legal principle established by the ICTY Appeals Chamber.[313] Indeed, a careful review of *Delalić*[314] does not reveal any indication that the test is absolute and thus allows for no exceptions.

112. Secondly, this Appeals Chamber has not yet decided on the issue of entering cumulative convictions for rape *vis-à-vis* sexual slavery. Therefore, the Prosecution's reference to the *RUF* Appeals Judgement is inaccurate,[315] inasmuch as the Appeals Chamber in *RUF* did not rule on the admissibility of cumulative convictions for rape *vis-à-vis* sexual slavery.[316] Moreover, no other judicial body with jurisdiction in appellate proceedings in international criminal law has ruled on the issue.

113. The Prosecution's reliance on *Kunarać* is misplaced. In that case, cumulative convictions were entered for the crimes of rape and **enslavement**, as opposed to **sexual slavery**. Indeed, the crime of enslavement does not necessarily involve sexual violence in **any form**, and as such should be distinguished from the crime of sexual slavery. The *actus*

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[310] Defence Appellant's Submission's, para. 821.
[311] Prosecution Response Brief, para. 726.
[312] *RUF* TJ, para. 2305.
[313] This line of reasoning is fully in accordance with the settled practice of the International Court of Justice when approaching situations where the practice of States seemingly departs from fundamental legal principles of public international law; see *Nicaragua* Case, para. 186.
[314] *Delalić* AJ, paras. 412-3.
[315] Prosecution Response Brief, para. 726, fn. 2101.
[316] The Appeals Chamber in *RUF* did indeed endorse the test set forth by *Čelebići*, as pointed out by the Prosecution, but did not apply it in relation to crimes of sexual slavery and rape; see *RUF* AJ, paras. 1192-5 (cumulative convictions for extermination and murder), 1196-8 (cumulative convictions for acts of terrorism and collective punishments).

reus of enslavement consists the exercise of any or all of the powers attaching to the right of ownership over a person[317], whereas the *actus reus* of sexual slavery consists the same exercise **and involves sexual acts**.[318] Therefore, the comparison drawn by the Prosecution between the *Kunarać* case and the case at hand[319] is inaccurate and does not appear to support the argument advanced by the Prosecution. The Prosecution failed to adequately and effectively address, let alone rebut, the error advanced by the Defence.

PART VII: SENTENCING ERRORS

A. GROUND 42: ON THE EXCESSIVE NATURE OF A 50 YEAR PRISON SENTENCE

(i) *The Defence properly notified the Appeal Chamber of Ground 42 of the Defence Appellant's Submissions in its Notice of Appeal*

114. Contrary to the Prosecution assertions,[320] the Defence elucidated its arguments in the Appeal Brief in full compliance with the Practice Direction on Grounds of Appeal, in particular Article 6(d).[321] Most importantly, the decisive element is whether there was prejudice to the opposing Party.[322] The Prosecution was evidently not prejudiced given that it was able to substantively respond to the Defence Ground 42. Finally, the Defence submits that there were serious errors in the Sentencing Judgment as set out in this ground and these should be considered by the Appeals Chamber in the interests of justice and fairness.

(ii) *Serving a sentence abroad as a factor in sentencing*

115. The Prosecution submits that serving a sentence abroad is not a factor to be taken into account in sentencing.[323] This argument is countered by its own discussion of the three

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[317] *AFRC* TJ, para. 744.
[318] Judgement, paras. 419, 421.
[319] Prosecution Response Brief, para. 725.
[320] Prosecution Response Brief, para. 730, where it claims that the Defence Ground 42 did not comply with the Practice Direction on Appeal Grounds in its Notice of Appeal and the Defence Appellant's Submissions seeing that the Defence 'only... elucidate[d]...[its] arguments in [its] Appeal Brief'.
[321] According to Article 6(d) of the Practice Directions on Grounds of Appeal, the Appellant's Submissions will include 'the arguments in support of each ground of appeal...', as opposed to the Notice of Appeal. See, also Defence Notice of Appeal, p. 40
[322] See Transcript, Statute Conference, 25 October 2012, p. 49827 to p. 49830 at line 7. See especially p. 49829 lines 18-29 to p. 49830, lines 1-7 where the Presiding Judge makes clear that the key test regarding the redress of a violation of the Practice Directions on Grounds of Appeal is prejudice to the opposing Party, as, well as whether the opposing Party was prevented from answering the Ground due to the violation.
[323] See Prosecution Response Brief, paras. 731-5.

authorities it cites.[324] The question raised in each of these authorities was whether excessive or sufficient consideration had been given to the question of serving a sentence abroad, not whether it was a factor at all.[325]

(iii) *Extraterritoriality as an aggravating factor*

116. The Prosecution submissions on extraterritoriality[326] fail to establish any authority for maintaining that the prohibition on the use of force under Public International Law has any bearing on extraterritoriality of conduct as an aggravating factor in sentencing. Contrary to the position advanced by the Prosecution, the Chamber does not have the discretion to apply customary international law applicable to States, when sentencing an individual. The duty to protect individuals within States lies upon States themselves. To take extraterritoriality into account is a clear error of law and consequently, when applied, an error of discretion.[327]

117. The Prosecution argues that state officials must abide by the prohibition on the use of force in the conduct of their inter-state relations.[328] Judge Bruno Simma's Separate Opinion in the ICJ *Oil Platforms* Case simply addresses the importance of the prohibition of the use of force by States. [329] Accordingly, it cannot provide justification for the Chamber's error of law when it utilised customary international law norms applicable to States to the sentencing an individual in a criminal trial. The Defence underscores that Mr. Taylor was not prosecuted as a State official representing the State of Liberia. Mr. Taylor was prosecuted as an individual; customary international law binding States does not apply to individuals.

(iv) *Breach of trust as an aggravating factor*

118. The Prosecution submissions with regard to breach of trust as an aggravating factor in sentencing are based on Mr. Taylor's influence as an international political leader and negotiator.[330] However, the Prosecution has failed to rebut the correct interpretation of the applicable legal principle as set out by the Defence. It has also failed to demonstrate that there were any findings beyond reasonable doubt in the Trial Chamber Judgment or

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[324] See Prosecution Response Brief, paras. 731-5 where the Prosecution cites to *RUF* AJ, *Mrđa* SJ and *Tadić* Sentencing AJ.
[325] See also Defence Appellant's Submissions, paras. 831-2. See also, *Tadić* Sentencing AJ at paras. 18 and 22 where the Appeal Chamber considered the weight to be given to serving a sentence abroad as a factor in sentencing.
[326] Prosecution Response Brief, paras. 736-9.
[327] Defence Appellant's Submissions, paras. 833-7.
[328] Prosecution Response Brief, para. 737.
[329] The Prosecution Response Brief cites to ICJ, *Oil Platforms* Separate Opinion, para. 6.
[330] See Prosecution Response Brief, para. 740.

Sentencing Judgment that demonstrate Mr. Taylor had a direct duty or obligation to protect or defend civilians in Sierra Leone. Mr. Taylor cannot be sentenced for breaching a duty or obligation that he did not owe.[331]

119. In relation with all other arguments made by the Prosecution in response to the Defence Ground 42, the Defence reiterates its arguments presented in the Defence Appellant's Submissions, as well as relevant arguments made in the Defence Respondent's Submissions to the Prosecution Appellant's Submissions.[332]

B. GROUND 43

120. In reply to the Prosecution's arguments on Ground 43,[333] the Defence respectfully refers the Appeal Chamber to its arguments at paragraphs 855 to 862 of the Defence Appellant's Submissions. The Statute and Special Court case law define the parameters of referring to Sierra Leonean law for the purposes of sentencing in restrictive terms,[334] contrary to ICTR and ICTY Statutes.[335] The difference between the Special Court case law and the *ad hoc* Tribunals' case law is justified on the basis of differences in the wording of their respective Statutes. The Special Court Statute deliberately restricts reliance on Sierra Leonean law for sentencing purposes. At the time the Statutes of the *ad hoc* Tribunals took effect, domestic laws in Rwanda and former Yugoslavia criminalised war crimes and crimes against humanity, contrary to the situation under Sierra Leonean law.[336]

121. The Prosecution's attempt to distinguish between *offences* and *modes of liability*[337] so as to allow the application of article 19(1) of the Statute in a less restrictive manner is artificial. The Statute clearly enumerates where Sierra Leonean law would be relevant to the Trial Chamber in determining an accused's sentence. There is no room for applying Sierra Leonean law outside the scope of offences under Article 5 of the Statute.[338]

122. The Prosecution argues that the Chamber 'merely noted' the relevance of Sierra Leonean law where appropriate, i.e. to offences under Article 5 of the Statute but did not apply it, knowing that it would not be appropriate or relevant in Mr. Taylor's case.[339] It then

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[331] Defence Appellant's Submissions, para. 838.
[332] See Defence Appellant's Submissions, Ground 42 and Defence Respondent's Submissions, paras. 131-3 and 141-57 for sentencing practices at the Special Court and at the *ad hoc* tribunals and for aiding and abetting.
[333] Prosecution Appellant's Submissions, paras. 751-3
[334] *AFRC* SJ, para. 32, *CDF* SJ, paras. 42-3.
[335] *CDF* AJ, paras. 475-7.
[336] *CDF* AJ, paras. 475-7, examined in the Defence Appellant's Submissions at para. 860.
[337] Prosecution Response Brief, para. 752.
[338] Defence Appellant's Submissions, paras. 857-62.
[339] Prosecution Appellant's Submissions, para. 757. Although the Prosecution contends in paras. 756 and 757, the Trial Chamber had full discretion to apply Sierra Leonean law and should have done so.

concludes that the mere noting of a provision of the law, even if irrelevant to the case, does not prejudice Mr. Taylor. This is not the case. The Chamber expressly considered and applied this law in sentencing Mr. Taylor, by stating: "it has noted *with regard to its consideration of the appropriate relative penalties* for different modes of liability that the law of Sierra Leone provides that an accessory to a crime may be indicted, tried, convicted and punished in all respects as if he were a principal felon."[340]

C. GROUND 44: THE TRIAL CHAMBER ERRED IN LAW WHEN IT RAISED AGGRAVATING FACTORS *PROPRIO MOTU*

123. In addition to arguments articulated in the Defence Appellant's Submissions,[341] clearly the Trial Chamber raised aggravating factors *proprio motu,* without the Defence having had a chance to address these factors.[342]

124. That Mr. Taylor had a chance to address sentencing issues in general is irrelevant to the determination of the matters raised in Ground 44. What is relevant is that Mr. Taylor was prevented from presenting his views on the specific aggravating factors in question. Mr. Taylor was not given proper notice of aggravating factors that the Trial Chamber took into account when determining sentence. He was denied his right to present a full response and defence.

125. As the ICTY Appeals Chamber recently recalled, any sudden and significant alterations in the scope of a case may deny individuals of their fair trial rights.[343] Any uncertainty or ambiguity as to how certain facts could be used by a trial chamber hamper an accused's ability to adequately prepare his defence. If Mr. Taylor had been given sufficient notice of aggravating factors raised by the Chamber, he could have addressed them directly. Mr. Taylor was denied this fundamental right.

126. The Prosecution's reliance on the recent *Rašić* Appeals Judgement[344] is clearly misguided. *Rašić* supports the Defence arguments in two main ways. Firstly, it delimits and defines a trial chamber's discretion at the sentencing stage and states that a trial chamber can

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[340] Sentencing Judgement, para. 37 (emphasis added).
[341] Defence Appellant's Submissions, paras. 863-9.
[342] See Sentencing Judgement, paras. 97-9, where the Trial Chamber enunciates its three aggravating factors, raised *proprio motu.* The absence of the Parties' arguments for or against these factors, contrary to all other mitigating and aggravating factors enumerated in the Sentencing Judgement where the Parties' arguments are laid out, gives further indication that the Defence did not have a chance to properly present its views.
[343] See Separate Opinion of Judge Theodor Meron, in *Gotovina* AJ, para. 5. Judge Meron addressed the scope of the Appeals Chamber's ability to examine alternate modes of liability; nevertheless, this statement was made recalling a general principle of law.
[344] Prosecution Response Brief, paras. 762, 766.

determine the weight given to mitigating and aggravating factors.[345] It does not recognize a trial chamber's discretion to raise these factors *proprio motu.* Secondly, the ICTY Appeals Chamber rejected the argument advanced by the appellant that the Trial Chamber in that case abused its discretion by considering aggravating factors not mentioned by the Parties. There is no finding that a trial chamber may consider aggravating factors *proprio motu.*[346]

127. In relation to case law cited by the Defence,[347] the Prosecution has not raised a single valid argument as to why this is irrelevant to the case at hand.

Respectfully submitted,

Morris Anyah **Lead Counsel for** **Charles G. Taylor**	Eugene O'Sullivan Co-Counsel for Charles G. Taylor	Christopher Gosnell Co-Counsel for Charles G. Taylor	Kate Gibson Co-Counsel for Charles G. Taylor

Dated this 30th Day of November 2012, The Hague, The Netherlands

[345] *Rašić* AJ, para. 9.
[346] *Rašić* AJ, para. 65.
[347] Defence Appellant's Submissions, paras. 865-9.

III. BOOK OF AUTHORITIES

1. SPECIAL COURT FOR SIERRA LEONE

A. *Legal Instruments*

Statute	Statute of the Special Court for Sierra Leone, 16 January 2002	*1*
Rules	Rules of Procedure and Evidence of the Special Court for Sierra Leone, as amended on 31 May 2012	*10*
Practice Direction on the Structure of Grounds of Appeal	Practice Direction on the Structure of Grounds of Appeal before the Special Court, as amended on 23 May 2012	*16*
Practice Direction on dealing with Documents	Practice Direction on dealing with Documents in The Hague - Sub-Office, as amended on 25 April 2008	*23*

B. *Taylor* Case

1. Taylor Case Filings

Prosecution Response Brief	*Prosecutor v. Taylor*, SCSL-03-01-A-1350, Public Prosecution Respondent's Submissions with Confidential Annexes A and D, 23 November 2012	*N/A*
Defence Response Brief	*Prosecutor v. Taylor*, SCSL-03-01-A-1349, Public with Confidential Annex A and Public Annex B, Respondent's Submissions of Charles Ghankay Taylor, 23 November 2012	*N/A*
Defence Appellant's Submissions	*Prosecutor v. Taylor*, SCSL-03-01-A-1331, Corrigendum to Appellant's Submissions of Charles Ghankay Taylor, 8 October 2012; Confidential Annex A and Public Annexes B and C to *Prosecutor v. Taylor*, SCSL-03-01-A-1326, Appellant's Submissions of Charles Ghankay Taylor, 1 October 2012; and *Prosecutor v. Taylor*, SCSL-03-01-A-1348, Amended Book of Authorities to the Defence Rule 111 Submissions, 31 October 2012	*N/A*
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Public Annex C

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STATUTE OF THE SPECIAL COURT FOR SIERRA LEONE

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

Article 1
Competence of the Special Court

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

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

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

Article 2
Crimes against humanity

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

a. Murder;
b. Extermination;
c. Enslavement;
d. Deportation;
e. Imprisonment;
f. Torture;
g. Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;
h. Persecution on political, racial, ethnic or religious grounds;
i. Other inhumane acts.

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

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

a. Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
b. Collective punishments;
c. Taking of hostages;
d. Acts of terrorism;
e. Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
f. Pillage;
g. The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;
h. Threats to commit any of the foregoing acts.

Article 4
Other serious violations of international humanitarian law

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

a. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
b. Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
c. Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.

Article 5
Crimes under Sierra Leonean law

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

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

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

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

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

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

i. Setting fire to dwelling - houses, any person being therein, contrary to section 2;

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

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

Article 6
Individual criminal responsibility

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

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

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

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

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

Article 7
Jurisdiction over persons of 15 years of age

1. The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.

2. In the disposition of a case against a juvenile offender, the Special Court shall order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.

Article 8
Concurrent jurisdiction

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

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

Article 9
Non bis in idem

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

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

a. The act for which he or she was tried was characterized as an ordinary crime; or
b. The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.

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

Article 10
Amnesty

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

Article 11
Organization of the Special Court

The Special Court shall consist of the following organs:

a. The Chambers, comprising one or more Trial Chambers and an Appeals Chamber;
b. The Prosecutor; and
c. The Registry.

Article 12
Composition of the Chambers

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

a. Three judges shall serve in the Trial Chamber, of whom one shall be a judge appointed by the Government of Sierra Leone, and two judges appointed by the Secretary-General of the United Nations (hereinafter "the Secretary-General").
b. Five judges shall serve in the Appeals Chamber, of whom two shall be judges appointed by the

Government of Sierra Leone, and three judges appointed by the Secretary-General.

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

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

4. If, at the request of the President of the Special Court, an alternate judge or judges have been appointed by the Government of Sierra Leone or the Secretary-General, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate such an alternate judge to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting.

Article 13
Qualification and appointment of judges

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

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

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

Article 14
Rules of Procedure and Evidence

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

2. The judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not, or do not adequately, provide for a specific situation. In so doing, they may be guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone.

Article 15
The Prosecutor

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

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

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

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

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

Article 16
The Registry

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

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

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

4. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses. The Unit personnel shall include experts in trauma, including trauma related to crimes of sexual violence and violence against children.

Article 17
Rights of the accused

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

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

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

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

a. To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
b. To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;
c. To be tried without undue delay;
d. To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
e. To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
f. To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Court;
g. Not to be compelled to testify against himself or herself or to confess guilt.

Article 18
Judgement

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

Article 19
Penalties

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

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

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

Article 20
Appellate proceedings

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

a. A procedural error;
b. An error on a question of law invalidating the decision;
c. An error of fact which has occasioned a miscarriage of justice.

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

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

Article 21
Review proceedings

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

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

a. Reconvene the Trial Chamber;
b. Retain jurisdiction over the matter.

Article 22
Enforcement of sentences

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

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

Article 23
Pardon or commutation of sentences

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

Article 24
Working language

The working language of the Special Court shall be English.

Article 25
Annual Report

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

SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • NEW ENGLAND • FREETOWN, SIERRA LEONE

RULES OF PROCEDURE AND EVIDENCE

Amended on 7 March 2003
Amended on 1 August 2003
Amended on 30 October 2003
Amended on 14 March 2004
Amended on 29 May 2004
Amended on 14 May 2005
Amended on 13 May 2006
Amended on 24 November 2006
Amended on 14 May 2007
Amended on 19 November 2007
Amended on 28 May 2010
Amended on 16 November 2011
Amended on 31 May 2012

Rule 16: Absence and Resignation *(amended 29 May 2004)*

(A) If a Judge is unable to continue sitting in a proceeding, trial or appeal which has partly been heard for a short duration and the remaining Judges are satisfied that it is in the interests of justice to do so, those remaining Judges may order that the proceeding, trial or appeal continue in the absence of that Judge for a period of not more than five working days.

(B) If a Judge is, for any reason, unable to continue sitting in a proceeding, trial or appeal which has partly been heard for a period which is or is likely to be longer than five days, the President may designate an alternate Judge as provided in Article 12(4) of the Statute.

(i) If an alternate Judge is not available as provided in Article 12(4) of the Statute, and the remaining Judges are satisfied that it would not affect the decision either way, the remaining Judges may continue in the absence of that Judge.

(ii) Where a trial or appeal chamber proceeds in the absence of one Judge, in the event that the decision is split evenly a new proceeding, trial or appeal shall be ordered.

(C) If a Judge is, for any reason, unable to sit in a proceeding, trial or appeal which has not yet been heard but has been scheduled, the President may designate an alternate Judge as provided in Article 12 (4) of the Statute.

(D) A Judge who decides to resign shall give notice of his resignation in writing to the President, who shall transmit it to the Secretary-General of the United Nations and the Government of Sierra Leone.

Rule 16*bis*: Alternate Judges *(adopted 14 May 2007)*

(A) An alternate Judge designated in accordance with Article 12(4) of the Statute shall be present at each stage of the trial or appeal to which he or she has been designated.

(B) During the proceedings, the alternate Judge may, through the Presiding Judge of the Trial Chamber or Appeals Chamber, pose questions which are necessary for the alternate Judge's understanding of the trial or appeal proceedings.

(C) An alternate Judge shall be present during the deliberations of the Trial Chamber or the Appeals Chamber to which he or she has been designated but shall not be entitled to vote thereat.

(D) The alternate Judge may perform such other functions within the Trial Chamber or Appeals Chamber as the Presiding Judge in consultation with the other judges of the Chamber may deem necessary.

Rule 17: Precedence *(amended 7 March 2003)*

(A) All Judges are equal in the exercise of their judicial functions, regardless of dates of election, appointment, age or period of service.

(B) Judges elected or appointed on different dates shall take precedence according to the dates of their election or appointment; Judges elected or appointed on the same date shall take precedence according to age.

Rule 86: Closing Arguments *(amended 14 May 2005)*

(A) After the presentation of all the evidence, the Prosecutor shall and the defence may present a closing argument.

(B) A party shall file a final trial brief with the Trial Chamber not later than five days prior to the day set for the presentation of that party's closing argument.

(C) The parties shall inform the Trial Chamber of the anticipated length of closing arguments; the Trial Chamber may limit the length of those arguments in the interests of justice.

Rule 87: Deliberations

(A) After presentation of closing arguments, the Presiding Judge shall declare the hearing closed, and the Trial Chamber shall deliberate in private. A finding of guilty may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt.

(B) The Trial Chamber shall vote separately on each count contained in the indictment. If two or more accused are tried together under Rule 48, separate findings shall be made as to each accused.

(C) If the Trial Chamber finds the accused guilty on one or more of the counts contained in the indictment, it shall also determine the penalty to be imposed in respect of each of the counts.

Rule 88: Judgement *(amended 7 March 2003)*

(A) The judgement shall be pronounced in public.

(B) If the Trial Chamber finds the accused guilty of a crime, the Trial Chamber may order the forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct as provided in Rule 104.

(C) The judgement shall be rendered by a majority of the Judges. It shall be accompanied by a reasoned opinion in writing. Separate or dissenting opinions may be appended.

Section 3: Rules of Evidence

Rule 89: General Provisions *(amended 7 March 2003)*

(A) The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.

(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

(C) A Chamber may admit any relevant evidence.

(i) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;

(ii) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;

(iii) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;

(iv) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of sexual nature of the prior or subsequent conduct of a victim or witness.

Rule 97: Lawyer-Client Privilege *(amended 7 March 2003)*

All communications between lawyer and client shall be regarded as privileged, and consequently disclosure cannot be ordered, unless:

(i) The client consents to such disclosure; or

(ii) The client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.

(iii) The client has alleged ineffective assistance of counsel, in which case the privilege is waived as to all communications relevant to the claim of ineffective assistance.

Rule 98: Motion for Judgment of Acquittal *(amended 14 May 2005 and 13 May 2006)*

If, after the close of the case for the prosecution, there is no evidence capable of supporting a conviction on one or more counts of the indictment, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgment of acquittal on those counts.

Section 4: Sentencing Procedure

Rule 99: Status of the Acquitted Person *(amended 7 March 2003)*

(A) In case of acquittal, the Special Court shall, subject to Sub-Rule (B) below, order the release of the accused.

(B) If, at the time the acquittal is pronounced, the Prosecutor advises the Trial Chamber in open court of his intention to file notice of appeal pursuant to Rule 108, the Trial Chamber may, on application of the Prosecutor and upon hearing the parties, in its discretion, issue an order for the continued detention of the accused, pending the determination of the appeal.

Rule 100: Sentencing Procedure *(amended 29 May 2004 and 24 November 2006)*

(A) If the Trial Chamber convicts the accused or the accused enters a guilty plea, the Prosecutor shall submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence no more than 7 days after such conviction or guilty

the Appeals Chamber accepts his recommendation and decides to rule on the appeal solely on the written submissions of the parties.

(C) The Pre-Hearing Judge shall record the points of agreement and disagreement between the parties on matters of law and fact. In this connection, he or she may order the parties to file further written submissions with the Pre-Hearing Judge or the Appeals Chamber.

(D) The Appeals Chamber may of its own initiative exercise any of the functions of the Pre-Hearing Judge.

Rule 110: Record on Appeal *(amended 7 March 2003)*

The record on appeal shall consist of the parts of the trial record as designated by the Pre-Hearing Judge, as certified by the Registrar.

Rule 111: Appellant's Submissions *(amended 7 March 2003)*

An Appellant's submissions shall be served on the other party or parties and filed with the Registrar within twenty one days of the notice of appeal pursuant to Rule 108.

Rule 112: Respondent's Submissions *(amended 7 March 2003)*

A Respondent's submissions shall be served on the other party or parties and filed with the Registrar within fourteen days of the filing of the Appellant's submissions.

Rule 113: Submissions in Reply *(amended 7 March 2003)*

(A) An Appellant may file submissions in reply within five days after the filing of the Respondent's submissions.

(B) No further submissions may be filed except with leave of the Appeals Chamber.

Rule 114: Date of Hearing *(amended 7 March 2003 and 24 November 2006)*

(A) The date of any hearing shall be set as provided for by Rule 109(B)(ii)(b).

(B) Where the Appeals Chamber decides that there will be a hearing, the Appeals Chamber or the Pre-Hearing Judge may request the parties to limit their oral submissions to an issue or issues indicated to them in writing.

(C) The Registrar shall notify the parties accordingly.

Rule 115: Additional Evidence *(amended 13 May 2006 and 24 November 2006)*

(A) A party may apply by motion to the Pre-Hearing Judge to present before the Appeals Chamber additional evidence which was not available to it at the trial. Such motion shall clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed. The motion shall also set out in full the reasons and supporting evidence on which the party relies to establish that the proposed additional evidence was not available to it at trial. The motion shall be served on the other party and

filed with the Registrar not later than the deadline for filing the submissions in reply. Rebuttal material may be presented by any party affected by the motion.

(B) Where the Pre-Hearing Judge finds that such additional evidence was not available at trial and is relevant and credible, he will determine if it could have been a decisive factor in reaching the decision at trial. Where it could have been such a factor, the Pre-Hearing Judge may authorise the presentation of such additional evidence and any rebuttal material.

(C) The Appeals Chamber may review the Pre-Hearing Judge's decision with or without an oral hearing.

Rule 116: Extension of Time Limits *(amended 19 November 2007)*

The Appeals Chamber may grant a motion to extend a time limit upon a showing of good cause. Where the Appeals Chamber is seised of such a motion at a time that it is not fully constituted due to the unavailability of one of its Members for any reason, the remaining Judges of the Appeals Chamber or a Judge designated by them, may rule on the motion if satisfied that it is in the interests of justice to do so.

Rule 117: Expedited Procedure *(amended 29 May 2004)*

(A) A reference under Rule 72(E) or (F), or any appeal under Rules 46, 65, 73(B), 77 or 91 shall be heard expeditiously by a bench of at least three Appeals Chamber Judges and may be determined entirely on the basis of written submissions.

(B) All time limits and other procedural requirements not otherwise provided for in these Rules shall be fixed by a practice direction issued by the Presiding Judge.

(C) Unless as otherwise ordered, Rules 109 to 114 and 118(D) shall not apply to such procedures.

Rule 118: Judgement on Appeal *(amended 7 March 2003 and 24 November 2006)*

(A) The Appeals Chamber shall pronounce judgement on the basis of the record on appeal and any oral arguments and additional evidence that has been presented to it.

(B) The judgement shall be rendered by a majority of the Judges. It shall be accompanied or followed as soon as possible by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

(C) In appropriate circumstances the Appeals Chamber may order that the accused be retried before the Trial Chamber concerned or another Trial Chamber.

(D) If the Appeals Chamber reverses an acquittal of an accused by the Trial Chamber on any count, the Appeals Chamber shall proceed to sentence the accused in respect of that offence.

(E) The judgement shall be pronounced in public, on a date of which notice shall have been given to the parties and counsel and at which they shall be entitled to be present.

SPECIAL COURT FOR SIERRA LEONE
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PRACTICE DIRECTION ON THE STRUCTURE OF GROUNDS OF APPEAL BEFORE THE SPECIAL COURT

Adopted on 1 July 2011
Amended 23 May 2012

PREAMBLE

The President of the Special Court for Sierra Leone ("Special Court");

CONSIDERING the Statute of the Special Court ("Statute") as annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, signed on 16 January 2002; and in particular Article 20 of the Statute which provides that the Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on a procedural error, an error on a question of law invalidating the decision, or an error of fact which has occasioned a miscarriage of justice;

CONSIDERING the Rules of Procedure and Evidence of the Special Court ("Rules"); in particular Rules 111, 112 and 113 which deal with the procedure for filing of written submissions by the Parties in appeals from final judgement;

PURSUANT to Rule 107 of the Rules and after consultation with the Vice-President;
HEREBY issues this Practice Direction in order to establish a procedure for the structuring of grounds of appeal and written submissions in appellate proceedings before the Special Court, and

STATES that this Practice Direction shall apply exclusively to appeals from final judgments of a Trial Chamber

I. FORMAL REQUIREMENTS

The Appellant's Notice of Appeal

1. A party seeking to appeal from a judgement or sentence of a Trial Chamber ("Appellant") shall file and serve upon the other parties, in accordance with the Statute and the Rules, a written Notice of Appeal containing in the following order:
(a) the date of the final judgment or sentencing judgment as well as the case number
(b) the specific provision of the Rules pursuant to which the Notice of Appeal is filed;
(c) the grounds of appeal, stating clearly in respect of each ground of appeal the substance of the alleged error;
(d) an identification of the finding, decision or ruling challenged in the judgment with specific reference to the page and paragraph numbers;
(e) an identification of any other order, decision or ruling challenged with specific reference to the date of its filing, and/or transcript page;
(f) the precise relief sought

2 Where a procedural error is alleged, such as would affect the fairness of the trial, the Appellant shall state in what manner the error has occasioned a miscarriage of justice.

3 Where an error of law is alleged in a ground of appeal, the Appellant shall state what error has been made in point of law and in what manner the error invalidates the decision.

4 Where an error of fact is alleged, the Appellant shall state in what manner the error of fact has occasioned a miscarriage of justice.

5 Where a misdirection either of law or of fact or of mixed law and fact is alleged in a ground of appeal, the Appellant shall state in what manner the Trial Chamber misdirected itself and where the misdirection occurred in the judgment;

The Appellant's Submissions

6. After filing a Notice of Appeal, the Appellant shall also file, in accordance with the Statute and the Rules, an Appellant's Submission, containing the following, with the appropriate titles and in the order herein indicated:
(a) a table of contents with page references;
(b) an introduction containing a statement of the subject matter, the specific provision of the Rules pursuant to which the Appellant Submissions is filed, the date of the impugned Judgment as well as the case number; and the date of any interlocutory filing or decision relevant to the appeal;
(c) a statement of the issues presented;
(d) the arguments in support of each ground of appeal containing the contentions of the Appellant on the issues presented and the reasons therefore; with precise references to the authorities relied upon;
(e) the conclusion and relief sought.

7. The Appellant shall not group disparate arguments, each pertaining to a substantial issue under a single ground of appeal

8. The Appellant shall not group allegations of error or misdirection relating to disparate issues under a single ground of appeal.

9. The Appellant shall not repeat in a disproportionate manner, the same arguments in numerous grounds of appeal.

10. The Appellant shall present a holistic and comprehensive ground of appeal. Division of a ground of appeal into "subs-grounds" is impermissible.

11. The Appellant shall maintain a respectful and decorous tone in his/her submissions.

The Respondent's Submissions

12. The opposite party ("Respondent") shall file in accordance with the Statute and the Rules a Respondent's Submission, containing the following, with the appropriate titles and in the order herein indicated:
(a) a table of contents with page references;
(b) an introduction containing a statement of the subject matter, the specific provision of the Rules pursuant to which the Respondent's Submissions is filed and the date of any interlocutory filing or decision relevant to the appeal;
(c) a statement on whether or not the ground of appeal is opposed and arguments in support thereof;

13. The statements and arguments must be set out and numbered in the same order as in the Appellant's Submissions and shall be limited to arguments made in response thereto. The Respondent shall maintain a respectful and decorous tone in his/her submissions

Submissions in Reply

14. An Appellant may file, in accordance with the Statute and the Rules, Submissions in Reply, limited to arguments in reply to the Respondent's Submissions, set out and numbered in the same order as in previous Submissions.

The Book of Authorities

15. The parties' Submissions shall be accompanied by a "Book of Authorities" setting out clearly all authorities relied upon.

16. The Book of Authorities shall be numbered consecutively and shall include a table of content describing each document, including the date and reference, a legible copy of the pages of or excerpts from every referenced material including case law, statutory and regulatory provisions from the Special Court, international tribunals and national sources to which the parties actually refer in the parties' submissions or intends to refer in the parties' oral arguments.

17. Authorities not in the official language of the Special Court shall be translated accordingly

18. A party may object to a translation by filing no later than 15 days from the filing of the Book of Authorities the translation which he/she contends is the correct translation instead of the translation challenged.

19. In the filing of the Book of Authorities, in respect of any appeal to be decided in Freetown, the parties shall be guided by Article 7 of the Practice Direction on Filing Documents before the Special Court, adopted on 27 February 2003, as amended on 16 January 2008.

20. In the filing of the Book of Authorities, in respect of any appeal to be decided in The Hague, the parties shall be guided by Article 7 of the Practice Direction on Dealing with Documents in The Hague Sub-Office, adopted on 16 January 2008 as amended on 25 April 2008.

21. The Book of Authorities shall not count towards the word and page limits set out in either the Practice Direction on Filing Documents before the Special Court or the Practice Direction on Dealing with Documents in The Hague Sub-Office.

22. Failure to file the Book of Authorities prescribed above shall not bar the Appeals Chamber from rendering a judgment, a decision or an order as it sees fit in the appeal.

Additional Evidence

23. A party applying to present additional evidence must do so by way of motion, in accordance with the Rules, stating:

(a) the specific Rule by which the application is made;
(b)a precise list of the evidence sought to be presented;
(c) an indication of the specific finding of fact made by the Trial Chamber to which the additional evidence is directed;
(d) the reasons and supporting evidence relied on to establish that the proposed additional evidence was not available at trial as required by that Rule
(e) the arguments in support of the requirement that the admission of the requested additional evidence should be in the interest of justice

24. The relevant documents and exhibits, where applicable, shall be translated into the working language of the Special Court.

25. Where a party is authorised by the Appeals Chamber to present additional evidence, then the requirements of this Practice Direction apply *mutatis mutandis.*

II. GENERAL REQUIREMENTS

26. The parties shall refer to and comply with the Practice Direction on Filing Documents before the Special Court for Sierra Leone, adopted on 27 February 2003, as amended on 16 January 2008, and the Practice Direction on dealing with Documents in The Hague Sub-Office, adopted on 16 January 2008 an amended on 25 April 2008, as applicable, for the general requirements for filing of written submissions, including the filing of authorities.

27. In accordance with the Rules, the time limits prescribed under this Practice Direction shall run from but shall not include, the day upon which the relevant document is filed. Should the last day of a time prescribed fall upon a non-working day of the Special Court it shall be considered as falling on the first working day thereafter.

28. The provisions of this Practice Direction are without prejudice to any orders or decisions that may be made by a designated Pre-Hearing Judge

or the Appeals Chamber in particular with regard to the variation of time limits.

III. NON-COMPLIANCE WITH THE REQUIREMENTS

29. Where a party fails to comply with the requirements laid down in this Practice Direction, or where the wording of a filing is unclear or ambiguous, a designated Pre-Hearing Judge or the Appeals Chamber may in its discretion decide upon an appropriate sanction, which can include an order for clarification or re-filing. The Appeals Chamber may also reject a filing or dismiss submissions therein.

IV. ENTRY INTO FORCE

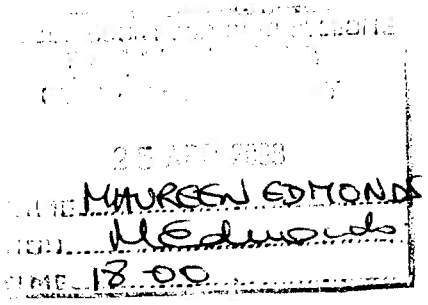
30. This Practice Direction as amended on 23 May 2012 entered into force on 1 July 2011.

Justice Jon M. Kamanda
President
23/05/12

SPECIAL COURT FOR SIERRA LEONE

Practice Direction on dealing with Documents in The Hague - Sub-Office

Adopted on 16 January 2008
Amended 25 April 2008



PREAMBLE

The Registrar of the Special Court for Sierra Leone (hereinafter "Special Court")

Considering the Statute of the Special Court for Sierra Leone (hereinafter "Statute") as annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, signed on 16 January 2002, and in particular Article 16 thereof;

Considering the Rules of Procedure and Evidence of the Special Court for Sierra Leone (hereinafter "Rules) as applicable pursuant to Article 14 of the Statute;

Hereby issues the Practice Direction on dealing with Documents before the Special Court for Sierra Leone –The Hague- Sub-Office (hereinafter "Practice Direction") Pursuant to Rule 33 (D) of the Rules.

Article 1 - General Principles

(A) Documents to be filed before the Special Court –The Hague in accordance with the Rules shall be submitted to the Court Management Section of the Special Court in The Hague

(B) Thereafter, the Court Management Sub-Unit shall be responsible for the service of the Hard Copy filed documents, except where Article 13 (D) of this Practice Direction applies. CMS Freetown shall be responsible for the service of the Electronic Copy.

Article 2 - Forms

The forms used by the Special Court in The Hague Sub-Office with respect to the filing and service of documents shall be in a standard forms issued by the Court Management Section. They shall be made available to the public.

Article 3 - Opening and Numbering of Case Files

(A) The Court Management Section shall open a new case file upon filing of:
  (i) an application for deferral under Rule 9 of the Rules;
  (ii) an indictment submitted by the Prosecutor for review and approval under Rule 47 of the Rules; or
  (iii) a request for the transfer and provisional detention of a suspect under Rule 40 bis of the Rules.

(B) Only one case file shall be opened for each case. If two or more accused who are separately indicted are jointly tried, the original case files shall be closed and a new case file with a new case number shall be opened. If two or more accused who are jointly indicted are separately tried, the initial case file shall be separated and new case files with new case numbers shall be opened. A

case file may be placed in several folders, whether public or confidential, which folders shall be numbered sequentially.

(C) The following symbols shall be used in assigning a case number (e.g., SCSL-03-01-PD-001):

(i) SCSL = Special Court for Sierra Leone;

(ii) 03 = Year in which the indictment was submitted for review and approval under Rule 47 of the rules, the request for transfer and provisional detention was filed under Rule 40bis of the Rules or the application for deferral was made under Rule 9 of the Rules;

(iii) 01 = Sequential number of the case e.g. the first case to come before the Special Court;

(iv)

PD	=	Transfer and Provisional Detention
I	=	Indictment;
D	=	Deferral;
PT	=	Pre-Trial;
Tbis	=	Re-trial following a decision of the Appeals Chambers;
A	=	Appellate Proceedings;
Rev	=	Review Proceedings; and

(v) 001 = Number of the document

Article 4 - Format of Documents

(A) All documents shall have the following information on the cover page:

(i) the case number

(ii) the Judge or Chamber before which the document is filed;

(iii) the date of filing

(iv) the title of the document;

(v) the type of the document (PUBLIC, CONFIDENTIAL or EX PARTE); and

(vi) the Parties and/or any other State, organisation or person that shall receive the document filed.

(B) Where a Party, State, organisation or person seeks to file all or part of a document on a confidential basis, the party shall mark the document as "CONFIDENTIAL" and indicate, on the relevant Court Management Section form, the **reasons for the confidentiality**. The Judge or Chamber shall thereafter review the document and determine whether confidentiality is necessary. Documents that are not filed confidentially may be used in press releases and be posted on the official website of the Special Court.

(C) Each page of the document shall have the case number indicated as a footer.

(D) Each page of the document shall be one-sided.

(E) The title of the document shall be as concise as possible.

(F) Documents shall be submitted on A4 or 8½ x 11 inch size paper. Margins shall be at least 2.5 centimetres on all four sides. All documents shall be paginated, excluding the cover sheet.
(G) The typeface shall be 12 point, "Times New Roman" font, with 1.5 line spacing. An average page shall contain a maximum of 300 words.
(H) Documents shall not be bound or stapled and shall not contain dividers, post-it indexes or flags.
(I) Only the original document shall be submitted to Court Management Section. No supplementary copies shall be accepted. Copies of photographs, audio tapes and video tapes which are submitted as part of the filing shall be provided **in sufficient number for service** on the Judge or Chamber before which the document is filed, the parties and/or any State, organization or person that shall be served with the document.
(J) The document shall be signed with a clear indication of the name of the person who signed it.

Article 5 - Contents of Documents

Documents filed before a Judge or Chamber shall contain the following:

(i) a brief of the argument;
(ii) affidavit(s) or solemn declaration(s) affirming contentious facts, if the Party, State, organization or person filing the document requires the Judge or Chamber to make a determination on a question of fact; and
(iii) a list of authorities referred to in the document and copies of those authorities, as provided in Article 7 (A) of this Practice Direction.
(iv) Any reference to a previously filed document shall include the court record document number in addition to the title and date of that document

Article 6 - Length of Documents

(A) Pre-trial briefs shall not exceed 50 pages or 15,000 words, whichever is greater.
(B) Final trial submissions shall not exceed 200 pages or 60,000 words, whichever is greater.
(C) Preliminary motions, motions, responses to such motions and replies to such shall not exceed 10 pages or 3,000 words, whichever is greater.
(D) Interlocutory appeals against decisions on motions shall be subject to the following:

(i) For leave to appeal:
(a) the motion of a Party seeking leave to pursue an interlocutory appeal shall not exceed 15 pages or4,500 words, whichever is greater;
(b) the response to such a motion shall not exceed 15 pages or 4,500 words, whichever is greater; and

(c) the reply to such a response shall not exceed 7 pages or 2,100 words, whichever is greater.

(ii) For merits of interlocutory appeals:

(a) the brief of an Appellant in an interlocutory appeal shall not exceed 30 pages or 9,000 words, whichever is greater; and

(b) the response brief of a Respondent in an interlocutory appeal shall not exceed 30 pages or 9,000 words, whichever is greater; and

(c) the reply brief of an Appellant in an interlocutory appeal shall not exceed 10 pages or 3,000 words, whichever is greater.

(E) Appeals against judgments and sentences shall be subject to the following:

(i) The brief of an Appellant against a judgment or a sentence shall not exceed 100 pages or 30,000 words, whichever is greater. Where the Prosecutor, as Appellant, files a consolidated brief against additional Respondents, a further 35 pages or 10,000 words, whichever is greater, may be filed in respect of each additional Respondent;

(ii) The response brief of a Respondent on an appeal against a judgment or a sentence shall not exceed 100 pages or 30,000 words, whichever is greater. Paragraph (D) (I) applies mutatis mutandis to any response brief filed by the Prosecutor; and

(iii) The reply brief of an Appellant on an appeal against a judgment or a sentence shall not exceed 30 pages or 9,000 words, whichever is greater. Where the Prosecutor, as appellant, files a consolidated reply brief against additional Respondents, a further 10 pages or 3,000 words, whichever is greater, may be filed in respect of each additional Respondent.

(F) Headings, footnotes and quotations count towards the word and page limits set out in the present article. Any appendices or authorities do not count towards the page limit.

(G) Party, State, organisation or person seeking to file a document which exceeds the page limits set out in this article shall obtain authorisation in advance from a Judge or a Chamber and shall provide an explanation of the exceptional circumstances that necessitate the oversized filing.

(H) The present article shall not apply to additional written submissions in connection with motions referred to the Appeals Chamber under Rule 72(E) and (F) of the Rules insofar as it is inconsistent with the *Practice Direction on Filing Documents under Rule 72 of Procedure and Evidence before the Appeals Chamber of the Special Court for Sierra Leone* issued on 22 September 2003.

Article 7 – Filing of Authorities

(A) Documents shall be filed with a list of the authorities referred to therein. Such list shall include the name, date and full citation for each authority, specifying which provision(s), paragraph(s) or page(s) are relied on. Where an authority is covered by paragraph (C) or (D) (i) below, the list shall also indicate the information required under those paragraphs.

(B) Documents shall be filed with copies of all authorities listed therein, including references, source materials, items from the record, exhibits and other relevant, non-argumentative material, with the exception of the following:

(i) Documents of the Special Court:

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

(b) the Statute of the Special Court;

(c) the Rules of Procedure and Evidence of the Special Court;

(d) the Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Special Court for Sierra Leone or Otherwise Detained under the Authority of the Special Court;

(e) the orders, decisions, judgments of the Special Court; and

(f) the Practice Directions of the Special Court;

(ii) Sierra Leonean Legislation:

(a) the Constitution of Sierra Leone, 1991;

(b) the Special Court Agreement, 2002, Ratification Act, 2002;

(c) the Prevention of Cruelty to Children Act, 1926;

(d) the Malicious Damage Act, 1861; and

(e) the Criminal Procedure Act, 1965;

(iii) international conventions and treaties; and

(iv) the Statutes and the Rules of Procedure and Evidence of:

(a) the International Criminal Tribunal for Rwanda;

(b) the International Criminal Tribunal for the former Yugoslavia; and

(c) The International Criminal Court.

(C) A Party, State, organization or person relying on an authority which has already been filed by that or any other Party, State, organization or person in the same case or proceeding shall not file the same authority, but shall indicate, in the list of authorities, the name and date of the document with which the authority was previously filed.

(D) Subject to paragraph (E) below, where the authority is:

(i) jurisprudence, the entire document shall be filed unless the authority is readily available on the internet, in which case the relevant URL address shall be indicated on the list of authorities as part of the case citation;

(ii) an academic text, the entire chapter containing the relevant text shall be filed; and

(iii) an official UN document, a copy of the entire document shall be filed.

(E) Where an authority exceeds 30 pages, a copy of the first page of the authority and the relevant section of the text shall be filed along with a note specifying that the authority exceeds 30 pages.

(F) Where an authority is not filed, except where the authority is one of the documents listed in paragraph (B) above, a Judge or a Chamber may decide upon an appropriate sanction, which may include an order for clarification or re-filing or the refusal to allow reliance on that authority.

Article 8 – Translation of Documents

In accordance with Rule 3 of the Rules, documents to be filed shall be in English, except when a certified translation into English is attached.

Article 9 –Filing Documents

Method of Filing Documents

(A) Documents shall be submitted to the Court Management Section by hand or by express post. For the trial of Charles Taylor, this shall mean the Office of the Court Management Section in The Hague, Netherlands. Documents submitted to any other section of the Registry of the Special Court shall be considered mis-delivered and the Party, State, organization or person so filing the document shall be responsible for any delay in the transmission of the document from that section of the Registry to the Court Management Section. The Appeals Chamber and or the Office of the Registrar may however file documents in the Charles Taylor case file at the Court Management Section in Freetown.

(B) The official filing hours are from 9:00 to 17:00 hours (local time in Freetown or The Hague, as applicable) every workday, excluding official holidays. However, documents filed after 16:00 hours shall be served the next working day. Documents shall not be accepted for filing after 17:00 hours except as provided under Articles 9 *bis* and 10 of this Practice Direction.

(C) The date of filing is the date that the document was received by the Court Management Section. The Court Management Section shall stamp the document legibly with the date of its receipt, subject to Articles 4 to 8 of this Practice Direction. The stamp shall be endorsed with the signature of the Court Management Section staff member who received the document.

Article 9 *bis*, After-Hours Filing:

(A) After-hours filing refers to the filing of documents on weekends or public holidays or outside of the following hours local time in Freetown or The Hague, as applicable: 9.00 to 17.00 hours during work days.

(B) A party anticipating a late filing must notify the Court Management Section during business hours to request permission and instructions for after-hours filing from the Chief of the Court Management Section and the Court Management Coordinator at the Hague Sub-Office.

Article 9 Ter, Microsoft Word Filing

All filings of Decisions, Orders and Judgements in accordance with Article 4 (F) and Article 9 (A) of the Practice Directions on Filing Documents before the Special Court for Sierra Leone, shall be accompanied with a Microsoft Word version. This shall be sent electronically to CMS on the day of filing.

CMS will then ensure that this is sent to Press and Public Affairs for them to upload on to the website on receipt.

Article 10 – Urgent Measures

(A) Chamber or Party filing a document that requires urgent action by a Judge or Chambers shall personally deliver the document bearing the word "URGENT" in bold capital letters to the Court Management Section and explain the circumstances in writing, or. only if necessary and unavoidable, orally.

(B)Upon determination by the Chief of the Court Management Section that the matter requires urgent attention, the Court Management Section shall process the document on an expedited basis and promptly forward a copy to the appropriate Judge or Chamber, Parties, and others as appropriate.

Article 11 – Deficient Submissions

(A) The Court Management Section shall be responsible for verifying compliance with the requirements laid down in Articles 4 to 9 of the Practice Direction.

(B) The Court Management Section shall inform the Party, State, organization or person who submitted a deficient document of the deficiency and request that it be corrected. The Court Management Section shall file the document only after the mistakes have been corrected. If the corrected document is filed outside the time limits set out in the Rules as a result of the deficiency, such document shall be filed in accordance with Article 12 of this Practice Direction.

Article 12 – Late Filing

A document may be filed outside the time limits set out in the Rules, in particular Rule 7 of the Rules. In such cases, the Party, State, organization or person filing the document shall indicate the reason for the delay on the relevant Court Management Form. A late Filing Form shall be completed by the Court Management section and served with the document. The Judge or Chamber before which such document is filed shall decide whether to accept the document despite its late filing.

Article 13 – Service of Documents

A. The Court Management Section shall ensure the service of filed documents.

B. Service of all documents filed in The Hague shall be effected by delivering hard copies to the Judges and Parties immediately after processing the document. Thereafter, the time limits run in accordance with Rule 7 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone. Any subsequent transmission of a copy of the same document electronically via the CMS Database System in Freetown whensoever it is received, is irrelevant for the purposes of the service. .

C. Service on the accused Charles Taylor shall be effected by delivering the hard copy to the Defence Office in The Hague.

D. Service outside The Hague not covered by paragraph (B) and (C) above shall be effected by transmitting the document electronically to the person to whom the document is directed. Such persons shall check their e-mail account diligently and regularly.

E. If any of the recipient refuses to acknowledge service, the Court Management Section shall record the time, date and place of delivery and the document shall be deemed to have been duly served.

F. This Article shall not apply to the service of the following:

i. the Prosecutor's Request for an Order for Transfer and/or Provisional Detention and the Order for Transfer and/or Provisional Detention on a suspect and his counsel, pursuant to Rule 40 *bis* (E) of the Rules; and

ii. the Warrant of Arrest, the Indictment and the Statement on the Rights of the Accused on an accused, pursuant to Rule 54 (B) (ii) or 58 of the Rules.

Article 14 - Transcripts

Production of Transcripts

The Court Reporters will prepare the transcripts and forward the 'Draft' electronic copy to the named individuals on the 'Appearance Sheet' by the end of the day for their input. This 'Appearance Sheet' will be maintained by the Supervisor of the Court Reporters.

A final copy shall be forwarded to the Court Records Assistant for distribution to all concerned parties not later than 12:00 hours the next working day.

The Court Reporters would be responsible for on-going pagination of the Transcripts.

Mode of Service of the Transcript

Electronic Service

A 'Recipient List' will be maintained by the Supervisor of the Court Reporters in consultation with the CMS Coordinator. This list will include: the Judges, all concerned parties, Court Management, the Registrar's and Deputy Registrar's Special Assistants and Head of Mission.

The Sub-Office shall be responsible for Electronic Service of the Transcript.

Hard Copy Service

The Court Records Assistant will distribute hard copies of the transcripts to the Judges and Parties. The Chamber may adopt any appropriate way of being served with the hard copies.

A separate form for the service of Transcripts to the Accused/Indictee will be prepared and given to Duty Counsel with the Transcript. The Duty Counsel will sign and receive it on behalf of the Accused/Indictee. It would be the responsibility of the Duty Counsel to effect service on Accused/Indictee. The form will be returned to the Court Records Office and filed.

Redactions

Redactions would be done by the Courtroom Officer using the Livenote software. There is a 30 minute delay period to allow for redactions. Redactions shall be effected by an Order from the presiding Judge to the AV booth.

An example of the Redaction Template is contained in Appendix II

Court Reporters

This Unit shall constitute of three Court Reporters. In the event of an emergency, it shall be necessary to hire the services of outside agencies to cover court proceedings. This Unit will utilise the Livenote software in delivering their services

Article 15 - Exhibits

When a document or other material is tendered in Court, and accepted into evidence by the Chamber, the Courtroom Officer shall be responsible for possession of the item until it is properly archived. The Courtroom Officer shall allocate the item an Exhibit Number and enter the relevant details in the Exhibit Log.

When a document or other material is tendered in Court, and not accepted into evidence by the Chamber, and where Counsel indicated that they wish to preserve the item for the record, the Courtroom Officer shall, upon direction by the Chamber remain responsible for possession of the item until it is properly archived. The Courtroom Officer shall allocate the item an "Identification-Only" Exhibit Number and enter the relevant details into a separate "Identification-Only" Log.

When tendered by the Prosecution, exhibits shall be sequentially numbered P-1, P-2, P-3, etc. When tendered by the Defence, exhibits shall be sequentially numbered D-1, D-2, D-3, etc. Other exhibits, for example those requested by the Chamber, shall be sequentially numbered C-1, C-2, C-3, etc. The Exhibit Log shall also contain information regarding date of admission, witness name or pseudonym (where entered during the testimony of a particular witness), title of the exhibit, classification (public/confidential), language/s of the document, name of receiving Courtroom Officer and any other such information as the Court may at that time wish to be recorded.

Article 16 – Judicial Archives:

The Court Management Section is responsible for maintaining the Judicial Archives of the Special Court.

(A) The Judicial Archives shall contain:
- (I) Case files;
- (II) Official copies of transcripts
- (III) Paper records
- (IV) Electronic documents
- (V) Correspondence files
- (VI) Originals
- (VII) Audio Visuals - Audio cassettes CDs, DVDs, DV-Cams, FTRs
- (VIII) Redacted audio and video recordings
- (IX) Photographs, Still pictures, graphs
- (X) Objects retained as evidence

(B) The Judicial Archives shall not include correspondence directly addressed to a Judge or to the Prosecutor of the Special Court, unless they transmit such correspondence to the Court Management Section, they may be archived in consultation with the Judges or Prosecutor of the Special Court at the close of Judicial activities

(C) All original documents in the Judicial Archives shall be kept securely locked when not in use by the Court Management Section Staff. No file or original of any document contained in the archives may be consulted without first obtaining permission from a designated member of the Court Management Section, nor moved from the Judicial Archives except for the purposes of making a photocopy, again only with the

permission of a designated member of the Court Management Section. If a copy is made, the original must be returned to the Judicial Archives immediately. All the above is subject to SCSL copy right rules.

(D) All original documents, transcripts, audio and video cassettes, diskettes, microfiches, photographs, etc filed in the Charles Taylor case shall be archived in the ICC vault at The Hague Sub Office till the end of all Charles Taylor Judiciary Proceeding and subsequently be taken a centralized archival repository

Article 17 – Entry into Force

This Practice Direction as amended on 25 April 2008

Herman Von-Hebel
Registrar
25/04/08

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SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

Before: Justice Shireen Avis Fisher, Pre-Hearing Judge

Registrar: Ms. Binta Mansaray

Date: 07 August 2012

PROSECUTOR **Against** **CHARLES GHANKAY TAYLOR**
(Case No. SCSL-03-01-A)

Public

DECISION ON PROSECUTION AND DEFENCE MOTIONS FOR EXTENSION OF TIME AND PAGE LIMITS FOR WRITTEN SUBMISSIONS PURSUANT TO RULES 111, 112 AND 113

Office of the Prosecutor:
Ms. Brenda J. Hollis
Mr. Nicholas Koumjian
Mr. Mohamed A. Bangura
Ms. Nina Tavakoli
Ms. Leigh Lawrie
Mr. Christopher Santora
Ms. Kathryn Howarth
Ms. Ruth Mary Hackler
Ms. Ula Nathai-Lutchman
Mr. James Pace
Mr. Cóman Kenny

Defence Counsel for the Accused:
Mr. Morris Anyah
Mr. Eugene O'Sullivan
Mr. Christopher Gosnell
Ms. Kate Gibson
Ms. Magda Karagiannakis

SPECIAL COURT FOR SIERRA LEONE
RECEIVED
COURT MANAGEMENT
THE HAGUE
07 AUG 2012
NAME SAMUEL J. FORNAH
SIGN
TIME 15:10

Justice Shireen Avis Fisher, Pre-Hearing Judge of the Appeals Chamber of the Special Court for Sierra Leone ("Special Court"), acting in accordance with the "Order Designating a Pre-Hearing Judge Pursuant to Rule 109 of the Rules of Procedure and Evidence,"[1] dated 21 June 2012;

RECALLING the "Decision on Defence Motion for Extension of Time to File Notice of Appeal,"[2] dated 20 June 2012, pursuant to which both parties were granted a five week extension to file their Notices of Appeal;

RECALLING that additional time to file Notices of Appeal was granted to "allow the Parties to conduct a thorough review of the Trial Judgement and allow for more expeditious preparation of future filings pursuant to Rules 111, 112 and 113 of the Rules";[3]

BEING SEIZED of the "Prosecution Consolidated Motion Pursuant to Scheduling Order For Written Submissions Regarding Rules 111, 112 and 113" ("Prosecution Motion"), dated 24 July 2012,[4] wherein the Prosecution requests (i) a two week extension and thirty additional pages with regard to filing its Appellant's Submissions,[5] or, in the alternative, the same extension of time as the Defence is granted should that be greater, (ii) the same increase in time limit and page extension for its Respondent's Submissions as the Defence is given for its Appellant's Submissions,[6] and (iii) a five day extension and ten additional pages with regard to filing its Submissions in Reply;[7]

BEING SEIZED of the "Defence Motion for Extensions of Time and Page Limits for Written Submissions Pursuant to Rules 111, 112 and 113" ("Defence Motion"), dated 24 July 2012,[8] wherein the Defence requests (i) ninety additional days and two hundred additional

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[1] *Prosecutor v. Taylor*, SCSL-03-01-A-1297, Order Designating a Pre-Hearing Judge Pursuant to Rule 109 of the Rules of Procedure and Evidence, 21 June 2012 [*Taylor* Order Designating a Pre-Hearing Judge].
[2] *Prosecutor v. Taylor*, SCSL-03-01-A-1296, Decision on Defence Motion for Extension of Time to File Notice of Appeal, 20 June 2012 [*Taylor* Decision on Filing Notice of Appeal].
[3] *Taylor* Decision on Filing Notice of Appeal, 20 June 2012, p. 3.
[4] *Prosecutor v. Taylor*, SCSL-03-01-A-1306, Prosecution Consolidated Motion Pursuant to Scheduling Order For Written Submissions Regarding Rules 111, 112 and 113, 24 July 2012 [Prosecution Motion].
[5] Prosecution Motion, paras 2(a) and 3(a).
[6] Prosecution Motion, paras 2(b) and 3(b).
[7] Prosecution Motion, paras 2(c) and 3(c).
[8] *Prosecutor v. Taylor*, SCSL-03-01-A-1305, Defence Motion for Extensions of Time and Page Limits for Written Submissions Pursuant to Rules 111, 112 and 113, 24 July 2012 [Defence Motion].

pages with regard to filing its Appellant's Submissions,[9] (ii) sixty additional days and fifty additional pages with regard to filing its Respondent's Submissions,[10] and (iii) fifteen additional days and seventy additional pages with regard to filing its Submissions in Reply;[11]

NOTING the "Prosecution Response to Defence Motion for Extensions of Time and Page Limits For Written Submissions Pursuant to Rules 111, 112 and 113" ("Prosecution Response"), dated 25 July 2012,[12] and the "Defence Response to Prosecution Consolidated Motion Pursuant to Scheduling Order for Written Submissions Regarding Rules 111, 112 and 113" ("Defence Response"), dated 26 July 2012;[13]

NOTING the "Prosecution Reply to Defence Response to Prosecution Consolidated Motion Pursuant to Scheduling Order For Written Submissions Regarding Rules 111, 112 and 113" ("Prosecution Reply"), dated 27 July 2012,[14] and the "Defence Reply to Prosecution Response to Defence Motion for Extensions of Time and Page Limits for Written Submissions Pursuant to Rules 111, 112 and 113" ("Defence Reply"), dated 27 July 2012;[15]

NOTING FURTHER that on 19 July 2012, Notices of Appeal were filed by both Parties, the Defence's Notice of Appeal[16] comprising forty-five grounds of appeal and the Prosecution's Notice of Appeal[17] comprising four grounds of appeal:,

DECIDES AS FOLLOWS, based on the written submissions:

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[9] Defence Motion, para. 1(i).
[10] Defence Motion, para. 1(ii).
[11] Defence Motion, para. 1(iii).
[12] *Prosecutor v. Taylor*, SCSL-03-01-A-1307, Prosecution Response to Defence Motion for Extensions of Time and Page Limits For Written Submissions Pursuant to Rules 111, 112 and 113, 25 July 2012 [Prosecution Response].
[13] *Prosecutor v. Taylor*, SCSL-03-01-A-1308, Defence Response to Prosecution Consolidated Motion Pursuant to Scheduling Order for Written Submissions Regarding Rules 111, 112 and 113, 26 July 2012 [Defence Response].
[14] *Prosecutor v. Taylor*, SCSL-03-01-A-1311, Prosecution Reply to Defence Response to Prosecution Consolidated Motion Pursuant to Scheduling Order for Written Submissions Regarding Rules 111, 112 and 113, 27 July 2012 [Prosecution Reply].
[15] *Prosecutor v. Taylor*, SCSL-03-01-A-1310, Defence Reply to Prosecution Response to Defence Motion for Extensions of Time and Page Limits for Written Submissions Pursuant to Rules 111, 112 and 113, 27 July 2012 [Defence Reply].
[16] *Prosecutor v. Taylor*, SCSL-03-01-A-1301, Notice of Appeal of Charles Ghankay Taylor, 19 July 2012 [Defence Notice of Appeal].
[17] *Prosecutor v. Taylor*, SCSL-03-01-A-1300, Prosecution's Notice of Appeal, 19 July 2012 [Prosecution Notice of Appeal].

I. SUBMISSIONS

1. The Prosecution submits that there is good cause for extending the time limits for: (i) its Appellant's Submissions due to the significant complexity of the legal issues raised by the Prosecution in its grounds of appeal;[18] (ii) its Respondent's Submissions due to the breadth of the Defence's grounds of appeal;[19] and (iii) for its Submissions in Reply in order to fully reply to the Defence Respondent's Submissions.[20] The Prosecution further submits that there are "exceptional circumstances" to grant the page-limit extensions requested for its Appellant's Submissions[21] and Respondent's Submissions,[22] namely the need to fully address the grounds of appeal in a cohesive and comprehensive manner and in light of the breadth of the Defence's grounds of appeal. The Prosecution contends that the requested extension of page limits for its Respondent's Submissions is consistent with the practice of the Special Court.[23]

2. The Defence submits that the requested extensions of time are reasonable, necessary and proportionate in light of the complexity and size of the Trial Judgment, the size of the record of the case and the breadth of its grounds of appeal.[24] The Defence contends that the requested extension of time for its Appellant's Submissions is reasonable and proportionate when compared with the time periods granted in other cases before other tribunals.[25] With regard to its Respondent's Submissions, the Defence argues that the Statutes of all international courts and tribunals and decisions in other cases at other tribunals provide that a response brief should be filed within a period of no more than two-thirds of the time granted for Appellant's Submissions.[26] The Defence further submits that the complexity and size of the Judgement, size of the record and breadth of the Defence's grounds of appeal constitute "exceptional circumstances" justifying the requested extensions of page limits.[27] The Defence

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[18] Prosecution Motion, para. 6.
[19] Prosecution Motion, para. 9.
[20] Prosecution Motion, para. 11.
[21] Prosecution Motion, para. 8.
[22] Prosecution Motion, para. 10.
[23] Prosecution Motion, para 10, *citing Prosecutor v. Sesay et al.*, SCSL-04-15-A-1263, Decision on Kallon Defence Motion for Extension of Time to File Appeal Brief and Extension of Page Limit, 4 May 2009 [RUF Kallon Extension Decision]; *Prosecutor v. Brima et al.*, SCSL-04-16-A-640, Decision on Urgent Joint Defence and Prosecution Motion for an Extension of Time for the Filing of Appeals Briefs, 10 August 2007 [AFRC Appeal Brief Extension Decision]; *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T-804, Decision on Urgent Joint Defence and Prosecution Motion for an Extension of Time for the Filing of Appeal Briefs and Extension of Page Limits for Appeal Brief, 7 November 2007 [CDF Appeal Brief Extension Decision].
[24] Defence Motion, paras 2, 9-11.
[25] Defence Motion, paras 2 and 12-15.
[26] Defence Motion, para. 16.
[27] Defence Motion, para. 18.

refers to the extensions granted in the *Sesay et al.*, *Fofana and Kondewa*, and *Brima et al.* cases in support.[28]

3. In its Response, the Prosecution submits that the Defence have established good cause and exceptional circumstances, but contends that the extensions requested by the Defence are more generous than necessary.[29] The Prosecution suggests that a total of ninety days and a total of two hundred pages for the Appellant's Submissions and a total of sixty pages for Submissions in Reply would be sufficient. The Prosecution further submits that the Defence's proposed extension of sixty days for its Respondent's Submissions would be sufficient for its purposes but would be inadequate for the Prosecution to address all the Defence's grounds of appeal.[30] The Defence replies that it has greater knowledge of the time required to prepare its Appellant's Submissions than the Prosecution and reiterates that the requested extension falls within the range granted by other tribunals in other cases.[31]

4. In its Response, the Defence states that the Prosecution's submissions in its Motion "are amplified significantly by those in the Prosecution Response and, accordingly, that the Defence's reply to the Prosecution Response would provide the most efficient way of addressing all relevant issues."[32] The Defence makes no further submissions in its Response. The Prosecution replies that the Defence's assertion regarding amplification is without merit and that Defence cannot incorporate its substantive response to the Prosecution Motion in its reply.[33]

5. The Prosecution and Defence both submit that any extensions of time or page limits granted by the Appeals Chamber should be granted equally to both Parties to ensure no undue advantage accrues to either party.[34]

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[28] Defence Motion, para. 19, *citing* RUF Kallon Extension Decision; AFRC Appeal Brief Extension Decision; CDF Appeal Brief Extension Decision.
[29] Prosecution Response, paras 2, 3.
[30] Prosecution Response, para. 4.
[31] Defence Reply, para. 3.
[32] Defence Response, para. 2.
[33] Prosecution Reply, para. 5.
[34] Prosecution Motion, para. 7; Defence Motion, paras 17, 20.

II. APPLICABLE LAW AND PRACTICE OF THE SPECIAL COURT

6. Rule 109 provides that the Pre-Hearing Judge shall ensure that the proceedings are not unduly delayed and shall take any measures related to procedural matters with a view to preparing the case for a fair and expeditious hearing.

7. Rule 108(A) provides that a party seeking to appeal a judgement or sentence shall file its notice of appeal not more than fourteen days from the receipt of the full judgement and sentence. Rules 111, 112 and 113 provide for the following time-limits, respectively: Appellant's Submissions shall be filed within twenty-one days of the filing of the Notice of Appeal; Respondent's Submissions shall be filed within fourteen days of the filing of the Appellant's Submissions; and Submissions in Reply shall be filed within five days after the filing of the Respondent's Submissions. Accordingly, the Rules provide for the completion of the filing of appeal submissions within fifty-four days, or approximately eight weeks, of the receipt of the full judgment and sentence.

8. Article 6(E) of the Practice Direction on dealing with Documents in The Hague Sub-Office ("Practice Direction") provides for the following page limits: Appellant's Submissions and Respondent's Submissions shall be no longer than one hundred pages or thirty thousand words, whichever is greater; and Submissions in Reply shall be no longer than thirty pages or nine thousand words, whichever is greater. Accordingly, the Practice Direction provides for a total of no more than two hundred and thirty pages or sixty-nine thousand words for appeal submissions, excluding the notices of appeal.

9. Rule 116 provides that a motion to extend a time limit may be granted upon a showing of good cause. Article 6(G) of the Practice Direction provides that an extension of the page limits may be granted if the moving Party demonstrates exceptional circumstances that necessitate the oversized filing.

10. In *Brima et al.*, the Appeals Chamber granted the Parties an extension of three weeks for the filing of the Appellant's Submissions.[35] The Appeals Chamber reasoned that the size of the Trial Judgment, the issuance of a Corrigendum, the fact that a recess fell during the period and the fact that the Defence counsel were not appointed until after the Sentencing Judgment was rendered constituted good cause for the extension. The Pre-Hearing Judge

further granted the Parties an extension of seven days for the filing of the Respondent's Submissions.[36] While the Parties had requested an extension of eleven days, the Pre-Hearing Judge reasoned that the Parties had already been granted an extension for the filing of the Appellant's Submissions and there was a need for the Appeals Chamber to dispose of the appeal expeditiously in order to avoid undue delay in granting an extension of only seven days.

11. Accordingly, the Parties in *Brima et al.* were granted a total of eighty-two days, or approximately eleven and a half weeks, from the receipt of the full judgement and sentence for the filing of their appeal submissions. The Parties did not request additional pages.

12. In *Fofana and Kondewa*, the Appeals Chamber granted the Parties an extension of four weeks and fifty pages for the filing of the Appellant's Submissions.[37] The Appeals Chamber reasoned that the fact that Defence Counsel was assigned on 19 October 2007 (ten days following receipt of the Sentencing Judgment in that case) constituted good cause for the extension of time limits. The Appeals Chamber also reasoned that the issues raised by the Trial Chamber and the notice of appeal filed by the Parties constituted exceptional circumstances warranting an extension of page limits. The Appeals Chamber found that the request for an extension of one hundred pages was excessive but that an extension of fifty pages was adequate. The Appeals Chamber further granted an extension of two weeks for the filing of the Respondent's Submissions.[38] The Appeals Chamber reasoned that the complexities of the issues presented by the Appellant's Submissions and the fact that a recess fell during the period constituted good cause for the extension.

13. Accordingly, the Parties in *Fofana and Kondewa* were granted a total of ninety-six days, or approximately fourteen weeks, from the receipt of the full judgement and sentence for the filing of their appeal submissions. The Parties were further granted a total extension of fifty pages for their appeal submissions.

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[35] AFRC Appeal Brief Extension Decision.
[36] *Prosecutor v. Brima et al.*, SCSL-04-16-A-654, Decision on Urgent Joint Defence and Prosecution Motion for an Extension of Time for the Filing of Response Briefs, 26 September 2007 [AFRC Response Brief Extension Decision].
[37] CDF Appeal Brief Extension Decision.
[38] *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-A-813, Decision on Urgent Renewed Joint Defence and Prosecution Motion for Extension of Time for the Filing of Response Briefs, 13 December 2007 [CDF Response Brief Extension Decision].

14. In *Sesay et al.*, the Pre-Hearing Judge granted the Parties an extension of ten days and fifty pages for the filing of the Appellant's Submissions.[39] The Pre-Hearing Judge reasoned that the length and complexity of the Trial Judgment, the need for the Accused to fully understand it and the issues raised in the notice of appeal constituted good cause for the extension of time limits. However, while the Party had requested an extension of eight weeks, the Pre-Hearing Judge found that an extension of ten days was reasonable. The Pre-Hearing Judge also reasoned that the thirty-one grounds of appeal and the length and complexity of the Trial Judgment constituted exceptional circumstances warranting an extension of page limits. However, while the Party had requested an extension of three hundred pages, the Pre-Hearing Judge found that request was excessive, and considered that an extension of fifty pages was sufficient. Further, the Pre-Hearing Judge granted the Parties an extension of seven days and fifty pages for the filing of the Respondent's Submissions. Finally, the Pre-Hearing Judge did not grant the Parties any extensions for the filing of Submissions in Reply.

15. Accordingly, the Parties in *Sesay et al.* were granted a total of seventy-one days, or approximately ten weeks, from the receipt of the full judgment and sentence for the filing of their appeal submissions.[40] The Parties were further granted a total extension of one hundred pages for their appeal submissions.

III. REASONING

16. I note that the Parties were previously granted a five-week extension for the filing of notices of appeal, for a total of forty-nine days from the receipt of the full judgement and sentence.

17. The additional extensions of time and page limits requested by the Parties in the instant Motions represent significant exceptions to the Rules, the Practice Direction and the practice of the Special Court. Notably, the Defence requests a total of one hundred and eleven days and three hundred pages for its Appellant's Submissions, a total of seventy-four days and one hundred and fifty pages for its Respondent's Submissions and a total of twenty days and one hundred pages for its Submissions in Reply. The Defence accordingly requests a total of two hundred and fifty-four days, or approximately thirty-six weeks, from the receipt of the

[39] RUF Kallon Extension Decision.

full judgment and sentence and a total five hundred and fifty pages for the filing of all appeal submissions. No previous Party before the Special Court has been granted more than one hundred days in total for the filing of all appeal submissions, much less the filing of the Appellant's Submission alone.

18. I find that the Parties have established good cause for the extension of time limits pursuant to Rule 116 and exceptional circumstances for the extension of page limits pursuant to Article 6(G) of the Practice Direction based on the complexity of the issues raised in the grounds of appeal and the size of the trial record. However, the Parties fail to provide persuasive justification for the specific extensions they request.

19. In its Motion, the Prosecution requests an extension of two weeks for the filing of the Appellant's Submissions.[41] In its Response, the Prosecution suggests that an extension of sixty-nine days for the Appellant's Submissions would be sufficient, but fails to provide any reasoning for this position or any explanation for the significant discrepancy between this position and the extension it requests in its Motion.[42]

20. The Defence fails to justify the specific extensions it requests by reference to the Rules, Practice Direction and practice of the Special Court. The Defence does not put forward arguments addressing the framework set forth in the Rules and Practice Direction and justifying the substantial deviation it proposes from that framework. Likewise, the Defence does not reference the prior decisions and practice of the Special Court, explaining why those prior cases are so dissimilar from this case as to warrant such a significant departure from the Special Court's practice. The trial records in prior cases were also significant in size. Appellants in prior cases also put forward comprehensive challenges to the Trial Chamber's findings. In particular, I note that appellants in prior cases challenged the Trial Chamber's crime base findings as well, which the Defence here does not contest. I further note that appellants in prior cases also challenged the Trial Chamber's identification and application of the elements of the crimes, which again the Defence here does not contest.

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[40] Due to a computational error, the Parties received an additional two days for the filing of the Respondent's Briefs. *Prosecutor v. Sesay et al.*, SCSL-04-15-A-1266, Corrigendum to Decision on Kallon Defence Motion for Extension of Time to File Appeal Brief and Extension of Page Limit, 6 May 2009.
[41] Prosecution Motion, paras 2, 6.
[42] Prosecution Response, para. 3.

21. I consider that the reliance by the Defence on the decisions of other tribunals in other cases is largely misplaced and certainly not dispositive.[43] Those tribunals apply different rules with substantively different provisions.[44] Similarly, the Defence fails to demonstrate that the cases cited represent a developed practice rather than *ad hoc* decisions. The Defence further analogizes to those other cases based solely on the length of the trial judgment, although it is noted that the majority of the cases cited are complex multi-accused cases.

22. Finally, the length of the Trial Judgment was already fully considered in the previously granted extension of time for the filing of the notices of appeal.[45]

23. In determining extensions of time and page limits that are reasonable and proportionate in the circumstances, I consider first the framework set out in the Rules and Practice Direction and the clear practice of the Special Court. As noted above, the Rules and Practice Direction provide for the completion of the filing of appeal submissions within fifty-four days, or approximately eight weeks, of the receipt of the full judgment and sentence, and for a total of no more than two hundred and thirty pages or sixty-nine thousand words for appeal submissions, excluding the notices of appeal.

24. The parties in prior cases have been granted extensions of time of two to six weeks in total and extensions of fifty to one hundred pages in total, depending on the specific circumstances of the case and the requests of the parties. In this regard, I note that the extensions of time granted in *Fofana and Kondewa* were largely premised on the facts that Defence Counsel was not assigned until after the receipt of the full judgment and sentence and that a recess fell during the submission period.[46] Neither of these considerations applies here.

25. As noted previously, the Parties have established good cause and exceptional circumstances based on the complexity of the issues raised in the grounds of appeal and the size of the trial record. Both the Defence and Prosecution have appealed the Trial Chamber's findings on the Appellant's individual criminal liability for aiding and abetting and planning. The Defence has filed thirty grounds of appeal challenging the Trial Chamber's findings on

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[43] Defence Motion, paras 12-15.
[44] Rules of Procedure and Evidence, International Criminal Tribunal for the former Yugoslavia, IT/32/Rev.46, Rules 108, 111-113; Rules of Procedure and Evidence, Special Tribunal for Lebanon, STL/BD/2009/01/Rev. 4, Rules 177, 182-184.
[45] *Taylor* Decision on Filing Notice of Appeal.
[46] CDF Appeal Brief Extension Decision; CDF Response Brief Extension Decision.

both the *actus reus* and *mens rea* for these modes of liability.[47] Likewise, the Prosecution has filed two grounds of appeal contending that the Trial Chamber should have convicted the Appellant for ordering and instigating the commission of all crimes charged in the Indictment.[48] Without detracting from the complexity of the other issues raised on appeal, I consider that these challenges to the Trial Chamber's finding on the Appellant's individual criminal liability raise complex issues of law and fact that necessitate additional review of the Trial Chamber's findings and careful consideration of the relevant jurisprudence. I further consider that the scope of the challenges to the modes of liability in this appeal is substantially broader than in prior cases, necessitating additional time and pages for the presentation of focused and coherent arguments on appeal.

26. The trial record in this proceeding is unquestionably substantial. The Indictment charged the Appellant with eleven Counts covering a broad temporal scope and wide geographic area. There were four hundred and twenty trial days, during which one hundred and fifteen witnesses were heard, one thousand five hundred and twenty-one exhibits were admitted and forty-nine thousand pages of transcript were produced. There were further one thousand two hundred and seventy-nine filings and decisions, totalling thirty-eight thousand and sixty-nine pages.

27. As the Defence notes, it has raised forty-five grounds of appeal comprehensively challenging the Trial Chamber's findings.[49] I consider that the Defence will need additional time and pages in order to comprehensively and coherently set forth its arguments. I further consider that the Prosecution will equally need additional time and pages in order to effectively respond to the Defence's contentions. Likewise, while the Prosecution has raised only four grounds of appeal, as noted above its challenges to the Trial Chamber's findings on the Appellant's individual criminal liability raise complex issues of law and fact. I consider that the Prosecution will need additional time and pages in order to comprehensively and coherently set forth its arguments, and I further consider that the Defence will need additional time and pages in order to effectively respond to the Prosecution's contentions. In this regard, I note that the Defence accurately characterizes the framework of the Rules with regard to the time allowed for Appellant's Submissions and Respondent's Submissions.[50] However, I

[47] Defence Notice of Appeal.
[48] Prosecution Notice of Appeal.
[49] Defence Motion, para. 10.
[50] Defence Motion, para. 16.

consider that, in the specific circumstances of this case, as the Appellant's Submissions will raise complex issues of law and fact, both the Prosecution and the Defence will require time equal to that provided for the Appellant's Submissions in order to prepare their Respondent's Submissions. I further consider that the Appeals Chamber will benefit in its consideration of the Parties' appeals from well thought-out and comprehensive responses.

28. Finally, I note that Counsel for both the Prosecution and the Defence are experienced lawyers with substantial knowledge of international criminal law and procedure. I further note that Counsel for the Prosecution and the Defence have participated throughout the proceedings and are intimately familiar with the facts and law of the case. I consider that these facts balance the complexity of the issues of law and fact raised and the size of the trial record. I further consider that the Parties will accordingly not require substantial additional time and pages for Submissions in Reply in order to address new or unanticipated arguments or issues.

29. In light of the above, I find that the following extensions of time are reasonable and proportionate: (i) for the Appellant's Submissions pursuant to Rule 111, an extension of thirty-two days, for a total of fifty-three days from the filing of the Notices of Appeal; (ii) for the Respondent's Submissions pursuant to Rule 112, an extension of thirty-nine days, for a total of fifty-three days from the filing of the Appellant's Submissions; and (iii) for the Submissions in Reply pursuant to Rule 113, an extension of two days, for a total of seven days from the filing of the Respondent's Submissions.

30. I further find that an extension of two hundred pages in total for both the Appellant's Submissions and the Respondent's Submissions is reasonable and proportionate. Considering that Counsel are experienced lawyers and best-placed to assess their needs and strategy, the Parties may allocate this extension between the Appellant's Submissions and the Respondent's Submissions as they see fit. I further find that an extension of twenty pages for Submissions in Reply is reasonable and proportionate. Counsel are reminded of the provisions of Article 6(F) of the Practice Direction in this regard, and are further reminded that the above extensions are a maximum but not a minimum. Finally, with regard to appendices and annexes, Counsel are reminded that all substantive arguments must be presented in the main text.

IV. DISPOSIION

31. For the foregoing reasons, I hereby **GRANT** the Defence and Prosecution Motions, **IN PART**, and **ORDER** as follows:

(i) The Parties are granted an extension of thirty-two (32) days to file their Appellant's Submissions pursuant to Rule 111, which must be thus submitted no later than 10 September 2012.

(ii) The Parties are granted an extension of thirty-nine (39) days to file their Respondent's Submissions pursuant to Rule 112, which must be thus submitted no later than 2 November 2012.

(iii) The Parties are granted an extension of two (2) days to file their Submissions in Reply pursuant to Rule 113, which must be thus submitted no later than 9 November 2012.

(iv) The Parties are granted an extension of two hundred (200) pages in total for both their Appellant's Submissions and Respondent's Submissions, so that the Appellant's Submissions and Respondent's Submissions together must not exceed four hundred (400) pages or one hundred and twenty thousand (120,000) words, whichever is greater.

(v) The Parties are granted an extension of twenty (20) pages for their Submissions in Reply, so that the Submissions in Reply must not exceed fifty (50) pages or fifteen thousand (15,000) words, whichever is greater.

Done in The Hague, The Netherlands, this 7th day of August 2012.

Hon. Justice Shireen Avis Fisher
Pre-Hearing Judge

[Seal of the Special Court for Sierra Leone]

1143)

SCSL-03-01-T
(31250 - 31324)

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THE SPECIAL COURT FOR SIERRA LEONE

Trial Chamber II

Before: Justice Julia Sebutinde, Presiding
Justice Richard Lussick
Justice Teresa Doherty
Justice El Hadji Malick Sow, Alternate

Registrar: Ms. Binta Mansaray

Date: 10 January 2011

Case No.: SCSL-03-01-T

SPECIAL COURT FOR SIERRA LEONE
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THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

URGENT AND PUBLIC WITH ANNEXES A-N

DEFENCE MOTION FOR DISCLOSURE AND/OR INVESTIGATION OF UNITED STATES GOVERNMENT SOURCES WITHIN THE TRIAL CHAMBER, THE PROSECUTION AND THE REGISTRY BASED ON LEAKED USG CABLES

Office of the Prosecutor:
Ms. Brenda J. Hollis

Counsel for Charles G. Taylor:
Mr. Courtenay Griffiths, Q.C.
Mr. Terry Munyard
Mr. Morris Anyah
Mr. Silas Chekera
Mr. James Supuwood
Ms. Logan Hambrick, Legal Assistant

assistance versus the prohibition against receiving instructions – are clear and obvious and must be respected.

Disclosure and/or Investigation

17. The Trial Chamber has the inherent power and duty to ensure that proceedings are fair and impartial. Rule 26*bis* mandates that the Chamber "shall ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and the Rules, with full respect for the rights of the accused..." That Rule and others, such as Rule 54 (which vests the Trial Chamber with the power to "issue orders... as may be necessary for the purposes of an *investigation* or for the preparation or conduct of the trial"), confirm that inherent in the Rules is clear recognition that a Chamber has inherent powers to oversee and regulate the conduct of proceedings before it.
18. Accordingly, this Court has the inherent power to order the Prosecution and the Registry to disclose information which stands to undermine the integrity and impartiality of the proceedings, and/ or to order an investigation into the same. The same applies with equal force to the obligation of the Trial Chamber to investigate, in appropriate circumstances, any one or more of its members.[36]

IV. ARGUMENT

19. The Cables and the Apology clearly indicate, *inter alia*, two things: 1) the USG's desire to ensure that Mr. Taylor not return to Liberia;[37] and 2) proof that there is and have been contacts between the Trial Chamber, the OTP and the Registry, respectively, and agents of the USG outside the official lines of communication.[38] This, it is submitted, raises serious

[36] Compare, for example, the Defence's instant request for the Trial Chamber to investigate the leak within its own quarters, to Defence requests at the ICTR for disclosure from a Judge of material or information in the possession of the Judge which is capable of demonstrating actual bias or the appearance of bias. *Karemera et al v Prosecutor*, ICTR-98-44-AR73.15, Decision on Joseph Nzirorera's Appeal Against a Decision of Trial Chamber III Denying the Disclosure of a Copy of the Presiding Judge's Written Assessment of a Member of the Prosecution Team, 5 May 2009, para. 11 (deeming such requests appropriate and not frivolous).
[37] March 2009 cable, paras. 11, 13 and 14.
[38] April 2009 cable: communication from a source in the Trial Chamber, para. 7 ("one Chamber contact believes that the Trial Chamber could have accelerated the Court's work by excluding extraneous material and arguments"); communications from sources in the Prosecution and Registry, para. 7 ("contacts in the Prosecution and Registry speculate that Justice Sebutinde may have a timing agenda. They think she, as the only African judge, wants to hold the gavel as presiding judge when the Trial Chamber announces the Taylor judgment. Reportedly, her next stint as presiding judge begins in January").

doubts about the independence and impartiality of the Special Court's prosecution of Charles Taylor. Viewed objectively and reasonably, evidence suggests that the indictment and trial of Mr. Taylor by the Special Court is no more than an extension of U.S. foreign policy interests in West Africa, with there being no connection to any alleged crimes in Sierra Leone.

20. This is even more so when the Cables are considered in the greater context of the operation of the Special Court, which was created and funded in large part by the American Government. As indicated earlier, American personnel have also held very important positions in the Prosecution. The OTP and its Investigations division has been led by five employees of the USG: David M. Crane and Alan White (U.S. Department of Defence), Stephen Rapp (U.S. Attorney and presently U.S. Ambassador at Large for War Crimes), Brenda J. Hollis (U.S. Air Force intelligence officer and judge advocate), and James C. Johnson (U.S. Army and special operations instructor).[39] Furthermore, and most disturbing in view of the USG's stated position that Mr. Taylor must be tried and kept away from West Africa for a long time, the OTP has received, directly and separate from the contributions by the USG to the Special Court as a whole, undisclosed and unaccounted for sums of money from the USG to support Prosecution operations. The Defence is at a loss as to what covert operations the Prosecution runs on such clandestine funding, suffice to say that this casts serious doubts on the independence of the prosecution of the Accused. Lead Defence Counsel has often called the trial political and Taylor's indictment selective, especially when considered against the decision not to indict similarly-situated Tejan Kabbah.[40] This confluence of factors leads to the possible conclusion that Mr. Taylor is a target of selective prosecution[41] and that the integrity of the trial process is irreparably tainted.

21. The only way to remove any doubt about the independence and impartiality of the tribunal is for the Trial Chamber to order the disclosure of and/or an investigation into the identity of the source(s) within the Trial Chamber, Prosecution and Registry and the full nature of their relationship with the USG. Specifically, this must include an explanation of the context and circumstances within which each of the comments recorded in the Cables were made to representatives of the USG. Furthermore, in the interests of justice, the Trial Chamber should

[39] See FN 14 above, and Annexes F-I.
[40] Defence Opening Statement, p. 24321.
[41] To demonstrate selective prosecution, the Defence must show: i) an improper or unlawful motive for prosecution and ii) that similarly situated persons were not prosecuted. *Prosecution v. Delalic et al,* IT-96-21-A, Judgement, 20 February 2001, para. 611.

order disclosure of any information tending to suggest that the Prosecution has sought or received instructions from the USG regarding any aspect of the Taylor trial, as well as an explanation and an accounting of the money provided by the USG to the Prosecution. If the parties are unwilling or unable to provide such information forthwith, then the Trial Chamber should order an investigation into the same.

V. CONCLUSION & RELIEF REQUESTED

22. Given the seemingly compromised impartiality and independence of the Special Court for Sierra Leone in light of its connection to the USG as alleged herein, the Trial Chamber must order disclosure and/or and investigation into the following:

    i. the identity of the source(s) within the Trial Chamber, Prosecution and Registry who provided the USG with the information in the Cables;

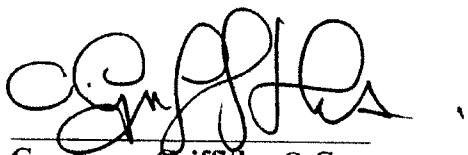
    ii. the full nature of the respective sources' relationship with the USG, specifically including an explanation of the context and circumstances in which each of the comments recorded in the Cables were made to representatives of the USG;

    iii. information tending to suggest that the Prosecution has sought or received instructions from the USG regarding any aspect of the Taylor trial; and

    iv. a full explanation of the money provided by the USG to the Prosecution, including the amounts of money given and when; the purpose of the funds; how the funds were used; and who the OTP was accountable to in the distribution and use of the funds.

23. The Defence further requests that the issue be considered on an expedited basis, given the advanced stage of the proceedings.

Respectfully Submitted,



Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 10th Day of January 2011,
The Hague, The Netherlands

1118)

SCSL-03-01-T
(30904-30951)

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30904

SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

Before:	Justice Julia Sebutinde, Presiding Judge Justice Richard Lussick Justice Teresa Doherty Justice El Hadji Malick Sow, Alternate Judge
Registrar:	Binta Mansaray
Case No.:	SCSL-03-1-T
Date:	11 November 2010

SPECIAL COURT FOR SIERRA LEONE
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PROSECUTOR

v.

Charles Ghankay TAYLOR

DECISION ON PUBLIC WITH CONFIDENTIAL ANNEXES A-J AND PUBLIC ANNEXES K-O DEFENCE MOTION REQUESTING AN INVESTIGATION INTO CONTEMPT OF COURT BY THE OFFICE OF THE PROSECUTOR AND ITS INVESTIGATORS

Office of the Prosecutor:
Brenda J. Hollis
Leigh Lawrie

Counsel for the Accused:
Courtenay Griffiths, Q.C.
Terry Munyard
Morris Anyah
Silas Chekera
James Supuwood

40. The Trial Chamber notes that the Prosecution has disclosed all payments made to witnesses to the Defence and that the Defence cross-examined those witnesses during the course of the trial.[90] As outlined above,[91] the issue raised does not fall within the ambit of Rule 77 as such. It is instead a question of discretionary payments and a possible abuse of that discretion under Rule 39(ii) in that the payments might not have been necessary for the safety, support or assistance of the potential witnesses and sources. The alleged abuse of any discretion under Rule 39(ii) will however only be considered at the stage of final deliberations, taking into account the evidence adduced and the cross-examination of the witnesses in question. It is not a matter that falls within the ambit of Rule 77.

3) Allegations relating to DCT-192

41. The Defence submits that during the course of questioning DCT-192, Prosecution Investigator Gilbert Morissette physically assaulted DCT-192, a suspect and/or potential witness, in order to elicit his cooperation and confession.[92] It cites in support of this allegation a signed statement of Logan Hambrick, Legal Assistant to the Defence, and an excerpt of Prosecution interview transcripts with Witness DCT-192.[93]

42. In her statement, Hambrick declares that during a proofing session with DCT-192 in 2010, the latter told her that he was taken from the Pademba Road Prison in Freetown in November 2002 where he was being held on charges of subversion, to meet with Prosecution investigators; that during this meeting Morissette accused him of giving an answer that was not "good enough",[94] grew angry and slapped him in the presence of other investigators; that following this interview, the Prosecution continued to solicit his cooperation and suggested that they would not indict him if he would agree to testify against Chief Sam Hinga Norman; that upon his release from Pademba Road, a member of the Sierra Leonean Police who worked for the Prosecution, Tamba Mbeki, made sure he had "clearance" to continue his subversive activities as an operative for LURD; and that "ultimately, due to these benefits and threats, [he] felt pressured to cooperate with the Prosecution and provide them with information, even though he refused to testify against Norman."[95] The 10 pages of interview

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[90] See only Defence references in Annex N.
[91] See para. 28 supra.
[92] Motion, para. 15.
[93] Motion, Confidential Annex B.
[94] Motion, Confidential Annex B, para. g.
[95] Motion, Confidential Annex B, para. l.

765) SCSL-03-01-T (24690 - 24718) 24690 10039

SPECIAL COURT FOR SIERRA LEONE

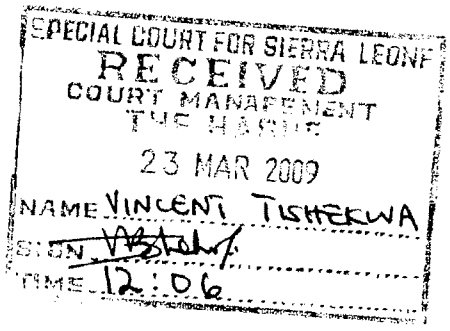
TRIAL CHAMBER II

Before: Justice Richard Lussick, Presiding Judge
Justice Teresa Doherty
Justice Julia Sebutinde
Justice El Hadji Malick Sow, Alternate Judge

Registrar: Herman von Hebel

Case No.: SCSL-03-1-T

Date: 23 March 2009



PROSECUTOR

v.

Charles Ghankay TAYLOR

DECISION ON DEFENCE APPLICATION FOR JUDICIAL NOTICE OF ADJUDICATED FACTS FROM THE AFRC TRIAL JUDGEMENT PURSUANT TO RULE 94(B)

Office of the Prosecutor:
Brenda J. Hollis
Nicholas Koumjian
Nina Jørgensen
Christopher Santora

Defence Counsel for Charles G. Taylor:
Courtenay Griffiths, Q.C.
Terry Munyard
Andrew Cayley
Morris Anyah

TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court");

SEISED of the "Defence Application for Judicial Notice of Adjudicated Facts from the AFRC Trial Judgement pursuant to Rule 94(B)", filed on 9 February 2009 ("Motion");[1]

NOTING the "Public with Annex A Prosecution Response to Defence Application for Judicial Notice of Adjudicated Facts from the AFRC Trial Judgement pursuant to Rule 94(B)", filed on 19 February 2009 ("Response");[2]

NOTING ALSO the "Defence Reply to Prosecution Response to Defence Application for Judicial Notice of Adjudicated Facts from the AFRC Trial Judgement pursuant to Rule 94 (B)", filed on 24 February 2009 ("Reply");[3]

RECALLING the Trial Chamber Judgment in *Prosecutor v. Brima, Kamara and Kanu* ("AFRC Trial Judgement");[4]

COGNISANT of the provisions of Article 17 of the Statute of the Special Court for Sierra Leone ("Statute") and Rules 26*bis*, 54, 73, 85 and 94 of the Rules of Procedure and Evidence ("Rules");

HEREBY DECIDES AS FOLLOWS, based solely on the written submissions of the parties, pursuant to Rule 73 A of the Rules;

I. SUBMISSIONS

1. Defence Motion

1. In its Motion the Defence requests that the Trial Chamber exercise its discretion by taking judicial notice of 15 facts which have been adjudicated upon in the AFRC Trial Judgement in the case of *Prosecutor v. Brima, Kamara and Kanu* ("AFRC Case") and which the

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[1] SCSL-03-01-T-723.
[2] SCSL-03-01-T-738.
[3] SCSL-03-01-T-743.
[4] *Prosecutor v. Brima, Kamara, Kanu*, SCSL-04-16-T-628, Judgement, 20 June 2007.

Defence submits are relevant to the modes of liability with which the Accused is charged.[5] The 15 facts are set out in Annex A to the Motion, and some of them have been re-formulated or modified in paragraph 18 of the Reply. It submits that none of the proposed adjudicated facts are contentious or involve legal conclusions.[6] The Defence further contends that admission of the facts would enable the Defence to streamline the evidence it would need to present during the Defence case.[7] Taking judicial notice of these facts would promote judicial economy and the harmonisation of the judgements of the Special Court.[8]

2. Relying on case law of Trial Chamber I, the Defence submits that Rule 94 has a two-fold rationale: (a) to promote judicial economy by dispensing with the need for the parties to lead evidence in order to prove supplementary facts or allegations already proven in past proceedings, and (b) to harmonise judgements in relation to certain factual issues that arise in multiple cases before the Special Court.[9] With regard to Rule 94(B) specifically, it submits that the Rule creates a "well-founded presumption for the accuracy of [the adjudicated] fact, which therefore does not have to be proven again at trial, but which, subject to that presumption, may be challenged at trial."[10]

3. According to the Defence, there is settled jurisprudence on the legal criteria for determining what constitutes an adjudicated fact. These are:

a. The fact must be distinct, concrete and identifiable;
b. The fact must be relevant and pertinent to an issue in the current case;
c. The fact must not contain legal conclusions, nor may it constitute a legal finding;
d. The fact must not be based on a plea agreement or upon facts admitted voluntarily in an earlier case;
e. The fact clearly must not be subject to pending appeal, connected to a fact subjected to pending appeal, or have been settled finally on appeal;
f. The fact must not go to the acts, conduct or mental state of one of the accused persons;

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[5] Motion, para. 1.
[6] Motion, para. 2.
[7] Motion, para. 2.
[8] Motion, para. 2.
[9] Motion, para. 4, referring to *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-1184, Decision on Sesay Defence Application for Judicial Notice to be taken of Adjudicated facts under Rule 94(B), 23 June 2008 ["Sesay Decision on Adjudicated Facts"], para. 17.
[10] Motion, para. 6, referring to Sesay Decision on Adjudicated Facts, para. 18.

g. The fact must not be sufficient, in itself, to establish the criminal responsibility of an accused person; and
h. The fact must not have been re-formulated by the party making the Application in a substantially different or misleading fashion; that is to say, the fact must not differ significantly from the way the fact was expressed when adjudicated in the previous proceedings, it must not have been abstracted from the context of the original judgement in an unclear or misleading manner, and it must not be unclear or misleading in the context in which it is placed in the Application.[11]

4. The Defence submits that the Trial Chamber would promote fairness and judicial economy if it were to accept the proposed facts and consequently narrow the factual issues in dispute. It avers that the rights of the Accused will be upheld by ensuring that the trial is not unnecessarily long.[12] The Defence adds that the Prosecution would not be prejudiced by any Trial Chamber decision to take judicial notice of the adjudicated facts as it could move the Trial Chamber to call witnesses to challenge any rebuttable presumption that would be created. It notes that an ICTR Trial Chamber took judicial notice of certain facts even after the Defence had presented most of its evidence.[13]

5. The Defence contends that all the proposed facts are distinct, concrete and identifiable; that they are not of a legal character; that they have not been taken out of context; and that they have not been contradicted by any finding of the Appeals Chamber; and that they are relevant to the instant case.[14]

6. The Defence submits that all 15 facts are relevant as they address the relationship between the leaders of the AFRC/RUF and/or the command structure of the two factions, and specifically, the relationship between the AFRC and RUF as it pertains to the Freetown invasion in January 1999,[15] and the fact that the RUF did not come into Freetown as a cohesive organisation between about 21 December 1998 and 28 February 1999.[16]

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[11] Motion, para. 7, referring to Sesay Decision on Adjudicated Facts, para. 19.
[12] Motion, paras 8, 9.
[13] Motion, para. 10.
[14] Motion, paras 11-13.
[15] Motion, para. 12.
[16] Motion, para. 13.

7. By reference to a Decision in the *Krajisnik* case, the Defence concludes that as long as the fair trial rights of the accused are respected, the Trial Chamber is under a duty to avoid wasting unnecessary time and resources on undisputed facts.[17]

2. **Prosecution Response**

8. The Prosecution opposes the Motion and submits that it should be denied,[18] on the grounds that the exercise of the Trial Chamber's discretion to take judicial notice of the proposed adjudicated facts would be contrary to the interests of justice and would not promote judicial economy and that the Defence has failed to satisfy several underlying criteria for judicial notice of adjudicated facts.[19]

9. The Prosecution points out that in contrast to Rule 94(A), according to which judicial notice is mandatory, Rule 94(B) vests the Trial Chamber with a discretionary power to take judicial notice of adjudicated facts.[20] It argues that even if this Trial Chamber were to adopt the legal criteria for taking judicial notice of adjudicated facts as laid out by Trial Chamber I, it would still retain its discretion to refuse to take judicial notice of adjudicated facts where doing so would not serve the interests of justice. It notes that the overriding consideration is whether taking judicial notice of the adjudicated fact will promote judicial economy while ensuring that the trial is fair, public and expeditious.[21]

10. The Prosecution refers to the finding of Trial Chamber I in the Sesay Decision on Adjudicated Facts, stating that the "[...] each criminal case centres on determining the guilt or innocence of a particular accused person or persons. As such, the issues, evidence and factual findings in one case cannot bind the prosecution in a different case."[22] It notes that a central issue in the instant case is the relationship between the AFRC and the RUF, concerted action between them culminating in the attack on Freetown in January 1999, and the relationship

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[17] Motion, para. 15, referring to *Prosecutor v. Krajisnik*, IT-00-39-PT, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92*bis*, 28 February 2003, paras 11-12.
[18] Response, para. 2.
[19] Response, para. 2.
[20] Response, para. 4.
[21] Response, para. 4, referring to Sesay Decision on Adjudicated Facts paras 15, 19, 21.
[22] Response, para. 5, referring to Sesay Decision on Adjudicated Facts, para. 32.

that none of the findings from the AFRC Trial Judgement at issue were contested in the parties' notices of appeal in that case, filed on 2 August 2007, and that the Defence has offered no explanation for the delay.[30]

15. The Prosecution submits that any rebuttal exercise would consume additional time and resources which would not be justified by the mere presumption of accuracy accorded to certain facts.[31] The Prosecution, therefore, submits that granting the Defence Motion would clearly disadvantage the Prosecution as it would have "presented its entire case without the knowledge of its burden to overcome a rebuttable presumption as to the veracity of certain now judicially noticed facts." Thus taking judicial notice of the proposed adjudicated facts would be contrary to the interests of justice and would not achieve judicial economy.[32]

16. More specifically, the Prosecution submits that Facts 1, 5, 6, 7 and 8 are not distinct, concrete and identifiable,[33] and that Facts 6, 9, 10, 11 and 12 lack relevance or are only tangentially relevant.[34] The Prosecution further objects to taking judicial notice of the facts at 1, 2, 3, 5, 7, and 8, contending that they include omissions and misstatements and are of a tendentious nature.[35]

3. Defence Reply

17. In reply, the Defence has slightly reformulated or amended Facts 1, 3, 5, 7 and 8 of the proposed adjudicated facts.[36]

18. The Defence contests the Prosecution claim that the adjudicated facts from the AFRC Judgment are "evidence of the Defence," when in fact a review of the AFRC Trial Judgement

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[30] Response, para. 9, footnote 31, referring to *Prosecutor v. Prlic et al.*, IT-04, 74, PT, Decision on Motion for Judicial Notice of Adjudicated Facts pursuant to Rule 94 (B), 14 March 2006.
[30] Response, para. 10.
[31] Response, para. 10, referring to *Prosecutor v. Hadzihasanovic and Kubura*, IT-01-47-T, Decision on Judicial Notice of Adjudicated Facts following the Motion submitted by Counsel for the Accused Hadzihasanovic and Kubura on 20 January 2005, 14 April 2005; *Prosecutor v. Ntakirutimana*, ICTR-96-10-T, Decision on Prosecutor's Motion for Judicial Notice of Adjudicated Facts, 22 November 2001, para. 31; Sesay Decision on Adjudicated Facts, paras 35, 36.
[32] Response, paras 12, 14.
[33] Response, para. 16.
[34] Response, para. 17.
[35] Response, para. 18.
[36] Reply, paras 3, 17-18.

between the two groups and the Accused.[23] The Prosecution concludes that no interests of justice would be achieved by giving the proposed evidence of the Defence a presumption of accuracy and that the Trial Chamber should base its findings on the evidence before it in the current case.[24]

11. The Prosecution provides examples of the evidence given by a number of its witnesses in the instant trial regarding the relationship between the AFRC and the RUF, and the relationship between the two groups and the Accused, and argues that while some of the issues were not core issues in the *AFRC* case, they are all clearly central to the charges against the Accused. It concludes that it would therefore be improper to take judicial notice of any of the proposed facts, and in particular Facts 1, 8, 9, 12, 13, 14, and 15.[25]

12. The Prosecution submits that its witnesses in the instant case provided more detail regarding proposed Facts 3 and 7, concerning the AFRC and RUF command structures during the Junta period, and argues that the evidence in this case comes from a variety of perspectives and paints a more complete and nuanced picture than did the evidence in the AFRC case.[26] Further, Facts 2 and 5 go to core issues in the current case and therefore it would not be in the interests of justice to take judicial notice of facts relating to these central issues.[27]

13. The Prosecution, however, refers to an ICTY Decision where a Trial Chamber only took judicial notice of facts which were not the subject of reasonable dispute and not "facts which involve interpretation",[28] but also refers to case law that "[a]s a party may challenge, at trial, a fact that has been judicially noticed, it follows that a Chamber is not restricted to taking judicial notice of facts that are not the subject of disputes between the parties."[29]

14. With regard to the timing of the Defence application, the Prosecution observes that the Defence filed its Motion after the Prosecution had announced that it had called its last witness,

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[23] Response, paras 5, 7.
[24] Response, para. 6.
[25] Response, footnote 24.
[26] Response, para. 8.
[27] Response, paras 8, 9, and footnote 30, referring to *Prosecutor v. Popovic et al.*, IT-05-99-T, Decision on Prosecution Motion for Adjudicated Facts, 26 September 2006, para. 19.
[28] *Prosecutor v. Sikirica et.al.*, IT-95-8, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 26 September 2006.

suggests that the facts were based primarily on the testimony of Prosecution witnesses.[37] The Defence submits that there would be no harm to the Prosecution's case if the previous testimony of its witnesses, in the AFRC, were granted a presumption of accuracy in the current case.[38] The Defence adds that only one of the purposes of Rule 94(B) is judicial economy; the other is to create consistency of case law. These twin purposes need only be balanced against the right of the accused to a fair trial.[39]

19. The Defence submits that the Prosecution will not be prejudiced by the admission of the proposed facts because, as the Prosecution has conceded, it has already led a certain volume of evidence on the issues in dispute.[40]

20. With regard to the timing of the Defence Motion, the Defence stresses that Rule 94(B) imposes no restriction as to which stage in the proceedings an adjudicated facts motion should be brought. It notes that the Defence case has yet to begin and that these proposed facts will help form the basis of the Defence case. The Defence asserts that it hoped to do a joint filing of adjudicated facts from the AFRC and RUF judgements, but that delays in issuing the judgement in the latter case prevented the Defence from doing so.[41]

21. The Defence submits that the case law cited by the Prosecution supports its position that late filings are acceptable and it notes that in those cases judicial notice was taken regardless of the advanced stage of the proceedings.[42]

22. The Defence submits that the relationship between the AFRC and RUF, and any relationship between either of these organizations and the Accused, is central to the instant case, and that the Prosecution cannot argue both that the proposed facts go to issues central to the present case and lack relevance. The Defence avers that there is no prohibition on taking

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[37] Reply, para. 4.
[38] Reply, para. 4.
[39] Reply, para. 5.
[40] Reply, para. 7.
[41] Reply, para. 9.
[42] Reply, para. 10, referring to Sesay Decision on Adjudicated Facts; *Prosecutor v. Hadzihasanovic and Kubura*, IT-01-47-T, Decision on Judicial Notice of Adjudicated Facts following the Motion submitted by Counsel for the Accused Hadzihasanovic and Kubura on 20 January 2005, 14 April 2005; *Prosecutor v. Ntakirutimana*, ICTR-96-10-T, Decision on Prosecutor's Motion for Judicial Notice of Adjudicated Facts, 22 November 2001.

judicial notice of facts that are central to a case; this is a discretionary issue.[43] The Defence argues that the fact that the relationship between the AFRC and RUF is central to the case is precisely why judicial economy will be promoted by taking judicial notice of the proposed acts, and notes that none of the proposed facts go to the relationship between the factions and the Accused.[44]

23. The Defence refers to Agreed Fact 31 in the "Joint Filing by the Prosecution and Defence Admitted Facts and Law"[45] regarding relations between the AFRC and the RUF during the Freetown invasion, and points out that the fact agreed to by the previous Defence team was simply a factual recognition that elements of the RUF may have participated in the Freetown attack, but says nothing about the RUF as a cohesive organisation.[46]

24. The Defence refutes the Prosecution objection that the proposed adjudicated facts mix principal and accessory facts.[47] Further, it disagrees that the proposed adjudicated facts are purposefully misleading and tendentious, but in light of the Prosecution's objections would be prepared to amend some of the proposed Facts 1, 2, 3, 5, 7 and 8 if the Trial Chamber deems it necessary.

II. APPLICABLE LAW

25. Rule 94 states as follows:

> **Judicial Notice** *(amended 1 August 2003)*
>
> (A) A Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.
>
> (B) At the request of a party or of its own motion, a Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Special Court relating to the matter at issue in the current proceedings.

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[43] Reply, paras 12, 13.
[44] Reply, paras 12-14.
[45] *Prosecutor v Taylor*, SCSL-03-01-PT-227, Joint Filing by the Prosecution and Defence Admitted Facts and Law, 26 April 2007.
[46] Reply, para. 15.
[47] Reply, para. 16.

26. Whereas Rule 94 does not define what constitutes an "adjudicated fact" this Court has previously held that when deciding whether or not to take judicial notice of a proposed fact as an adjudicated fact, the following criteria must be met:

a. The fact must be distinct, concrete and identifiable;

b. The fact must be relevant and pertinent to an issue in the current case;

c. The fact must not contain legal conclusions, nor may it constitute a legal finding;

d. The fact must not be based on a plea agreement or upon facts admitted voluntarily in an earlier case;

e. The fact clearly must not be subject to pending appeal, connected to a fact subject to pending appeal, or have been settled finally on appeal;

f. The fact must not go to proof of the acts, conduct, or mental state of the accused person;

g. The fact must not be sufficient, in itself, to establish the criminal responsibility of the Accused;

h. The fact must not have been re-formulated by the party making the application in a substantially different or misleading fashion; that is to say, the fact must not differ significantly from the way the fact was expressed when adjudicated in the previous proceedings, it must not have been abstracted from the context of the original judgement in an unclear or misleading manner, and it must not be unclear or misleading in the context in which it is placed in the application.[48]

27. Facts that the Trial Chamber has taken judicial notice of under Rule 94(A) need not be proven again at trial. In contrast, Rule 94(B) creates a

> "well-founded presumption of accuracy of [the proposed fact], which therefore does not have to be proven again at Trial, but which, subject to that presumption, may be challenged at [...] trial."[49]

Like all rebuttable evidence, judicially noticed adjudicated facts remain subject to challenge by the non-moving party during the course of the trial.[50] As a party may challenge, at trial, an

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[48] Sesay Decision on Adjudicated Facts, para. 19.

[49] Sesay Decision on Adjudicated Facts, para. 18; see also *Prosecutor v. Karemera* et al., ICTR-98-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (AC), 16 June 2006, para. 42, stating the "facts noticed under Rule 94(B) are merely presumptions that may be rebutted [...] with evidence at trial."

[50] *Prosecutor v. Popovic et. al.*, IT-05-88-T, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex, 26 September 2006, para. 21.

adjudicated fact that has been judicially noticed, it follows that the Trial Chamber is not restricted to taking judicial notice of facts that are not subject of dispute between the parties.[51]

28. Pursuant to Rule 94(B), taking judicial notice of adjudicated facts is a matter for the exercise of the Trial Chamber's discretion. Therefore, even where a proposed adjudicated fact fulfils all of the aforementioned criteria, the Trial Chamber will retain its discretion not to take judicial notice of said fact if doing so will not best serve the interests of justice.[52] Factors to be considered in that regard are the rights of the accused and judicial economy.[53]

29. The Special Court has further established that

> "the overriding consideration is whether taking judicial notice of the said fact will promote judicial economy while ensuring that the trial is fair, public and expeditious. Other relevant factors in such a determination include: the stage of proceedings at the time the Application is brought; the volume of evidence already led by the parties in respect of the proposed adjudicated facts; whether the proposed adjudicated facts go to issues central to the present case; and the nature of the proposed adjudicated facts, including whether they are over-broad, tendentious, conclusory, too detailed, so numerous as to place a disproportionate burden on the opposing party to rebut the facts, or repetitive of evidence already heard in the case."[54]

30. Rule 94(B) has two purposes. The first is to promote judicial economy by dispensing with the need for the parties to lead evidence in order to prove supplementary facts or allegations already proven in past proceedings. The second is to harmonise judgements in relation to certain factual issues that arise in multiple cases before the Special Court.[55]

III. DELIBERATIONS

1. Timing of the Defence Application

31. The Defence filed the Motion after the Prosecution announced that it would be calling its last witness. The Prosecution objects to the timing of the Motion, submitting that it has

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[51] *Prosecutor v. Prlic et. al.*, IT-04-74-PT, Decision on Motion for Judicial Notice of Adjudicated Facts pursuant to Rule 94(B), 14 March 2006, para. 10.
[52] Sesay Decision on Adjudicated Facts, para. 20.
[53] Sesay Decision on Adjudicated Facts, para. 21.
[54] Sesay Decision on Adjudicated Facts, para. 21.

already closed its case and that trial fairness would require that it be given the opportunity to consider calling "rebuttal" evidence, either before the close of its case, or in a rebuttal case.[56] Therefore the granting of the Motion would be contrary to the interest of justice and would not achieve judicial economy.

32. The Trial Chamber finds that the timing of the Motion is not in itself of sufficient concern to justify dismissal of the Motion in its entirety.[57] The Chamber notes that the Motion was filed before the opening of the Defence case and is intended to streamline the Defence case.[58] Furthermore, the Prosecution submissions, if accepted would lead to an unacceptable limitation of the application of Rule 94(B) to the pre-trial stage or to the Prosecution case. The Trial Chamber notes that Rule 94(B) itself does not contain such a limitation and that in the event that the proposed adjudicated facts are judicially noticed, the Prosecution may have the option to challenge them by cross-examining Defence witnesses or by calling rebuttal evidence. The Trial Chamber accordingly rejects an objection based on this ground alone.

2. The Proposed facts go to issues central to the present case

33. The Prosecution submits that it would be inappropriate to take judicial notice of Facts 1, 2, 3, 5, 7, 8, 9, 12, 13, 14 and 15 as they relate to central issues in this case, specifically the relationship between AFRC and the RUF.[59] In support, the Prosecution refers to a decision in the *Popovic* case before the ICTY, which states:

> "[...] some of the proposed adjudicated facts go to issues which are at the core of this case. In balancing judicial economy with the Accused's right to a fair and public trial, the Trial Chamber is of the view that a number of these facts should be excluded in the interests of justice".[60]

34. The Prosecution argues that the issues in the AFRC case were different and not central issues in that case, but are central in the present case. Whether a proposed adjudicated fact

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[55] Sesay Decision on Adjudicated Facts, para. 17.
[56] Response, para. 10.
[57] *Prosecutor v. Hadzihasanovic and Kubura*, IT-01-47-T, Decision on Judicial Notice of Adjudicated Facts following the Motion submitted by Counsel for the Accused Hadzihasanovic and Kubura on 20 January 2005, 14 April 2005. The Trial Chamber also notes that the Motion in the Sesay Decision on Adjudicated Facts was filed much later than the Motion in the instant case.
[58] Motion, para. 2.
[59] Response, paras 7-9 and footnote 24.

goes to issues central to the present case is a relevant factor to be considered in determining whether the Trial Chamber should exercise its discretion to judicially notice such fact.[61] In the present case, the Trial Chamber has to examine each of the proposed facts individually in order to ascertain whether it fulfils this and other criteria for judicial notice.

3. General Considerations

35. The Trial Chamber has individually considered the proposed adjudicated facts set out in Annex A as amended in the Reply and finds that each of them is relevant and pertinent to an issue in the current case; does not contain legal conclusions or constitute a legal finding; is not based on a plea agreement or upon facts admitted voluntarily in the AFRC Case; is not subject to a pending appeal, nor is it connected to a fact pending appeal, nor has it been settled finally on appeal; does not go to proof of the acts, conduct or mental state of the Accused; and is not sufficient in itself to establish the criminal liability of the Accused.

36. The Chamber will consider in detail below, whether the proposed facts are sufficiently distinct, concrete and identifiable[62] and if they have been extracted in a manner that is not misleading.[63]

37. The Prosecution submits that the Defence, by submitting entire paragraphs rather than a specific fact, has obscured the principal facts it seeks to have judicial notice taken of, and objects specifically to proposed Facts 1, 5, 6, 7 and 8.[64] The Trial Chamber finds that proposed Facts 1, 5, 6, 7 and 8, as partly amended by the Defence in its Reply, are sufficiently distinct, concrete and identifiable.

4. Discussion

38. Having determined that the proposed facts satisfy the above mentioned general requirements, the Trial Chamber will now assess whether judicial notice may be taken of all of

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[60] *Prosecutor v. Popovic et al.*, IT-05-99-T, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts - With Annex, 26 September 2006, para. 19.
[61] Sesay Decision on Adjudicated Facts, para. 21.
[62] See para. 26.a) *supra*.
[63] See para. 26.h) *supra*.
[64] Response, para. 16.

the adjudicated facts proposed by the Defence and whether doing so would promote judicial economy and serve the interests of justice on a fact by fact basis.

39. Proposed Fact 1, as amended by the Defence Reply,[65] states:

> As the founders of the AFRC belonged to the Sierra Leone Army and therefore had been fighting the RUF since 1991, the coalition between the two factions following the 1997 coup was not based on longstanding common interests. Both factions officially declared that they were joining forces to bring peace and political stability to Sierra Leone. On 18 June 1997, the RUF issued an official apology to the nation for its crimes and went on to praise Johnny Paul Koroma's Government.[66]

40. The Prosecution objects that by omitting the final line of paragraph 169 of the AFRC Trial Judgement the proposed fact is tendentious and misleading.[67] In its Reply the Defence therefore proposed to include the last sentence of para. 169 of the AFRC Trial Judgement, if the Trial Chamber deems necessary.[68] This sentence stated that: "On 18 June 1997, the RUF issued an official apology to the nation for its crimes and went on to praise Johnny Paul Koroma's government."

41. The Prosecution, in addition, submits that this fact deals with the relationship between the RUF and AFRC and therefore goes to a central issue of the case.[69] The Trial Chamber, however, notes that the proposed fact does not discuss the relationship of these two organisations with the Accused. Furthermore, the Trial Chamber notes that the Prosecution concedes that it has led evidence on similar issues. The Trial Chamber considers that the proposed fact adds contextual elements to the evidence adduced by the Prosecution and therefore considers that taking judicial notice of proposed Fact 1 would promote judicial economy while causing no undue prejudice to the Prosecution.

42. Proposed Fact 2 states:

> [F]rom the earliest days there were tensions between the two factions and relations deteriorated over time. In October 1997, Johnny Paul Koroma ordered the arrest of two RUF leaders on charges that they were plotting with the CDF to overthrow his government. Not long after this incident, Koroma ordered the arrest of Issa Sesay, another top RUF commander, for his part in looting the Iranian Embassy in

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[65] Reply, para. 18 (a).
[66] AFRC Trial Judgement, para. 169 [footnotes omitted].
[67] Response, para. 16, Annex A.
[68] Reply, para. 18.
[69] Response, para. 7, footnote 24.

> Freetown. In response the RUF stopped attending joint meetings. In January 1998 Sam Bockarie, formally Vice-Chairman of the AFRC government in Foday Sankoh's absence, left Freetown for Kenema District because of his discontent with AFRC commanders.[70]

43. The Prosecution submits that Fact 2, which is based on para. 171 of the AFRC Trial Judgment, standing on its own is misleading. The previous paragraph in the AFRC Trial Judgement, para. 170, states that "commanders of both factions attended coordination meetings at which they planned operations and organised joint efforts to obtain arms and ammunition." Therefore, The Prosecution submits that in the absence of para. 170, Fact 2 is misleading.

44. The Trial Chamber agrees with the Prosecution submissions and finds that it may have been appropriate to take judicial notice of the adjudicated facts of both paragraphs. The Defence, however, has not proposed the inclusion of para. 170 of the AFRC Trial Judgement in its Reply.[71] Accordingly, the Trial Chamber considers that it would not be in the interests of justice to take judicial notice of proposed Fact 2 as this fact has been abstracted from the context of the AFRC Trial Judgement in a misleading manner.

45. Proposed Fact 3, as amended in the Reply,[72] states:

> The RUF and AFRC were allied in one government and worked closely together during the AFRC period, [but] the individuals continued to identify themselves as either RUF or SLA and that at an organisational level, separate commanders for each group co-existed in the Districts.[73]

46. The Defence has amended its wording of proposed Fact 3, to include the word "closely", following the Prosecution objection in its Response.

47. The Prosecution submits that the fact relates to a key issue and is misleading, as the Defence has omitted the phrase "available evidence suggests" following "AFRC period".[74] The Trial Chamber agrees with the submissions and considers that it would not be in the interests of justice to take judicial notice of proposed Fact 3 as this fact has been abstracted from the

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[70] AFRC Trial Judgement, para. 171 [footnotes omitted].
[71] Reply, para. 18 (b).
[72] Reply, para. 18 (e).
[73] AFRC Trial Judgement, para. 1655 [footnotes omitted].
[74] Response, paras 8 and 18.

context of the AFRC Trial Judgement in a misleading manner. The sentence "available evidence suggests" highlights that the Prosecution did not prove the issue beyond a reasonable doubt. Therefore, the Trial Chamber declines to take judicial notice of proposed Fact 3.

48. Proposed Fact 4 states:

> The Supreme Council did not have the collective ability to effectively control the military, as the military retained its own distinct chain of command and organisational structure.[75]

49. The Trial Chamber finds that this fact is sufficiently distinct, concrete and identifiable; is not extracted in a misleading manner and satisfies the criteria for judicial notice.

50. Proposed Fact 5, as amended by the Defence Reply,[76] states:

> Soon after the Conakry Accord was signed, hostilities resumed. ECOMOG forces attacked Freetown on 13 and 14 February 1998. The AFRC forces were not able to hold their positions and escaped through the Freetown peninsula. The government of former President Kabbah was reinstated in March 1998.[77]
>
> The retreat from Freetown was uncoordinated and without any semblance of military discipline. AFRC soldiers and RUF fighters fled with their families using either civilian cars or army vehicles. The fleeing troops passed through the villages of Lumley, Goderich, York and Tumbo. From Tumbo they crossed Yawri Bay to Fogbo. They then proceeded to Newton and Masiaka (Port Loko District). It took three to four days for the troops to reach Masiaka. This period is often referred to as "the intervention".[78]

51. The Prosecution objects to this fact stating that the retreat did not take place *following* the reinstatement of President Kabbah in March 1998. It submits that the two paragraphs together suggest that the troops did not reach Masiaka until March 1998.[79] The Trial Chamber disagrees and finds that the fact is sufficiently distinct insofar as the second paragraph[80] deals with the retreat and explains in more detail and specificity the second sentence of the first paragraph, i.e. the escape of the AFRC forces from the Freetown peninsula. The Trial Chamber is

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[75] AFRC Trial Judgement, para. 1656 [footnotes omitted].
[76] Reply, para. 18 (c).
[77] AFRC Trial Judgement, para. 175 [footnotes omitted].
[78] AFRC Trial Judgement, para. 176 [footnotes omitted].
[79] Response, Annex A.
[80] AFRC Trial Judgement, para. 176 [footnotes omitted].

therefore satisfied that this fact is sufficiently distinct, concrete and identifiable; is not extracted in a misleading manner and satisfies the criteria for judicial notice.

52. However, the Trial Chamber notes that it has already taken judicial notice of the fact that "President Kabbah's government returned to power in Sierra Leone in March 1998" pursuant to Rule 94(A).[81] The Trial Chamber considers that it is inappropriate to take judicial notice of the same fact again pursuant to Rule 94(B). The above sentence is therefore deleted from proposed Fact 5.

53. Proposed Fact 6 states:

> When SAJ Musa learned about Koroma's decision - that the AFRC soldiers should be subordinate to RUF command as part of the plan to recapture Kono District - he was furious. He would not accept the notion that untrained RUF fighters could be in charge of former soldiers, and insisted that the purpose of his group was to reinstate the army and that the RUF could not lead such a mission.[82]
>
> In addition, before the operation to recapture Kono took place, a dispute erupted over command and control issues resulting in hostilities between the two factions and the deaths of several fighters. As a result, SAJ Musa, and a significant number of AFRC troops loyal to him, opted not to participate in or support the operation.[83]

54. The Prosecution objects to this fact, submitting that the Defence has only referred to the relevance in general terms and that the fact is only tangentially relevant or relevant in part.[84] The Trial Chamber disagrees, as this fact deals with the relationship between two of the major warring factions in the armed conflict.

55. Trial Chamber considers that taking judicial notice of Fact 6 would promote judicial economy while causing no undue prejudice to the Prosecution. The Trial Chamber is satisfied that this fact is sufficiently distinct, concrete and identifiable; is not extracted in a misleading manner and satisfies the criteria for judicial notice.

56. Proposed Fact 7, as amended by the Defence Reply,[85] states:

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[81] *Prosecutor v. Taylor*, SCSL-03-01-T-370, Decision on the Prosecution Motion for Judicial Notice, 7 December 2007, Annex A, Fact E.
[82] AFRC Trial Judgement, para. 180 [footnotes omitted].
[83] AFRC Trial Judgement, para. 181 [footnotes omitted].
[84] Response, para. 17.
[85] Reply, para. 18 (e).

> When Johnny Paul Koroma departed for Kailahun District in March 1998, he was given to believe that he would be welcome there by the RUF. However, when he arrived in Kailahun he encountered a hostile RUF leadership. He was arrested by Sam Bockarie, Issa Sesay and other RUF fighters. He was then stripped and searched for diamonds and his wife was sexually assaulted. Bockarie placed Koroma under house arrest in Kagama village near Buedu where he remained until mid 1999.[86]

57. The Prosecution submits that by omitting two sentences contained in para. 185 of the AFRC Trial Judgement, the originally proposed Fact 7 was misleading.[87] In addition it submits that the proposed fact is not clear as the last sentence of the original proposed fact made a reference to the Indictment period of the AFRC case.[88] In its Reply the Defence agreed to delete the last sentence of the originally proposed fact.[89] The Trial Chamber therefore finds that proposed Fact 7, as amended, is not misleading and now is sufficiently distinct, concrete and identifiable, not extracted in a misleading manner and considers that taking judicial notice of this fact would promote judicial economy, while causing no undue prejudice to the Prosecution and therefore satisfies all the criteria for judicial notice.

58. Proposed Fact 8, as amended by the Defence Reply,[90] states:

> At a meeting in Koinadugu District, various AFRC commanders met with SAJ Musa to discuss the future and develop a new military strategy. The commanders agreed that the troops who had arrived from Kono District should act as an advance troop which would establish a base in north western area Sierra Leone in preparation for an attack on Freetown. The purpose was to "restore the Sierra Leone Army".[91]

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[86] AFRC Trial Judgement, para. 188.
[87] Response, para. 18, Annex A, Fact 7. The originally proposed Fact 7, which was based on paras 185 and 188 of the AFRC Trial Judgement, did not refer to the following two sentences of para. 185: "The majority of AFRC fighting forces remained in Kono District alongside the RUF troops. Although the AFRC were subordinate to the RUF, there was cooperation between them and the two factions planned and participated in joint operations."
[88] Response, para. 16, Annex A, Fact 7. The last sentence of this fact originally stated: "Koroma did not have any contact whatsoever with any of his former associates during the remaining period covered by the indictment.", see Motion, Annex A, Fact 7. The passage omitted from para. 188 of the AFRC Trial Judgement states: "*No evidence was adduced suggesting* that Koroma had any form of contact whatsoever with any of his former associates during the remaining period covered by the Indictment."
[89] Reply, para. 18 (e).
[90] Reply, para. 18 (f).
[91] AFRC Trial Judgement, paras 190, 379 [footnotes omitted].

59. In response to the Prosecution's submission that the last sentence of the originally proposed Fact 8 was misleading,[92] the Defence has amended the proposed Fact 8 in accordance with paragraph 190 of the AFRC Trial Judgement.[93]

60. The Trial Chamber finds that the amended proposed Fact 8 is now sufficiently distinct, concrete and identifiable, and that the Defence has not obscured the principal facts by submitting an entire paragraph rather than a specific fact it seeks to have judicially noticed, and that the criteria for judicial notice are satisfied.

61. Proposed Fact 9 states:

> From Colonel Eddie Town, in or around September 1998, AFRC troops staged a number of attacks on ECOMOG positions to supplement their dwindling stocks of arms and ammunition.[94]

62. The Prosecution objects to this fact, submitting that the Defence has only referred to the relevance in general terms and that the fact is only tangentially relevant or relevant in part.[95] The Trial Chamber finds that proposed Fact 8 is relevant to the instant case as it deals with the arms supply of one of the major rebel groups operating in the armed conflict in Sierra Leone. The Trial Chamber is therefore satisfied that this fact is sufficiently clear and satisfies the criteria for judicial notice.

63. Proposed Fact 10 states:

> In October 1998, following an armed clash with Dennis Mingo, SAJ Musa left Koinadugu District to join the advance team and prepare for an attack on Freetown. SAJ Musa did not follow the same route taken by the advance teams in his journey to the west.[96]

64. Again the Prosecution objects to this fact, submitting that the Defence has only referred to the relevance in general terms.[97] The Trial Chamber finds that this proposed Fact is relevant as it deals with the relationship between two senior officers of the two main warring factions in

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[92] Response, para. 16.
[93] Reply, para. 18 (f).
[94] AFRC Trial Judgement, paras 193, 384 [footnotes omitted].
[95] Response, para. 17.
[96] AFRC Trial Judgment, para. 197[footnotes omitted].
[97] Response, para. 17.

the armed conflict in Sierra Leone. The Trial Chamber is therefore satisfied that this fact is sufficiently clear and satisfies the criteria for judicial notice.

65. Proposed Fact 11 states:

> Upon his arrival in 'Colonel Eddie Town' in November 1998, SAJ Musa assumed command. He emphasised his disenchantment with the RUF and stressed that it was vital that his troops arrive in Freetown before the RUF. SAJ Musa reorganised the troops and began the advance towards Freetown. The troops passed through the villages of Mange, Lunsar, Masiaka and Newton before arriving in Benguema in the Western Area in December 1998. Throughout the advance, the troops withstood frequent attacks by ECOMOG.[98]

66. The Trial Chamber considers that taking judicial notice of Fact 11 would promote judicial economy without causing undue prejudice to the Prosecution. The Trial Chamber disagrees that this fact is not relevant to the case,[99] as it deals with the organisation of one of the major warring factions in Sierra Leone. The Trial Chamber is therefore satisfied that this fact is relevant, sufficiently distinct, concrete and identifiable and satisfies the criteria for judicial notice.

67. Proposed Fact 12 states:

> On one occasion during the advance, SAJ Musa and the AFRC troops heard the British Broadcasting Corporation (BBC) interview Sam Bockarie over the radio. Bockarie revealed the position of the AFRC fighting forces and explained that it was RUF troops who were approaching Freetown. Soon after, ECOMOG bombarded the area. Musa immediately contacted Sam Bockarie, insulted him and told him that he had no right to claim that the troops approaching Freetown were RUF troops.[100]

68. The Prosecution objects to this fact, submitting that the Defence has only referred to the relevance in general terms.[101] The Prosecution further argues that this fact goes to a central issue of the case.[102] The Trial Chamber is satisfied that this fact is relevant, sufficiently distinct, concrete and identifiable, not extracted in a misleading manner and considers that taking judicial notice of this fact would promote judicial economy, while causing no undue prejudice to the Prosecution. Fact 12 therefore satisfies all the criteria for judicial notice.

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[98] AFRC Trial Judgement, para. 198 [footnotes omitted].
[99] See Response, para. 17.
[100] AFRC Trial Judgement, para. 200 [footnotes omitted].
[101] Response, para. 17.

69. Proposed Fact 13 states:

> On 23 December 1998, shortly after the arrival in Benguema, SAJ Musa was killed in an explosion during an attack on an ECOMOG weapons depot.[103]

70. The Prosecution argued that proposed Fact 13 goes to a central issue of the case.[104] The Trial Chamber is satisfied that this fact is relevant, sufficiently distinct, concrete and identifiable, not extracted in a misleading manner and considers that taking judicial notice of this fact would promote judicial economy, while causing no undue prejudice to the Prosecution. Fact 13 therefore satisfies all the criteria for judicial notice.

71. Proposed Fact 14 states:

> Following the death of SAJ Musa, the troops reorganised. On 5 January 1999, the Accused Brima gathered the troops in Allen Town and told them the time had come to attack Freetown. On 6 January 1999, they invaded Freetown.[105]

72. In relation to this proposed fact the Prosecution argued once again that it goes to a central issue of the case.[106] The Trial Chamber is satisfied that this fact is relevant, sufficiently distinct, concrete and identifiable, not extracted in a misleading manner and considers that taking judicial notice of this fact would promote judicial economy, while causing no undue prejudice to the Prosecution and therefore satisfies all the criteria for judicial notice.

73. Proposed Fact 15 states:

> Following heavy assaults from ECOMOG, the troops were forced to retreat from Freetown. This failure marked the end of the AFRC offensive as the troops were running out of ammunition. While the AFRC managed a controlled retreat, engaging ECOMOG and Kamajor troops who were blocking their way, RUF reinforcements arrived in Waterloo. However, the RUF troops were either unwilling or unable to provide the necessary support to the AFRC troops.[107]

74. The Prosecution submits that proposed Facts 15 goes to a central issue of the case as it deals with the relationship between the AFRC and RUF during the 1999 Freetown attack.[108]

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[102] Response, para. 7, para. 24.
[103] AFRC Trial Judgment, para. 201 [footnotes omitted].
[104] Response, para. 7, footnote 24.
[105] AFRC Trial Judgement, paras 202, 398 [footnotes omitted].
[106] Response, para. 7, footnote 24.
[107] AFRC Trial Judgement, para. 206 [footnotes omitted].
[108] Response, para. 7, footnote 24.

The Trial Chamber, by majority, Justice Doherty dissenting, is satisfied that this fact is relevant, sufficiently distinct, concrete and identifiable, not extracted in a misleading manner and considers that taking judicial notice of this fact would promote judicial economy, while causing no undue prejudice to the Prosecution and therefore satisfies all the criteria for judicial notice.

FOR THE ABOVE REASONS

GRANTS THE MOTION in part, and takes judicial notice of the facts listed in the Annex to this Decision and

DENIES the remainder of the Motion.

Justice Doherty appends a Separate and partly Dissenting Opinion.

Done at The Hague, The Netherlands, this 23rd day of March 2009.

Justice Teresa Doherty

Justice Richard Lussick
Presiding Judge

Justice Julia Sebutinde

[Seal of the Special Court for Sierra Leone]

ANNEX A

Fact	AFRC Para	Adjudicated Fact
1	169	As the founders of the AFRC belonged to the Sierra Leone Army and therefore had been fighting the RUF since 1991, the coalition between the two factions following the 1997 coup was not based on longstanding common interests. Both factions officially declared that they were joining forces to bring peace and political stability to Sierra Leone. On 18 June 1997, the RUF issued an official apology to the nation for its crimes and went on to praise Johnny Paul Koroma's Government.
4	1656	The Supreme Council did not have the collective ability to effectively control the military, as the military retained its own distinct chain of command and organisational structure
5	175, 176	Soon after the Conakry Accord was signed, hostilities resumed. ECOMOG forces attacked Freetown on 13 and 14 February 1998. The AFRC forces were not able to hold their positions and escaped through the Freetown peninsula. The retreat from Freetown was uncoordinated and without any semblance of military discipline. AFRC soldiers and RUF fighters fled with their families using either civilian cars or army vehicles. The fleeing troops passed through the villages of Lumley, Goderich, York and Tumbo. From Tumbo they crossed Yawri Bay to Fo-gbo. They then proceeded to Newton and Masiaka (Port Loko District). It took three to four days for the troops to reach Masiaka. This period is often referred to as "the intervention".
6	180, 181	When SAJ Musa learned about Koroma's decision - that the AFRC soldiers should be subordinate to RUF command as part of the plan to recapture Kono District - he was furious. He would not accept the notion that untrained RUF fighters could be in charge of former soldiers, and insisted that the purpose of his group was to reinstate the army and that the RUF could not lead such a mission. In addition, before the operation to recapture Kono took place, a dispute erupted over command and control issues resulting in hostilities between the two factions and the deaths of several fighters. As a result, SAJ Musa, and a significant number of AFRC troops loyal to him, opted not to participate in or support the operation.
7	188	When Johnny Paul Koroma departed for Kailahun District in 1998, he was given to believe that he would be welcome there by the RUF. However, when he arrived in Kailahun he encountered a hostile RUF leadership. He was arrested by Sam Bockarie, Issa Sesay and other RUF fighters. He was then stripped and searched for diamonds and his wife was sexually assaulted. Bockarie placed Koroma under house arrest in Kagama village near Buedu where he remained until mid 1999.
8	190, 379	At a meeting in Koinadugu District, various AFRC commanders met with SAJ Musa to discuss the future and develop a new military strategy. The

		commanders agreed that the troops who had arrived from Kono District should act as an advance troop which would establish a base in north western area Sierra Leone in preparation for an attack on Freetown. The purpose was to "restore the Sierra Leone Army".
9	193, 384	From Colonel Eddie Town, in or around September 1998, AFRC troops staged a number of attacks on ECOMOG positions to supplement their dwindling stocks of arms and ammunition
10	197	In October 1998, following an armed clash with Dennis Mingo, SAJ Musa left Koinadugu District to join the advance team and prepare for an attack on Freetown. SAJ Musa did not follow the same route taken by the advance teams in his journey to the west
11	198	Upon his arrival in 'Colonel Eddie Town' in November 1998, SAJ Musa assumed command. He emphasised his disenchantment with the RUF and stressed that it was vital that his troops arrive in Freetown before the RUF. SAJ Musa reorganised the troops and began the advance towards Freetown. The troops passed through the villages of Mange, Lunsar, Masiaka and Newton before arriving in Benguema in the Western Area in December 1998. Throughout the advance, the troops withstood frequent attacks by ECOMOG.
12	200	On one occasion during the advance, SAJ Musa and the AFRC troops heard the British Broadcasting Corporation (BBC) interview Sam Bockarie over the radio. Bockarie revealed the position of the AFRC fighting forces and explained that it was RUF troops who were approaching Freetown. Soon after, ECOMOG bombarded the area. Musa immediately contacted Sam Bockarie, insulted him and told him that he had no right to claim that the troops approaching Freetown were RUF troops
13	201	On 23 December 1998, shortly after the arrival in Benguema, SAJ Musa was killed in an explosion during an attack on an ECOMOG weapons depot
14	202, 398	Following the death of SAJ Musa, the troops reorganised. On 5 January 1999, the Accused Brima gathered the troops in Allen Town and told them the time had come to attack Freetown. On 6 January 1999, they invaded Freetown
15	206	Following heavy assaults from ECOMOG, the troops were forced to retreat from Freetown. This failure marked the end of the AFRC offensive as the troops were running out of ammunition. While the AFRC managed a controlled retreat, engaging ECOMOG and Kamajor troops who were blocking their way, RUF reinforcements arrived in Waterloo. However, the RUF troops were either unwilling or unable to provide the necessary support to the AFRC troops.

SEPARATE AND PARTLY DISSENTING OPINION OF JUSTICE TERESA DOHERTY

1. I agree with the conclusions of my learned colleagues in this Decision, with the exception of two issues: (A) that the decision should have reasoned more clearly why the Trial Chamber exercised its discretion to judicially notice adjudicated facts that may go to a "central issue" of the case, and (B) the admission of proposed Fact 15.

A. Centrality of the Issue

2. Whether a proposed adjudicated fact goes to issues central to the present case is a relevant factor to be considered in determining whether the Trial Chamber should exercise its discretion to judicially notice such fact.[109]

3. The Prosecution has argued that several Facts relate to central issues in this case.[110] The majority has addressed this issue in its Decision, and nothing in this separate or dissenting opinion should suggest otherwise but, in my opinion, this element should have been further addressed in more detail. This specific element falls within the discretion of the Trial Chamber and the parties should be able to comprehend the specific reasoning for a discretionary decision. In this regard I am reminded by the Appeals Chamber Decision that unambiguously states that a Trial Chamber should "provide a reasoned opinion that, among other things, indicates its view on all those relevant factors that a reasonable Trial Chamber would have been expected to take into account before coming to a decision."[111] Therefore, I feel obliged to elaborate in more detail on this particular element.

4. In relation to the substantive issue itself, the question that arises is: what is a central issue? I note that there are three different aspects in the established test for judicial notice of adjudicated facts[112]: First, the fact has to be relevant. Secondly, and to be understood more narrowly than relevance, the Chamber may exercise its discretion even when a fact is "central"

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[109] See Majority Decision, para. 34.
[110] See Majority Decision, para. 33.
[111] *Prosecutor v. Taylor*, SCSL-03-01-T (AC), Decision on Prosecution Appeal Regarding the Decision Concerning Protective Measures of Witness TF1-168, 17 October 2008, paras 18. 19; see also *Prosecutor v. Krajisnik*, IT-00-39-A, Judgement (AC), 17 March 2009, para. 139.

to the case. Thirdly, the Chamber has no discretion, and must dismiss a fact that goes to the acts and conduct of the accused. I therefore note that a "central issue" is more than merely relevant but does not extend to the actual acts and conduct of the accused. What is "central" depends on the individual case itself and that is why the determination falls within the discretion of a Chamber.

5. The Prosecution notes that a central issue in the instant case is the relationship between the AFRC and the RUF, concerted action between them culminating in the attack on Freetown in January 1999, and the relationship between the two groups and the Accused.[113] The Defence agrees with the Prosecution.[114]

6. I note that the Prosecution opposes most, if not all, of the facts on the ground that the relationship between the AFRC and the RUF and more specifically, SAJ Musa and senior members of the RUF, are central to the case. The Chamber must determine the right balance and assess whether those facts are central and, therefore, should not be judicially noticed but be determined on the evidence presented at trial.

7. However, a perusal of the Indictment, the Case Summary and the Prosecution Pre-Trial Brief indicate that the relationship between SAJ Musa and members of the RUF are not a central issue in this case. The facts geographically and temporally fall into a period that is not charged in the indictment, and therefore it can be said that the relationship between SAJ Musa and members of the RUF is not the main point that needs to be proven in this case, but is still important enough to bring a contextual understanding of the facts in this case. Therefore, the proposed facts are relevant, but are not sufficiently central to preclude the Chamber from exercising its discretion.

8. Therefore, I concur with the conclusions of the majority, with the exception hereunder, but would have added a brief reasoning for the exercise of the Trial Chamber's discretion.

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[112] See Majority Decision, para. 26.
[113] Response, paras 5, 7.
[114] Reply, para. 14.

B. Dissent on Fact 15

9. I have to dissent from the conclusion reached by my learned colleagues in relation to proposed Fact 15, specifically the last sentence[115].

10. In that regard it should be noted that this fact was taken from the section of the AFRC Trial Judgement entitled "Context". The Fact is only based on a conclusion made by the military expert Col. Iron in his expert report which was tendered by the Prosecution in the AFRC case.[116] Further, it should be recalled that in the AFRC case the Trial Chamber did not specifically address the involvement of the RUF in the Freetown attack, as the pleading of a joint criminal enterprise between members of these two factions was dismissed on the grounds of a defective pleading.[117]

11. Furthermore, unlike the other proposed facts the AFRC Trial Judgement, did not otherwise address the involvement of the RUF in the 1999 Freetown attack in detail.

12. Finally, I note that the prior Defence team agreed that the RUF was involved in the Freetown attack.[118] The current Defence team now appears to qualify this agreed fact and submits in its Reply that this fact does not tie it to any "grand conclusion".[119] I consider that this shows that the issue raised in Fact 15, i.e. the exact involvement of the RUF in the 1999 Freetown attack, is a central issue in this case.

13. For the above reasons, it is my considered opinion that it would have been preferable not to add a rebuttable presumption to specific issues raised in this sentence of proposed Fact 15, but to determine it on the evidence adduced in this case alone. For those reasons I would have not admitted proposed Fact 15.

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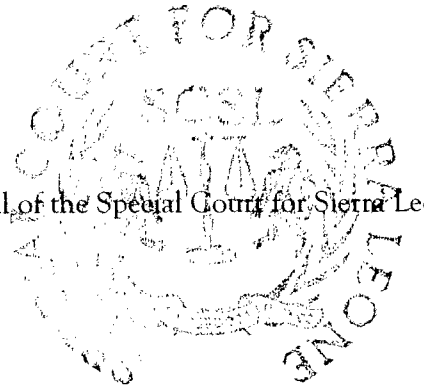
[115] The last sentence states "However, the RUF troops were either unwilling or unable to provide the necessary support to the AFRC troops"
[116] See AFRC Trial Judgement, para. 206, footnote 351.
[117] AFRC Trial Judgement, para. 85.
[118] SCSL-03-01-PT-277, Joint Filing by the Prosecution and Defence Admitted Facts and Law, 26 April 2007, Agreed Fact 31.
[119] Reply, para. 15.

Done at The Hague, The Netherlands, this 23rd day of Month 2009.

Doherty J.

Justice Teresa Doherty



[Seal of the Special Court for Sierra Leone]

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THE SPECIAL COURT FOR SIERRA LEONE

Trial Chamber II

Before: Justice Richard Lussick, Presiding
Justice Teresa Doherty
Justice Julia Sebutinde
Justice El Hadji Malick Sow, Alternate

Registrar: Mr. Herman von Hebel

Date: 24 February 2009

Case No.: SCSL-2003-01-T

THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC

DEFENCE REPLY TO PROSECUTION RESPONSE TO DEFENCE APPLICATION FOR JUDICIAL NOTICE OF ADJUDICATED FACTS FROM THE AFRC TRIAL JUDGEMENT PURSUANT TO RULE 94(B)

Office of the Prosecutor:
Ms. Brenda J. Hollis
Mr. Nicholas Koumjian
Ms. Nina Jorgensen
Mr. Christopher Santora

Counsel for Charles G. Taylor:
Mr. Courtenay Griffiths, Q.C.
Mr. Terry Munyard
Mr. Andrew Cayley
Mr. Morris Anyah

I. Introduction

1. On 19 February 2009, the Prosecution filed a *Response to the Defence Application for Judicial Notice of Adjudicated Facts from the AFRC Trial Judgement Pursuant to Rule 94(B),* ("Response"), wherein it objected to the admission of all 15 adjudicated facts on the basis that the admission of the facts would be contrary to the interests of justice, would not promote judicial economy, and because the underlying criteria for taking judicial notice of adjudicated facts have not been met.[1]
2. The Prosecution's Response is without merit for the following reasons:
   a) The Response fails to acknowledge that the adjudicated facts are largely based on the testimony of its own evidence in the AFRC case;
   b) The Prosecution would not be unduly disadvantaged by the admission of the facts at this stage of the proceedings;
   c) The Prosecution seeks to put undue restrictions on the Trial Chamber's discretion; and
   d) The Prosecution's arguments are internally inconsistent.
3. In light of some of the Prosecution's objections, the Defence however specifies in paragraph 18 of this Reply, slight reformulations or amendments of Facts 1, 3, 5, 7 and 8 of the proposed adjudicated facts, should the Trial Chamber be inclined to consider them.

II. Submissions

The Prosecution is not disadvantaged by the admission of adjudicated facts

4. The Prosecution incorrectly states that the adjudicated facts selected from the AFRC Judgement are "evidence of the Defence".[2] A perusal of the transcript and especially the transcript references in the AFRC Judgment however makes it very clear that the facts as adjudicated therein were based primarily on the testimony of Prosecution witnesses.[3] It is therefore curious that the Prosecution should find the evidence of its own witnesses in a

[1] *Prosecutor v. Taylor,* SCSL-03-01-T-738, Public with Annex A, Prosecution Response to Defence Application for Judicial Notice of Adjudicated Facts from the AFRC Trial Judgement Pursuant to Rule 94(B), 19 February 2009 ("**Response**").
[2] Response, para. 6.
[3] Fact 1: Exhibits P-61 and P-77; Fact 2: TF1-045, TF1-334, Gibril Massaquoi and George Johnson; Fact 3: Gibril Massaquoi; Fact 4: TF1-184 and Gibril Massaquoi; Fact 5: Exhibits P-36 and P-57, TF1-334, George Johnson and Col. Richard Iron; Fact 6: TF1-184, TF1-153 and George Johnson; Fact 7: TF1-334, TF1-045, TF1-153 and George Johnson; Fact 8: TF1-184, TF1-334 and George Johnson; Fact 9: TF1-334 and George Johnson; Fact 10: unspecified; Fact 11: George Johnson; Fact 12: TF1-334; Fact 13: unspecified; Fact 14: TF1-334 and George Johnson; Fact 15: Exhibit P-36 and Col. Richard Iron.

previous trial – some of whom were called to testify again in this trial – objectionable, even if the evidence in this trial is broader or more expansive. The Defence submits that there would be no harm to the Prosecution's case if the previous testimony of its witnesses, as adjudicated in the AFRC Judgement, were given a "presumption of accuracy" in this trial; unless of course, the Prosecution is now advancing a different account.

5. While admittedly, the Prosecution needs to tailor its case against a particular accused person before the court, one of the twin purposes of the doctrine of judicial notice is to create consistency of case law.[4] This and the other twin purpose – judicial economy – need only be balanced against the Accused's right to a fair trial.[5]

6. The Defence observes that none of the decisions cited by the Prosecution to support its argument on trial fairness and prejudice were made in the context of adjudicated facts.[6] Rather, the statements were made in relation to the admission of evidence during the Prosecution's own case, when the imperative that the Prosecution be treated fairly is of greater significance. In this instance, the Prosecution has had every opportunity to present evidence, both documentary and oral, and the admissibility of that evidence has been fairly determined. Thus, it is of no detriment to the Prosecution if the adjudicated facts are now admitted with a rebuttable presumption of accuracy.

7. At all times, the Prosecution must prove its case beyond a reasonable doubt. The standard of proof required to establish guilt beyond a reasonable doubt is obviously higher than the standard of proof required to challenge adjudicated facts that may be given a rebuttable presumption of accuracy.[7] The Prosecution concede that a certain volume of evidence has already been led in respect to the issues contained in the proposed adjudicated facts.[8] This evidence could be used to challenge any rebuttable presumption created. Therefore, the Prosecution is not prejudiced by the admission of these adjudicated facts even though it has essentially closed its case.

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[4] *Prosecutor v. Ntakirutimana*, ICTR-96-10-T and ICTR-96-17-T, Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts, 22 November 2001, para. 28 ("***Ntakirutimana* Decision**")
[5] Ibid.
[6] Response, para. 4.
[7] See Response, para. 12.
[8] Response, para. 13.

8. Furthermore, the admission of adjudicated facts at this stage does not require any mental somersault on the part of the Trial Chamber.[9] While the Prosecution has presented the bulk of its evidence, it is assumed that the Trial Chamber has not yet made a final determination on the accuracy, credibility, or reliability of the Prosecution evidence; the Defence case may impact its assessment in this regard. A presumption of accuracy for adjudicated facts is only one more factor to consider when weighing all the evidence at the conclusion of the case.
9. The Prosecution complains of the Defence "delay" in filing its application for adjudicated facts.[10] However, the Defence reiterates that Rule 94(B) imposes no restrictions as to which stage in the proceedings an adjudicated facts motion should be brought. To the degree that the stage in the proceedings is a discretionary factor against admission and some explanation is warranted, the Defence submits that these adjudicated facts will help form the basis of the Defence case; the Defence case has yet to begin. The Defence had initially hoped to wait and do a joint filing of adjudicated facts from the AFRC and RUF judgements, but as the RUF judgement and appeal filings were pushed further and further back, the Defence decided to go ahead with this application.
10. In regard to the stage of the proceedings, the Prosecution erroneously states that the *Hadzihasanovic* and *Ntakirutimana* cases do not assist the Defence.[11] In fact, in *Hadzihasanovic*, the Trial Chamber partially granted the Defence application and admitted 39 adjudicated facts, despite considering that both the Prosecution and Defence had finished presenting their cases (the rest of the facts were dismissed on other grounds).[12] Additionally, in *Ntakirutimana,* only one of seven proposed adjudicated facts was dismissed on the basis that taking judicial notice of the issue would not assist judicial economy.[13] Furthermore, in generally considering the issue the Trial Chamber decided that they were "not inclined to view judicial notice as significantly influencing judicial economy" because the case itself was short – only 27 trial days for the Prosecution case and one month scheduled for the Defence case.[14]

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[9] Response, para. 13.
[10] Response, para. 10.
[11] Response, para. 11.
[12] *Prosecutor v. Hadzihasanovic and Kubura,* IT-01-47-T, Decision on Judicial Notice of Adjudicated Facts Following the Motion Submitted by Counsel for the Accused Hadzihasanovic and Kubura on 20 January 2005, 14 April 2005.
[13] *Ntakirutimana* Decision, para. 52
[14] Ibid, para. 31.

11. Consequently, because the Prosecution is not prejudiced by the admission of adjudicated facts which would establish a rebuttable presumption of accuracy for findings based on testimony of its own witnesses in another proceeding before this Tribunal, and because the stage of the proceedings would still allow the Prosecution to call rebuttal evidence and/or cross-examine Defence witnesses on these facts, the Trial Chamber should exercise its discretion in favour of the Defence application.

The Prosecution's objections to centrality and relevance have no basis

12. The Prosecution argues both that the proposed adjudicated facts go to issues central to the present case[15] and that some of the proposed adjudicated facts lack relevance.[16] Obviously, the proposed facts cannot be both "central" and "remotely connected" at the same time.
13. In reply to the substance of the objections, the Defence submits that there is no prohibition on the admission of 'central facts' through judicial notice, save that, that is discretionary. With respect to the relevance argument, the Defence submits that all of the facts objected to by the Prosecution are relevant to the relationship between or command structure of the AFRC and/or the RUF (Facts 6, 10, 11 and12), and the supply of arms/ammunition (Fact 9).
14. The relationship between the AFRC and the RUF, and any relationship between either of those organizations and the Accused is certainly central to this case. That is precisely why it makes judicial economy to admit previously adjudicated facts that go to some aspects of this issue, so that it does not have to be addressed to a great extent in the Defence case. In that event, the evidence already led by the Prosecution on this issue[17] could either be used to rebut the presumption of accuracy of the adjudicated facts or to fill in additional and contextual details. Even so, none of the proposed adjudicated facts discuss the relationship between either of the organizations and the accused.
15. To the extent this Defence team stands by the Agreed Facts of the previous Defence team, Agreed Fact 31, which states "[o]n about 6 January 1999, *inter alia*, RUF and AFRC forces attacked Freetown", that does not tie the Defence to any grand conclusion.[18] The admission is simply a factual recognition that there may have been RUF elements that participated in

[15] Response, paras. 7-9.
[16] Response, paras. 17.
[17] Response, paras. 7 and 8.
[18] See Response, para. 7, footnote 15.

the AFRC attack on Freetown.[19] It says nothing about what the RUF may have done as a cohesive organization, or about whether or not the RUF sent reinforcements to Waterloo or the Freetown environs in the days after the 6 January invasion, etc. Thus the proposed adjudicated facts from the AFRC Judgement are not in contradiction with this Agreed Fact.

Reformulations or clarifications in light of Prosecution objections

16. The Prosecution complains that the proposed adjudicated facts as stated mix principal and accessory facts.[20] The Defence disagrees that the mixed nature of these adjudicated facts and the fact that they are written in paragraphs makes them inappropriate for purposes of judicial notice. The facts are sufficiently clear, and the paragraph format allows the principal facts to be understood in context.
17. In relation to Fact 7, which does arguably contain a vague phrase, "the remaining period covered by the indictment", the Defence would not be opposed to amending it to clarify the date of the remaining period of the AFRC Indictment, which was January 2000. However, based on Prosecution objections set out below, the Defence agree to take out the last sentence of Fact 7 completely.
18. The Prosecution further complains that Facts 1, 2, 3, 5, 7, and 8 are formulated in a way that is misleading and tenditious.[21] The Defence disagrees that the proposed adjudicated facts are purposefully misleading or tenditious, but in light of the Prosecution's objections would amend some of the facts as follows, if the Trial Chamber deems it necessary.
    a. Fact 1 – Amend to include the final line of paragraph 169 of the AFRC Judgement, which states: "On 18 June 1997, the RUF issued an official apology to the nation for its crimes and went on to praise Johnny Paul Koroma's government."
    b. Fact 2 – Do not amend. Of course, there is evidence on record to show that the AFRC and RUF cooperated, but to what degree and on what basis, the Defence intend to challenge in its Defence case. It is a fact, however, that the AFRC and RUF relations deteriorated over time, and the specifics contained in Fact 2 are evidence of this split.
    c. Fact 3 – Amend to include the word "closely". There is no need to include the phrase "the available evidence suggests", as of course the fact is based on the evidence before

[19] See also, eg., cross-examination of TF1-371.
[20] Response, para. 16 (specifically referencing Facts 1, 5, 6, and 8).
[21] Response, para. 18 and Annex A.

the AFRC Trial Chamber. If there is evidence to the contrary on record in the Taylor case, that will be used to rebut the presumption of accuracy. Thus, Fact 3 may be amended to read: "The RUF and AFRC were allied in one Government and worked closely together during the AFRC period, but the individuals continued to identify themselves as either RUF or SLA and at an organizational level, separate commanders for each group co-existed in the Districts."

d. Fact 5 – Amend such that Fact 5 encompasses paragraphs 175 and 176 from the AFRC Judgement verbatim. However, if adopted verbatim, the Defence notes that the sentence "The government of former President Kabbah was reinstated in March 1998" would be included; this fact was judicially noted by the Trial Chamber in the AFRC Judgment and as such may not be a proper candidate for an adjudicated facts filing. Thus, the Defence leaves the inclusion of this sentence up to the Trial Chamber, requesting that the rest of the two paragraphs be judicially noted either way..

e. Fact 7 – Amend to strike the first sentence[22] and include the facts regarding the search for diamonds and the sexual assault on his wife. As noted above, further amend to strike the last sentence. Thus, Fact 7 should read: "When Johnny Paul Koroma departed for Kailahun District in 1998, he was given to believe he would be welcomed there by the RUF. However, when he arrived in Kailahun, he encountered a hostile RUF leadership. He was arrested by Sam Bockarie, Issa Sesay and other RUF fighters. He was then stripped and searched for diamonds and his wife was sexually assaulted. Bockarie placed Koroma under house arrest in Kagama village near Buedu where he remained until mid-1999."

f. Fact 8 – Amend to strike the last sentence.

III. Conclusion

19. The Defence persists with its plea for the Trial Chamber to exercise its discretion to judicially note the 15 adjudicated facts from the AFRC Judgement. This will promote

[22] The Defence submit that both the Prosecution and Defence interpretation of "Within three days of his arrival in Koidu Town, around 4 March 1998, Johnny Paul Koroma ("JPK") departed for Kailahun" could be correct based on the context of paragraph 188 in the AFRC Trial Judgement. Because it is not clear whether JPK arrived in Koidu Town around 4 March and left three days later, or whether JPK arrived in Koidu Town around 1 March and left on 4 March, the Defence finds that the interpretation of this fact is not clear and agrees to remove it from consideration. However, to give the rest of the Fact some temporal reference, the Defence will simply refer to March 1998.

judicial economy and consistency of case law, without prejudicing the Prosecution, especially considering that most of the facts are based on prior testimony of Prosecution witnesses.

20. To the extent that the Trial Chamber considers and agrees with the Prosecution's objections to certain facts, the Defence would agree to the amendments or reformulations as described above in paragraph 18.

Respectfully Submitted,

Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 24th Day of February 2009
The Hague, The Netherlands

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SCSL-03-01-PT
(9566-9575)

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

Before: Justice Julia Sebutinde, Presiding
Justice Richard Lussick
Justice Teresa Doherty
Justice El Hadji Malick Sow, Alternate Judge

Acting Registrar: Mr. Herman von Hebel

Date filed: 29 May 2007

THE PROSECUTOR **Against** **Charles Taylor**

Case No. SCSL-03-01-PT

PUBLIC

PROSECUTION'S SECOND AMENDED INDICTMENT

Office of the Prosecutor:

Mr. Stephen Rapp

Defence Counsel for Charles Taylor:

Mr. Karim A. A. Khan
Mr. Roger Sahota

THE SPECIAL COURT FOR SIERRA LEONE

CASE NO. SCSL– 2003– 01– PT

THE PROSECUTOR

Against

CHARLES GHANKAY TAYLOR also known as
DANKPANNAH CHARLES GHANKAY TAYLOR also known as
DANKPANNAH CHARLES GHANKAY MACARTHUR TAYLOR

SECOND AMENDED INDICTMENT

The Prosecutor, Special Court for Sierra Leone, under Article 15 of the Statute of the Special Court for Sierra Leone (the Statute) charges:

CHARLES GHANKAY TAYLOR also known as
(aka) DANKPANNAH CHARLES GHANKAY TAYLOR
aka DANKPANNAH CHARLES GHANKAY MACARTHUR TAYLOR

with **CRIMES AGAINST HUMANITY, VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II and OTHER SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW, in violation of Articles 2, 3 and 4 of the Statute** as set forth below:

THE ACCUSED

1. **CHARLES GHANKAY TAYLOR aka DANKPANNAH CHARLES GHANKAY TAYLOR aka DANKPANNAH CHARLES GHANKAY MACARTHUR TAYLOR** (the **ACCUSED**) was born on 27 or 28 January 1948 at Arthington in the Republic of Liberia.

2. From the late 1980's the **ACCUSED** was the Leader or Head of the National Patriotic Front of Liberia (NPFL), an organized armed group.

3. From 2 August 1997 until about 11 August 2003, the **ACCUSED** was the President of the Republic of Liberia.

4. Paragraphs 1 through 3 are incorporated by reference in CHARGES below.

CHARGES

By his acts or omissions in relation to the below described events, the **ACCUSED**, pursuant to Article 6.1. and, or alternatively, Article 6.3. of the Statute, is individually criminally responsible for the crimes alleged below:

TERRORIZING THE CIVILIAN POPULATION

COUNT 1: Acts of Terrorism, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II**, punishable under Article 3.d. of the Statute.

PARTICULARS

5. Members of the Revolutionary United Front (RUF), Armed Forces Revolutionary Council (AFRC), AFRC/RUF Junta or alliance, and/or Liberian fighters, including members and ex-members of the NPFL (Liberian fighters), assisted and encouraged by, acting in concert with, under the direction and/or control of, and/or subordinate to the **ACCUSED**, burned civilian property, and committed the crimes set forth below in paragraphs 6 through 31 and charged in Counts 2 through 11, as part of a campaign to terrorize the civilian population of the Republic of Sierra Leone.

Burning

6. Between about 30 November 1996 and about 18 January 2002, members of RUF, AFRC, AFRC/RUF Junta or alliance, and/or Liberian fighters, assisted and encouraged by, acting in concert with, under the direction and/or control of, and/or

subordinate to the **ACCUSED**, engaged in widespread destruction of civilian property by burning, including the following:

Kono District

7. Between about 1 February 1998 and about 31 December 1998, in various locations, including Koidu, Tombodu or Tumbodu, Sewafe or Njaima Sewafe, Wendedu and Bumpe;

Freetown and Western Area

8. Between about 21 December 1998 and about 28 February 1999, in locations throughout Freetown, including Kissy and eastern Freetown and the Fourah Bay, Upgun, State House, Calaba Town, Kingtom and Pademba Road areas of the city, and Hastings, Goderich, Kent, Grafton, Wellington, Tumbo, Waterloo and Benguema in the Western Area.

UNLAWFUL KILLINGS

COUNT 2: Murder, a **CRIME AGAINST HUMANITY**, punishable under Article 2.a. of the Statute;

In addition, or in the alternative:

COUNT 3: Violence to life, health and physical or mental well-being of persons, in particular murder, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II**, punishable under Article 3.a. of the Statute.

PARTICULARS

9. Between about 30 November 1996 and about 18 January 2002, members of RUF, AFRC, AFRC/RUF Junta or alliance, and/or Liberian fighters, assisted and encouraged by, acting in concert with, under the direction and/or control of, and/or subordinate to the **ACCUSED**, throughout Sierra Leone, unlawfully killed an unknown number of civilians, including the following:

Kenema District

10. Between about 25 May 1997 and about 31 March 1998, in various locations, including Kenema town and the Tongo Fields area;

Kono District

11. Between about 1 February 1998 and about 31 January 2000, in various locations, including Koidu, Tombodu or Tumbodu, Koidu Geiya or Koidu Gieya, Koidu Buma, Yengema, Paema or Peyima, Bomboa fuidu, Bumpe, Nimikoro or Njaima Nimikoro and Mortema;

Kailahun District

12. Between about 1 February 1998 and about 30 June 1998, in various locations, including Kailahun town;

Freetown and Western Area

13. Between about 21 December 1998 and 28 February 1999, in locations throughout Freetown, including the State House, Kissy, Fourah Bay, Upgun, Calaba Town, Allen Town and Tower Hill areas of the city, and Hastings, Wellington, Tumbo, Waterloo and Benguema in the Western Area.

SEXUAL VIOLENCE

COUNT 4: Rape, a **CRIME AGAINST HUMANITY**, punishable under Article 2.g. of the Statute;

And:

COUNT 5: Sexual slavery, a **CRIME AGAINST HUMANITY**, punishable under Article 2.g. of the Statute;

In addition, or in the alternative:

COUNT 6: Outrages upon personal dignity, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II**, punishable under Article 3.e. of the Statute.

PARTICULARS

14. Between about 30 November 1996 and about 18 January 2002, members of RUF, AFRC, AFRC/RUF Junta or alliance, and/or Liberian fighters, assisted and encouraged by, acting in concert with, under the direction and/or control of, and/or subordinate to the **ACCUSED**, committed widespread acts of sexual violence against civilian women and girls, including the following:

Kono District

15. Between about 1 February 1998 and about 31 December 1998, raped an unknown number of women and girls in various locations, including Koidu, Tombodu or Tumbodu, Wondedu and AFRC and/or RUF camps such as "Superman Ground", "Guinea Highway" and "PC Ground"; abducted an unknown number of women and girls from various locations within the District, or brought them from locations outside the District, and used them as sex slaves;

Kailahun District

16. Between about 30 November 1996 and about 18 January 2002, raped an unknown number of women and girls in locations throughout Kailahun District; abducted many victims from other areas of the Republic of Sierra Leone, brought them to locations throughout the District, and used them as sex slaves;

Freetown and Western Area

17. Between about 21 December 1998 and about 28 February 1999, raped an unknown number of women and girls throughout Freetown and the Western area, and abducted an unknown number of women and girls and used them as sex slaves.

PHYSICAL VIOLENCE

COUNT 7: Violence to life, health and physical or mental well-being of persons, in particular cruel treatment, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II**, punishable under Article 3.a. of the Statute;

In addition, or in the alternative:

COUNT 8: Other inhumane acts, a **CRIME AGAINST HUMANITY**, punishable under Article 2.i. of the Statute.

PARTICULARS

18. Between about 30 November 1996 and about 18 January 2002, members of RUF, AFRC, AFRC/RUF Junta or alliance, and/or Liberian fighters, assisted and encouraged by, acting in concert with, under the direction and/or control of, and/or subordinate to the **ACCUSED**, committed widespread acts of physical violence against civilians, including the following:

Kono District

19. Between about 1 February 1998 and about 31 December 1998, mutilated and beat an unknown number of civilians in various locations, including Tombodu or Tumbodu, Kaima or Kayima and Wondedu. The mutilations included cutting off limbs and other body parts and carving "AFRC" and "RUF" on the bodies of the civilians;

Kailahun District

20. Between about 30 November 1996 and about 18 January 2002, beat an unknown number of civilians in locations throughout the District;

Freetown and Western Area

21. Between about 21 December 1998 and about 28 February 1999, mutilated and beat an unknown number of civilians in various areas of Freetown, including the northern and eastern areas of the city, the Kissy area around the State House, Fourah Bay, Upgun and the Kissy mental hospital, and Hastings, Wellington, Tumbo, Waterloo and Benguema in the Western Area. The mutilations included cutting off limbs.

CHILD SOLDIERS

COUNT 9: Conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities, an **OTHER SERIOUS VIOLATION OF INTERNATIONAL HUMANITARIAN LAW**, punishable under Article 4.c. of the Statute.

PARTICULARS

22. Between about 30 November 1996 and about 18 January 2002, throughout the Republic of Sierra Leone, members of RUF, AFRC, AFRC/RUF Junta or alliance, and/or Liberian fighters, assisted and encouraged by, acting in concert with, under the direction and/or control of, and/or subordinate to the **ACCUSED**, routinely conscripted, enlisted and/or used boys and girls under the age of 15 to participate in active hostilities. Many of these children were first abducted, then trained in AFRC and/or RUF camps in various locations throughout the country, and thereafter used as fighters.

ABDUCTIONS AND FORCED LABOUR

COUNT 10: Enslavement, a **CRIME AGAINST HUMANITY**, punishable under Article 2.c. of the Statute.

PARTICULARS

23. Between about 30 November 1996 and about 18 January 2002, members of RUF, AFRC, AFRC/RUF Junta or alliance, and/or Liberian fighters, assisted and encouraged by, acting in concert with, under the direction and/or control of, and/or subordinate to the **ACCUSED**, engaged in widespread and large scale abductions of civilians and use of civilians as forced labour, including the following:

Kenema District

24. Between about 1 July 1997 and about 28 February 1998, used an unknown number of civilians living in the District as forced labor in various locations such as the Tongo Fields area;

Kono District

25. Between about 1 February 1998 and about 18 January 2002, abducted an unknown number of civilians, and took them to various locations outside the District, or to locations within the District such as AFRC and/or RUF camps, Tombodu or Tumbodu, Koidu and Wondedu, and used them as forced labour;

Kailahun District

26. Between about 30 November 1996 and about 18 January 2002, brought abducted civilian men, women and children to various locations within the District and used them and residents of the District as forced labour;

Freetown and Western Area

27. Between about 21 December 1998 and about 28 February 1999, abducted an unknown number of civilians, including a large number of children, from locations throughout Freetown and the Western Area, and used them as forced labour.

LOOTING

COUNT 11: Pillage, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II**, punishable under Article 3.f. of the Statute.

PARTICULARS

28. Between about 30 November 1996 and about 18 January 2002, members of RUF, AFRC, AFRC/RUF Junta or alliance, and/or Liberian fighters, assisted and encouraged by, acting in concert with, under the direction and/or control of, and/or subordinate to the **ACCUSED**, engaged in widespread unlawful taking of civilian property, including the following:

Kono District

29. Between about 1 February 1998 and about 31 December 1998, in various locations, including Koidu, Tombodu or Tumbodu and Bumpe;

Bombali District

30. Between about 1 February 1998 and about 30 April 1998, in various locations, including Makeni;

Port Loko District

30A. Between about 1 February 1998 and about 30 April 1998, in various locations, including Masiaka;

Freetown and Western Area

31. Between about 21 December 1998 and about 28 February 1999, throughout Freetown and the Western Area.

32. Paragraphs 4 through 31 are incorporated by reference in INDIVIDUAL CRIMINAL RESPONSIBILITY below.

INDIVIDUAL CRIMINAL RESPONSIBILITY

33. The **ACCUSED**, by his acts or omissions, is individually criminally responsible pursuant to Article 6.1. of the Statute for the crimes referred to in Articles 2, 3 and 4 of the Statute as alleged in this Amended Indictment, which crimes the **ACCUSED** planned, instigated, ordered, committed, or in whose planning, preparation or execution the **ACCUSED** otherwise aided and abetted, or which crimes amounted to or were involved within a common plan, design or purpose in which the **ACCUSED** participated, or were a reasonably foreseeable consequence of such common plan, design or purpose.

34. In addition, or alternatively, pursuant to Article 6.3. of the Statute, the **ACCUSED**, while holding positions of superior responsibility and exercising command and control over subordinate members of the RUF, AFRC, AFRC/RUF Junta or alliance, and/or Liberian fighters, is individually criminally responsible for the crimes referred to in Articles 2, 3 and 4 of the Statute as alleged in this Amended Indictment. The **ACCUSED** is responsible for the criminal acts of his subordinates in that he knew or had reason to know that the subordinate was about to commit such acts or had done so and the **ACCUSED** failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Dated 29 May 2007,
Freetown, Sierra Leone,

Stephen Rapp
The Prosecutor

227)

SCSL-03-01-PT
(5473-5479)

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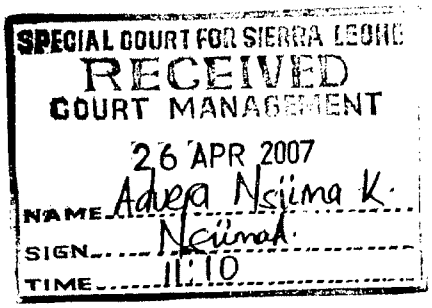
SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

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

Acting Registrar: Mr. Herman von Hebel

Date filed: 26 April 2007



THE PROSECUTOR **Against** **Charles Taylor**

Case No. SCSL-03-01-PT

PUBLIC
JOINT FILING BY THE PROSECUTION & DEFENCE
ADMITTED FACTS & LAW

Office of the Prosecutor:
Ms. Brenda J. Hollis
Ms. Wendy van Tongeren
Ms. Leigh Lawrie

Defense Counsel
Mr. Karim A. A. Khan
Mr. Roger Sahota

The Prosecution and Defence file this statement of admitted facts and law and agree that the following statements of fact and law are not in dispute.

I. AGREED STATEMENTS OF FACT

Charles Ghankay Taylor

1. CHARLES GHANKAY TAYLOR also known as DANKPANNAH CHARLES GHANKAY TAYLOR also known as DANKPANNAH CHARLES GHANKAY MACARTHUR TAYLOR (CHARLES GHANKAY TAYLOR):

   (a) was born on 28 January 1948 in Arthington, Liberia;

   (b) graduated with a B.Sc. in economics from Bentley College, Waltham, Massachusetts, U.S.A;

   (c) speaks English; and

   (d) was the President of Liberia from his inauguration on 2 August 1997 until his departure from Office on or about 11 August 2003.

Countries of Interest (in alphabetical order)

Burkina Faso

2. At all times relevant to this Amended Indictment, Blaise Compaoré was the President of Burkino Faso. The history of his presidency is as stated below:

   (a) On 15 October 1987, after a military coup d'état, Blaise Compaoré became President of Burkina Faso, taking military and executive control of the country.

   (b) In 1991, Blaise Compaoré was elected President of the Republic of Burkina Faso after winning the majority of votes in a democratic election.

   (c) In 1998, Blaise Compaoré was elected for a second term as President of the Republic of Burkina Faso.

   (d) On about 13 November 2005, Blaise Compaoré was re-elected to the Presidency of Burkina Faso for a third term and continues to date to serve as President.[1]

The Gambia

3. In 1994, YAHYA A. J. J. JAMMEH (JAMMEH) took control of The Gambia in a military coup.

[1] See https://www.cia.gov/cia/publications/factbook/geos/uv.html

4. In 1996, JAMMEH was elected as President of The Gambia and was re-elected for a second term in 2001.

Liberia

5. Liberia became a member of the United Nations in 1945.

6. Liberia became a member State of the Economic Organization of West African States in 1975.

7. Liberia became a member State of the Organization for African Unity in 1963, and remained a member of its successor organization, the African Union.

Libya

8. Libya is also known as Great Socialist People's Libyan Arab Jamahiriya.

Mano River Region

9. The Mano River delta area includes territory in the countries of Sierra Leone, Liberia and Guinea.

10. The Mano River Union is an international association established in 1973 between Liberia and Sierra Leone. In 1980, Guinea joined the Union.

Nigeria

11. In June 1998, SANI ABACHA, the leader of Nigeria, died and was succeeded by MAJOR-GENERAL ABDULSALAMI ABUBAKAR.[2]

12. In 1999, OLUSEGUN OBASANJO became the elected civilian head of state of Nigeria.[3]

13. In April 2003, OLUSEGUN OBASANJO was elected President of Nigeria for a second term.[4]

Sierra Leone

14. Sierra Leone is a country in Western Africa whose western shores touch the Atlantic Ocean and whose neighbouring countries include, *inter alia,* Guinea and Liberia.

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[2] Country Profile: Nigeria (http://news.bbc.co.uk/2/hi/africa/country_profiles/1064557.stm)
[3] Country Profile: Nigeria (http://news.bbc.co.uk/2/hi/africa/country_profiles/1064557.stm)
[4] Country Profile: Nigeria (http://news.bbc.co.uk/2/hi/africa/country_profiles/1064557.stm)

Relevant Organised Forces

Sierra Leone

Revolutionary United Front (RUF)

15. The RUF fought against, *inter alia*, the Republic of Sierra Leone Military Forces, commonly known as the Sierra Leone Army or SLA.

The Civil Defence Force (CDF)

16. The Civil Defence Force (CDF) fought, *inter alia*, against the RUF, and, later, also against the AFRC.

The Armed Forces Revolutionary Council (AFRC)

17. The AFRC seized power from the elected government of the Republic of Sierra Leone via a coup d'état on 25 May 1997.

18. Within days of the coup, JOHNNY PAUL KOROMA aka JPK (KOROMA) became the leader and Chairman of the AFRC.[5]

19. The AFRC were also referred to, *inter alia*, as "Junta", "soldiers", "SLA", and "ex-SLA" by the population of Sierra Leone.[6]

International Forces

UNOMIL

20. By Resolution 856 (S/RES/856/1993) dated 10 August 1993, the United Nations Security Council authorized the establishment of a United Nations Observer Mission in Liberia (UNOMIL).

UNOMSIL

21. By Resolution 1181 (S/RES/1181/1998), dated 13 July 1998, the United Nations Security Council established the United Nations Observer Mission to Sierra Leone (UNOMSIL).

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[5] Fact judicially noticed in *Prosecutor v. Brima, Kamara, Kanu,* SCSL-04-10-T, "Decision on the Prosecution Motion for Judicial Notice and Admission of Evidence", 25 October 2005.
[6] Fact was judicially noticed in *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-04-15-T, "Consequential Order regarding Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence", 24 May 2005 but was not judicially noticed in *Prosecutor v. Brima, Kamara, Kanu,* SCSL-04-10-T, "Decision on the Prosecution Motion for Judicial Notice and Admission of Evidence", 25 October 2005.

UNAMSIL

22. By Resolution 1270 (S/RES/1270/1999) dated 22 October 1999, the United Nations Security Council established the United Nations Mission in Sierra Leone (UNAMSIL).

23. UNAMSIL was a peacekeeping force in Sierra Leone from October 1999 until December 2005.

The Conflict in Liberia

The Involvement of ECOWAS & ECOMOG

24. In August 1990, certain ECOWAS member states including Sierra Leone authorized and sent ECOMOG forces to Liberia. The ECOMOG forces sent to Liberia comprised forces primarily from Nigeria.

Liberian National Transitional Government

25. In July 1993, representatives from the NPFL, ULIMO and the Interim Government of Liberia signed a ceasefire agreement known as the *Cotonou Accord*, which created the Liberia National Transitional Government.

26. In August 1995, representatives of the various armed factions involved in the conflict in Liberia signed another ceasefire agreement known as the (first) *Abuja Accord.*

27. The transitional period created in the *Abuja Accord* was subsequently extended in August 1996 until the installation of an elected government in 1997.

The Conflict in Sierra Leone

Background

28. Despite temporary lulls in the fighting occasioned by a 30 November 1996 peace agreement and a 7 July 1999 peace agreement, active hostilities continued in the Republic of Sierra Leone until about 18 January 2002.

29. The Republic of Liberia acceded to the Geneva Conventions on 29 March 1954 and acceded to Additional Protocol II on 30 June 1988.

1997 AFRC Overthrow of President Kabbah

30. Shortly after the AFRC seized power, the RUF joined with the AFRC in governing Sierra Leone.[7]

[7] This fact was not judicially noticed in *Prosecutor v. Brima, Kamara, Kanu,* SCSL-04-10-T, "Decision on the Prosecution Motion for Judicial Notice and Admission of Evidence", 25 October 2005.

Attack on Freetown & Western Area 1998/1999

31. On about 6 January 1999, *inter alia*, RUF and AFRC forces attacked Freetown.

Lomé Peace Treaty July 1999

32. On 7 July 1999, the Government of Sierra Leone signed a peace agreement with the RUF in Lomé, Togo (*Lomé Peace Agreement*).[8]

Post- Lomé Peace Agreement

33. Under the Security Council's authorization set out in S/RES/1270 (1999), UNAMSIL was charged, *inter alia*, with overseeing the disarmament and demobilisation of combatants from all armed factions throughout Sierra Leone.

34. Some time after the *Lomé Peace Agreement* and SANKOH'S arrest and detention, ISSA SESAY was appointed as the Interim Leader of the RUF.

35. On about 18 January 2002, PRESIDENT KABBAH, announced an end to hostilities.

UNAMSIL Abductions

36. In May 2000, RUF abducted UNAMSIL peacekeepers in Sierra Leone.

[8] Fact judicially noticed in *Prosecutor v. Brima, Kamara, Kanu,* SCSL-04-10-T, "Decision on the Prosecution Motion for Judicial Notice and Admission of Evidence", 25 October 2005.

II. AGREED STATEMENTS OF LAW

37. In the Amended Indictment, the words "civilian(s)" or "civilian population"[9] refer to persons who took no active part in the hostilities, or who were no longer taking an active part in the hostilities, including combatants rendered hors de combat by virtue of injury or wounds, capture or surrender.

Filed jointly by the Prosecution and the Defence in Freetown,
26 April 2007

For the Prosecution

Brenda J. Hollis
Senior Trial Attorney

For the Defence

Karim A. A. Khan
Lead Counsel for Charles G. Taylor

[9] See paragraphs 5, 6, 9, 14 of the Amended Indictment.

Case No. SCSL-2003-01-A
THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

Thursday, 25 October 2012
9.30 a.m.
STATUS CONFERENCE

APPEALS CHAMBER

Before the Judges:	Justice Shireen Fisher, Presiding
For Chambers:	Mr Kevin Hughes
For the Registry:	Ms Elaine Bola-Clarkson Ms Zainab Fofanah Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Mr Nicholas Koumjian Ms Ruth Mary Hackler
For the accused Charles Ghankay Taylor:	Mr Morris Anyah Ms Magda Karagiannakis Mr Michael Herz Ms Szilvia Csevar Ms Yael Vlas Gvirsman Mr Isaac Ip Ms Alexandra Popov

MR ANYAH: Thank you.

PRESIDING JUDGE: Okay. Then whether the Prosecutor's appellant submissions comply with paragraph 7, 8, and 10 of the practice direction. Are you suggesting, Mr Anyah, that they do not?

10:31:19

MR ANYAH: Yes, Madam President. We are suggesting that.

PRESIDING JUDGE: Okay. And in what way are you prejudiced by what -- by the omissions that you're suggesting that have been made here?

10:31:32

MR ANYAH: Well, we had a Status Conference on the 18th of June when Your Honour Madam President indicated the importance to the Chamber of the new practice direction on the structure of grounds of appeal.

PRESIDING JUDGE: That's very true.

10:31:50

MR ANYAH: And you said that we ought to follow the direction because Your Honours felt very strongly about it.

PRESIDING JUDGE: That's right.

MR ANYAH: And that is the basis upon which we say they do not comply with it.

10:31:56

PRESIDING JUDGE: Okay.

MR ANYAH: It's not so much prejudice to Mr Taylor. It is for the Court to have a document that's consistent with the practice direction.

PRESIDING JUDGE: Okay. And the consistency with the

10:32:06

practice direction is in order that we may all have specific and detailed information necessary to properly consider and make decisions on your case, without which there could be prejudice to one side or the other. My question to you is: Do you see any prejudice in the omissions that you feel have been made by the

Prosecutor regarding those three practice directions?

MR ANYAH: Well, it circumscribes in some manner the manner in which our response is to be provided. We have delineated our grounds distinctly. We alleged 45 grounds and I believe we filed
10:32:48 submissions on 42 grounds of appeal. The Prosecution --

PRESIDING JUDGE: Which in and of itself means that you were in violation of the practice direction in terms of your notice, which --

MR ANYAH: No, we are not.

10:32:55 PRESIDING JUDGE: -- we did not raise because we saw no prejudice. When I ask --

MR ANYAH: Madam President, I don't believe we are. A party can always withdraw a ground when they see and have done further research that it is not legally viable, and that's what
10:33:07 we've done. We've withdrawn those grounds. And it should be to the benefit of the Court for expeditiousness purposes.

PRESIDING JUDGE: You have also relied in some of your grounds on arguments made and other of your grounds, which is repetition, but we did not consider that to be prejudicial to any
10:33:20 party, and it did not interview with the Court's observance of your material, and therefore we did not raise it with you as we could have under Article 29 -- or 28, I'm sorry. No, I'm -- 29. So my question is: We don't see any difficulty in terms of understanding the four grounds of appeal that the prosecutor has
10:33:53 set out. If you have -- if you feel that by your allegation that they do not comport with those three provisions that you are in some way prejudiced, I need to know that because then we can talk about how to make sure that you aren't prejudiced.

MR ANYAH: Well, if the touchstone of the inquiry is

whether we're prejudiced or not that is one thing. If the inquiry is whether they violate the spirit and the letter of the -- if they violate the letter of the practice direction, that's another thing. So it depends on the nature of the inquiry. If it is the former, whether we are prejudiced, I would ask for time to go back review their brief again, determine how our response is being prepared, and let Your Honour know by way of a filing if we still contest this issue.

10:34:30

PRESIDING JUDGE: All right. But I would point out paragraph 28:

10:34:48

"The provisions of this practice direction are without prejudice to any orders or decisions that may be made by the designated Pre-Hearing Judge."

I am telling you I found nothing in the Prosecution's brief that I considered to be a violation to the extent that it interfered with our ability to understand the brief and to consider it carefully within the spirit of these Rules. If, in fact, there is something there that affects you, that you feel is prejudicial to your client, by all means raise it, but I am saying that under Article -- Article 28, I see nothing that if there is even a technical violation that is inconsistent with the spirit of the Rules or in any way inhibits us from properly understanding the arguments.

10:35:03

10:35:35

If you're saying you can't answer those arguments, let me know why, but I would expect that you would explain to me why you are in some way prejudiced. If it's simply a question of, "Are we going to be accused of not complying with the Rule if we follow the same format," if that's the crux of what it is that you're concerned about, then I suggest that the way to resolve

10:35:58

that is to talk among yourselves in person and say. "We're going to follow the same format. Are you going to have any objection to that?" If they don't, you already know the Court's position. If you want to follow the same format that she has set out,
10:36:42 that's perfectly fine as far as the Court is concerned. And if you can agree that that is not going to raise any issues among you, proceed.

MR ANYAH: Madam President, you've made your position known to us. We will go back, and we will consider. If they are
10:37:01 appropriate grounds to proceed, given your comments this morning, we will proceed. If they are not, you will not receive a motion from us.

PRESIDING JUDGE: Thank you. Okay. A couple of other things, and I will get to the recess issue, not to worry.

10:37:30 I am perfectly happy to settle any motions that you have in good faith that affect your arguments on appeal. I am perfectly happy to settle any valid motions of process that you cannot resolve among yourselves, after having tried to do so, that will advance the appeal. I am not willing to look at those motions,
10:37:54 though, until I have some certification from the two of you that you have tried to work out whatever the allegations that you are making about one another, because what we're talking about here is allegations against each other. We're not talking about the appeal case. We need to focus on the appeal cause, because none
10:38:13 of us have an awful lot of time.

In connection with that, please do not plead by correspondence. I know my senior legal officer has indicated to the parties if there is any misunderstanding in the past, if there's anything you need the Court to do, you have to issue a

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

THURSDAY, 15 APRIL 2010
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Julia Sebutinde, Presiding Justice Richard Lussick Justice Teresa Doherty Justice El Hadji Malick Sow, Alternate
For Chambers:	Mr Artur Appazov
For the Registry:	Ms Rachel Irura Ms Zainab Fofanah
For the Prosecution:	Mr Nicholas Koumjian Mr Mohamed A Bangura Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Ms Logan Hambrick Ms Salla Moilanen

A. Yes.
Q. Did any other leader in the sub-region to your knowledge contact Bockarie about your welfare?
A. Yes, I remember when we were in Buedu - when we were in
13:13:24 Buedu, by then all of them had come back. One day we were taken out of the cells and taken to Mosquito's house, where we met Mr Musa Cisse. He said he had been sent there by Charles Taylor to talk on our behalf so that we would be put either on parole or released. But when he gave the message, Mosquito said the only
13:13:50 thing he can do for us without anybody's instruction is to kill us. He said but for him to say he can release us - he said even if Foday Sankoh himself sent a message to him to have us released, he said he would not do it until he was back. So he refused to release us, even to put us on parole.
13:14:11 Q. Who had sent Musa Cisse?
A. Mr Musa Cisse said he was sent there by Charles Taylor to talk to Foday Sankoh - Mosquito to beg him to have us released --
Q. Did Musa Cisse say why Charles Taylor wanted you released?
A. Well, when we went - because Musa Cisse we knew ourselves
13:14:34 in Ivory Coast when we went there. He said he had been sent by Charles Taylor to talk to Mosquito on our behalf so that - first of all, to save our lives; secondly, so as the peace process can have some kind of a start.
Q. So that's why Charles Taylor had sent Musa Cisse to
13:14:55 Mosquito?
A. Yeah. According to Musa Cisse, that was what he sent him for.
Q. Now, did Mosquito follow - take that advice?
A. I have already said it, no, he did not, because Mosquito

said he would not take anybody's - for our release, he said, if Foday Sankoh himself told him to release us, he said he would not do it until Foday Sankoh was back.

Q. Can you help us as to a time when this envoy, Musa Cisse, was sent by Charles Taylor?

13:15:20

A. That was the time when the peace process was on.

Q. Which peace process?

A. The Lome peace arrangement was on. That was the time. When the Lome Peace Agreement was on.

13:15:37

Q. Now, the Lome Peace Agreement was signed in 1999, yes?

A. Yeah.

Q. Was it prior to the signing that Musa Cisse was sent by Charles Taylor?

A. Of course. It was prior to the signing.

13:15:52

Q. Whilst you were in custody, Mr Fayia, were you ever given a trial or court-martial by the RUF?

A. Yes. There was a day when Mosquito - we did not know that he had met with the War Council and they had come to an agreement to have us tried. They tried us - according to them, they tried us in a court-martial. They marched all of us to the hall where they were waiting us with all the scars - not scars, with all the wounds, because the wounds have just got - we were so messed up, the wounds were very, very fresh. Flies were all over our bodies. They told us to go inside there to be tried, and the judge was one Mr Baindah. One Mr Baindah was the judge. He has gone back to Liberia.

13:16:20

13:16:45

Q. How do you spell his name?

A. Baindah, B-A-I-N-D-A-H.

Q. And was he a Liberian?

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

MONDAY, 12 APRIL 2010
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Julia Sebutinde, Presiding Justice Richard Lussick Justice El Hadji Malick Sow, Alternate
For Chambers:	Ms Erica Bussey
For the Registry:	Ms Rachel Irura Ms Zainab Fofanah
For the Prosecution:	Ms Brenda J Hollis Ms Kathryn Howarth Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Terry Munyard

Q. And, Mr Ngebeh, after the fighters under Rambo, as you call him, had deployed to Hastings, then they began to attack Jui and Kossoh Town. Isn't that right?
A. By then it was ECOMOG that was at Jui. ECOMOG was based at
12:14:21 Jui at the time that we entered Hastings. We were trying to fight our way to join our brothers in Freetown, but there was no way. God never gave us the opportunity. We tried, but we were unable. I can't tell lies to you. We were trying to join the AFRC in Freetown, but the ECOMOG blocked us at Jui. We attacked
12:14:38 them and we did not succeed. Thank you.
Q. You started attacking them as early as 9 January. Isn't that right?
A. We attacked in January. That's what I know, mama.
Q. And these were the fighters under Rambo who had gone to
12:14:58 Masiaka, Waterloo, Hastings and then began attacking Jui and Kossoh Town. Isn't that right?
A. It was only Jui. Only Jui. The troops under Rambo attacked Jui. We couldn't go beyond Jui. We were not even able to capture a single place from ECOMOG in Jui. We attempted twice
12:15:27 but we failed. So we made our defensive.
Q. When this was happening you were still in Makeni, weren't you?
A. No, I was now at Hastings. I was now at Hastings.
Q. So in January 1999 you were in Hastings?
12:15:45 A. I used to come, Rambo had a weapon that I was the only person that was able to use it, an electronic missile. It was that weapon that caused me to go to Hastings. We had captured it from the Guinea people. I used that to launch on the men in Freetown. It was an electronic ground missile. It uses current.

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

THURSDAY, 17 SEPTEMBER 2009
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Richard Lussick, Presiding Justice Teresa Doherty Justice Julia Sebutinde Justice El Hadji Malick Sow, Alternate
For Chambers:	Ms Doreen Kiggundu
For the Registry:	Ms Rachel Irura Mr Benedict Williams
For the Prosecution:	Ms Brenda J Hollis Mr Mohamed A Bangura Mr Christopher Santora Ms Ruth Mary Hackler
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Morris Anyah

who led the troops that entered Freetown?

Q. So who was at the transmitting station with you? Who else was there on this day, 6 January?

A. I met all the operators - in fact almost all the operators by then were in the transmitting station. Like Seibatu, Tiger, Tourist. Almost all the operators were in the station on that particular day.

Q. Now, on that particular day what stations was the transmitting station in Buedu in contact with?"

15:44:03 Now, pausing there. Mr Taylor, at the time - this is back in January 1999 - were you aware of an AFRC commander called Gullit?

A. No. No.

Q. Were you aware back then that the invasion of Freetown had been led by that individual?

15:44:37 A. No, I didn't know.

Q. Let's move on. Page 21581, line 1:

"Actually, there had been some minor problems that had been existing between us and Gullit. That is, RUF and AFRC. That was Sam's concern. That was the only time that he was grumbling. Even before they entered Freetown and even when he received the message in the morning, that was when Sam was saying that. He said maybe Gullit and others would want to - maybe they would change this time around to cooperate if at all they didn't go there to seize power, they wouldn't want to be greedy and take power on their own. And Sam Bockarie assured Gullit that Rambo was very close to him on his way to join him in the city - and that Rambo was on his way to join him in the city and that time

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

MONDAY, 17 AUGUST 2009
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Richard Lussick, Presiding Justice Teresa Doherty Justice Julia Sebutinde Justice El Hadji Malick Sow, Alternate
For Chambers:	Mr William Romans Mr Artur Appazov
For the Registry:	Ms Rachel Irura Mr Benedict Williams
For the Prosecution:	Ms Brenda J Hollis Mr Mohamed A Bangura Mr Christopher Santora Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Terry Munyard Mr Morris Anyah Mr Silas Chekera

A. That is correct.
Q. And it's said, "Had met with Sam Bockarie at the Roberts International Airport. The two leaders reportedly informed Sam Bockarie." Was there any discussion about it or were you in
11:05:46 effect telling him what was going to happen?
A. In effect we told him. Following the second meeting with Bockarie where there was outright belligerence on his part, on the one hand. On the other hand, the determination of ECOWAS and the international community to see Lome work and that we were not
11:06:14 prepared to permit anyone to obstruct the process, on the other hand. And even on another track, Sam Bockarie's new ideas, a decision was taken by, I can say, ECOWAS, because when Obasanjo came we had discussed it with virtually everybody that Bockarie would be kept in Liberia until the disarmament process was over.
11:06:40 He had a choice of staying in Liberia or going to a third country, but that he would not be permitted to obstruct the process.

So when I hear in this Court that Bockarie left, Bockarie did not voluntarily leave Sierra Leone. We, I would call it,
11:06:59 extracted. ECOWAS extracted Bockarie from Sierra Leone. That's how he left. He did not leave from Sierra Leone voluntarily when he came to Liberia in December of 1999. People did not know the inside story of it, but this is what happened.
Q. So, Mr Taylor, can we take it then that Bockarie arriving
11:07:22 in Liberia wasn't at your personal invitation?
A. It was an ECOWAS extraction. I would like to use that word extraction. We took him out of Sierra Leone. He had no choice.
Q. Because it goes on, "It had been decided". Does that mean it had been decided prior to this meeting at Roberts

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THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

THURSDAY, 9 APRIL 2009
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Richard Lussick, Presiding Justice Teresa Doherty Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Sidney Thompson
For the Registry:	Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Mr James Johnson Ms Kathryn Howarth. Ms Ula Nathai-Lutchman Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Morris Anyah Mr Silas Chekera Ms Salla Moilanen

important because eventually it allowed the men, when they retreated from Freetown, to use the forest to come towards their colleagues at Waterloo and he also told you that during this time the AFRC and the RUF had a cordial relationship. They had an understanding. They were together as one. There were no problems.

10:32:25

In relation to the overall situation between the AFRC and the RUF after the junta was pushed out, Prosecution exhibit D-85 is also of assistance to you. This is a comprehensive report to Foday Sankoh from Major Francis Musa, and at page 00009766 the report indicates that the consultation, coordination and cooperation among senior officers and other ranks brought about the recapture of Joru Jungle, Kono, Makeni, Magburaka, Segbwema, Tongo Field, Western Jungle and Freetown and many other places from the end of 1998 to early 1999, and at page 9767 he told you that about 95 per cent of the SLA brothers, including Akim Turay, Soriba, Dumbuya, Bakarr, Leather Boot and many others are loyal to the movement.

10:32:43

10:33:12

So the RUF and the AFRC, this evidence shows, continued to work together to regain control of the country after the junta were forced out. Both were involved in the movements to Freetown from the various axes were part of the group that entered Freetown, but even if it were not true that RUF were actually among those who entered Freetown, liability would still lie for the crimes committed in Freetown because of the continuing existence of the alliance of the participants in this joint criminal enterprise including AFRC and the RUF.

10:33:38

10:33:57

Now, this plurality also included people who were more directly subordinate to Charles Taylor and it included those from

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THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

MONDAY, 6 APRIL 2009
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Richard Lussick, Presiding Justice Teresa Doherty Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Doreen Kiggundu
For the Registry:	Mr Gregory Townsend Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Mr James Johnson Ms Kathryn Howarth Ms Ula Nathai-Lutchman Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Terry Munyard Mr Morris Anyah Mr Silas Chekera

does not say the basis or his basis for this information, but that comes quite close to assessing his reliability and credibility and so I will not delve further into it.

Now this same witness, the witness who just spoke of
10:50:03 Sam Bockarie being alerted about the 448 jets, the witness said at page 8402 and 8403, that possibly in August or September of 1998, before the Kono invasion, a commander went to Liberia for reinforcements. Charles Taylor reorganised a bigger group, armed them and sent them to Sam Bockarie to reinforce the junta troops
10:50:46 in Freetown. The reference here is to the 6 January invasion of Freetown.

Now, what do we know about that invasion? There are a few things that are worth noting. When your Honour considers this witness's evidence, it is also appropriate to consider the
10:51:22 evidence provided by TF1-360 at page 3383. That witness said that SAJ Musa, the SLA or AFRC, acted completely on his own and without authority from Sam Bockarie in attacking Freetown. The witness acknowledged that Sam Bockarie had no idea where SAJ Musa's group was. The majority decided to disobey Sam Bockarie's
10:52:06 orders not to go into Freetown.

So we have another Prosecution witness saying that Sam Bockarie had no idea where the troops that attacked or invaded Freetown were, that SAJ Musa acted completely on his own in invading Freetown, and yet we have another Prosecution witness
10:52:37 saying that Charles Taylor reorganised a bigger group, armed them and sent them to Sam Bockarie to reinforce the junta troops in Freetown.

Do we know whether these troops that Charles Taylor allegedly armed and reorganised made their way into Freetown

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

WEDNESDAY, 2 JULY 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Carolyn Buff
For the Registry:	Ms Advera Nsiima Kamuzora Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Terry Munyard Mr Morris Anyah
For the Office of the Principal Defender:	Ms Elizabeth Nahamya

others that I cannot recall.
Q. When you say he came with camouflage, what do you mean?
A. That is the clothes that a soldier puts on. That is combat.
15:34:34 Q. How was this ammunition and the camouflage and the other things, how was it brought to Buedu?
A. It was a vehicle that brought them.
Q. And can you tell us the size of this vehicle?
A. At that time they were brought in a pick-up.
15:35:08 Q. You said that Mosquito gave Issa Sesay these materials. Why did he give Issa Sesay these materials?
A. He said we should try and capture Koidu Town and the other areas which were mining areas, because the Pa, Charles Taylor, had said we should try and get these areas in order to get more
15:35:44 diamonds.
Q. And what was Issa Sesay's role in this operation?
A. Issa Sesay was to go and organise commanders. He was to become the commander to organise - to organise so that they can fight and capture these areas.
15:36:15 Q. And you said you took these materials to Superman Ground. How did you transport the materials to Superman Ground?
A. Well, Sam Bockarie ordered - captured some civilians around Buedu and the surrounding villages to carry these arms and ammunition, so that was what they did before we departed.
15:36:53 Q. What happened when you arrived back in Superman Ground?
A. When we got to Superman's ground, Issa Sesay called a meeting. At this meeting he called, Morris Kallon was at this meeting, Akim Turay was at this meeting, Banya was at this meeting, Gassama Mansaray was at this meeting, and other people

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

TUESDAY, 13 MAY 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr William Romans Ms Sidney Thompson
For the Registry:	Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Mr Christopher Santora Ms Julia Baly Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Terry Munyard Mr Morris Anyah

MR MUNYARD: Madam President, I'm in the Court's hands.

PRESIDING JUDGE: Is it in answer to the question, Mr Witness?

THE WITNESS: Yes, sir. I want to ask something. I want to get some clarification.

14:35:29

PRESIDING JUDGE: What is the clarification you need?

THE WITNESS: I would like to know if the total went up to 12, because I was not counting when I was calling the names.

MR MUNYARD: All right. I can answer that:

14:35:50 Q. Mr Kanneh, what you said was that, "We were 12 in number", and you gave the names that you could recall. I don't think you gave a total of 12 names in your evidence on Friday, but you were giving the names that you remembered and what you said was this:

"Well, we were 12 in number that particular night that we

14:36:12 were present. I don't know how many names I have made mention of, but we were 12 in number."

Do you see? You may not have remembered all of them on Friday, but you did it make it very plain that there were 12 of you.

14:36:28 A. Yes, sir. That's what I said, because when I called out the names later I said "and others".

Q. I'm going from page 9419 of the transcript. Now, let's see what the Prosecution have recorded by looking at tab 3, page 44309. I'm starting here simply to establish that we're talking

14:37:16 about the right meeting. Halfway down the page, "The following questions refer to the time after Sam Bockarie came back from Burkina Faso." You were asked, "Was there another meeting at Sam Bockarie's house that took place at night?", and your answer, "Yes, it took place from 11 p.m. to 2 a.m." Over the page, "Who

was there?", and this was the answer that you gave then. We'll go through the answer and you can tell us if it's been correctly recorded, "Mike Lamin, SB [meaning Sam Bockarie], SYB Rogers, Gbessay Ngobeh" - have I got his name right or wrong? Gbessay
14:38:13 Ngobeh, sorry. "CO Lion, Jungle, Martin, Gaddafi (Foday), Issa Sesay, Jallow, Tom Sandi, Rashid Sandi, Junior Vandi, Sam Kolleh and Major Francis who was a Gambian."

Now, did you tell the Prosecution in November of last year that those 16 people were present at the meeting.

14:38:51 A. No, I spoke about 12 people and even yesterday I called SBY [sic] Rogers's name.

Q. I'm going to come back to SYB Rogers in a moment, but there's no mention of Morris Kallon in that list that we've just read out from the notes of your interview on 1 November last
14:39:22 year. Was he there, or wasn't he there?

A. Morris Kallon was there.

Q. There's no mention of Matthew Barbue there in that list. Was he present at the meeting, or wasn't he?

A. He was there, sir.

14:39:45 Q. There are, as I've said, 16 names listed there, not 12.

A. Well, in that meeting there were 12 of us.

Q. When this was read back to you did you correct it?

A. No, sir.

Q. Why not?

14:40:07 A. Well, I did not know whether it had gone beyond 12, but I know we were 12, so - and I called out 12 names.

Q. Two of whom don't even appear in this list that I've just read out to you from the notes of that interview. When it was read back to you did you not point out to them that Morris Kallon

that that is exactly what they have said; that you mentioned those 16 names?
A. Well, I spoke about 12. All along I've been talking about 12 in my statements and even yesterday.
14:51:31 Q. We've been at this for the last 20 minutes. Are you saying that you didn't realise that the Prosecution got these names from you?
A. Yes, sir.
Q. And if it's right that these were the names you told them,
14:51:52 how is it that you told them the names of four people who were nowhere near that meeting?
A. Please repeat that.
Q. If they've got it right in recording these 16 names, how is it that you managed to give them the names of four people who
14:52:13 were nowhere near the meeting?
A. Well, I have not even accepted that I was the one who gave them those extra four names. The ones that I mentioned, I accepted to you that those were the names that I gave to them.
Q. You mean the ones that you mentioned in evidence and the
14:52:35 ones that you've agreed out of this list of 16, you accept that you gave those names?
A. No.
Q. I'm going to move on. Oh, I just want to ask you about one other person. Was Isaac Mongor at this meeting?
14:53:13 A. No.
Q. Are you quite sure about that?
A. Yes, sir, I did not see him.
Q. This is the meeting at which Sam Bockarie tells you about all these arms, ammunition and other items that he'd brought back

from Burkina Faso, yes?
A. Yes, sir. Yes, sir.
Q. And there was only one such meeting, was there, with these 12 senior figures from the RUF, plus Jungle?
14:53:53 A. Yes, sir.
Q. And this is the meeting at which SYB Rogers was present, is that right?
A. Yes, sir.
Q. Even though you didn't list him on Friday. Do you agree
14:54:15 that you didn't list him on Friday when you were giving the list?
A. I called his name.
Q. Did SYB Rogers have anything to say at that meeting that you can now remember?
A. No.
14:54:34 Q. Did anyone praise Sam Bockarie for what he had achieved in bringing back these materials from Burkina Faso?
A. Amongst us, the 12 people who were there?
Q. Well, yes, not amongst anybody else who wasn't there.
A. Well, even if that could have happened maybe it is just
14:55:15 because I cannot recall now. I am not saying nobody said that or did so, but I cannot recall now.
Q. Were any photographs produced during this meeting?
A. No, there were no photographs.
Q. When do you say it was that you saw the materials that he'd
14:55:41 brought back from Burkina Faso?
A. After the meeting, the following morning.
Q. The following morning. Did you see any photographs then?
A. No.
Q. And, let me suggest to you, any photographs of a hotel in

Q. Can I just ask you about something else at the foot of that page, please, 44312. You were asked this question, "During the meeting was there discussion about getting manpower support from Liberia?" Do you remember that, that question?
15:39:22 A. Yes, sir.
Q. And the answer that you are recorded as giving is this, "Jungle and Morris Kallon and Lion suggested that." Did you say that?
A. Well, the two men whom you have mentioned, I spoke about
15:39:49 them, but I did not mention Lion.
Q. Yes. Morris Kallon is not one of the 16 names that you listed earlier on, that we looked at on page 44310, when you answered the question, "Who was there?" So that would make 17 names if indeed you did say those first 16, wouldn't it?
15:40:37 A. Who is the 17th?
Q. Morris Kallon who has just appeared in this answer.
A. No, no. Even among that 12 people there is Morris Kallon's name and even the 16th name that you mentioned, there was Morris Kallon's name, and the 12 men that I called, Morris Kallon's name
15:41:05 is among them.
Q. The rest of the answer is as follows, "SB ...", that's Sam Bockarie, "... rejected this because of past problems when the NPFL came." Did you say that?
A. That he did not agree that a force would come from NPFL,
15:41:30 yes, I said that.
Q. Your answer is recorded on the LiveNote as, "That he did agree that the force would come from NPFL, yes, I said that". In fact the answer that's recorded here - here on the page of the interview notes - is that Sam Bockarie rejected the suggestion of

manpower support from Liberia. "Sam Bockarie rejected this because of past problems when the NPFL came."
A. Yes, sir, I said that.
Q. That is what you said?
15:42:17 A. Yes, sir. Yes, sir.
Q. And then it goes on to read, "SB ...", Sam Bockarie, "... was okay with ULIMO-K assistance."
A. He said he preferred ULIMO-K. He said he preferred them to the NPFL. That was what I mentioned.
15:42:44 Q. And were ULIMO-K still in existence in December of 1998?
A. No, at that time ULIMO-K was no longer in existence, but their members were still around.
Q. All right. So Sam Bockarie was basically saying that he did not want manpower support from Liberia, is that right?
15:43:36 A. From NPFL, yes, it's correct.
Q. And for NPFL in 1998 do you mean the Armed Forces of Liberia?
A. Yes, sir. Yes, sir. The Armed Forces of Liberia, Mr Taylor's troops.
15:44:05 Q. Thank you. So, Bockarie rejected the idea of support from Mr Taylor's troops?
A. Yes, sir.
Q. Over the page, please, 44313. Do you have that page there?
A. Yes, sir.
15:44:50 Q. "Resume interview - 1430", that's 2.30 in the afternoon. "Further to night time meeting at SB's house", and then some more questions were asked and the first is, "Was there any discussion about civilians?" Your answer was, "No discussion about civilians". Were you asked that question and did you give that

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

FRIDAY, 9 MAY 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Sidney Thompson
For the Registry:	Ms Rachel Irura
For the Prosecution:	Mr Christopher Santora Ms Julia Baly Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Terry Munyard Mr Morris Anyah

A. Well, when Mr Bockarie came he called on us because there was no need for him to call all the officers again, so those of us who were closer to his location, he invited us. We came to Buedu and then he explained to us that he has brought ammunition, he has brought enough logistics so that we will be able to run any kind of mission. So he said we should now plan how to take the move and that the first target should be Kono, to Makeni, up to Freetown. And that the next target should be Segbwema and Daru, that is heading towards Kenema and to go to the southern province. So those were the things we discussed and the issue of SAJ Musa's disloyalty that he has been doing all along. That was also something we discussed.

10:25:49
10:26:15

Q. When you say the first target should be Kono, to Makeni, up to Freetown, what do you mean by that the first target was to be Kono?

10:26:46

A. Well, Kono is a mining area. In that whole country that is the place we know for high level productivity for diamonds, so we believe that if we were able to capture there first it would have been good for us. That was the reason why Kono - he said Kono should serve as the first target that we should capture.

10:27:12

Q. Were any particular commanders given the role of capturing Kono?

A. Well, yes.

Q. Who?

A. Well, Sam Bockarie told us that this plan was designed in Monrovia with Mr Taylor. He said it was designed in Monrovia so he only brought it to brief us, that this should be the way we should do things so that we will be able to succeed in the war.

10:27:33

Q. Who was it that was going to attack Kono?

A. Well, the commanders were there, Issa was there, Morris Kallon and Superman. They were the most senior men that were supposed to run this mission in those areas.
Q. When you say run this mission in those areas, which areas
10:28:34 are you talking about?
A. Kono.
Q. The plan was then to move on to Makeni, is that right?
A. Yes.
Q. What was to take place at Makeni?
10:28:49 A. Well, they should clear starting from Kono up to Makeni and those are towns that you cannot just jump over and go to Freetown, they were provincial headquarters, you have to pass through them first.
Q. What do you mean when you say, "They should clear"? What
10:29:16 do you mean by "clear"?
A. Clear in the sense - clear in the sense that when as you push forward you shouldn't spare any town, you shouldn't jump over any town, you shouldn't leave any town untouched. You have to pass through them all and make sure that they are under
10:29:41 control. That is what I mean by "clear".
Q. What commanders were given the role of clearing Makeni?
A. It was Issa who was the overall for that operation and Morris Kallon was his deputy and Superman was third in command.
Q. Then you said on to Freetown. Was anyone given the role of
10:30:23 moving on to Freetown?
A. Yes, they gave the mission to somebody.
Q. Who?
A. Well, Sam Bockarie sent the message to SAJ Musa even before they attacked Kono but he refused. He rejected the orders. He

said he cannot take orders from him, so there was a heated argument over the issue.

Q. When you refer to this heated argument, did it take place in this meeting?

10:31:06 A. You mean whether the argument took place during the meeting?

Q. Yes.

A. Yes, after the meeting he called him, but in fact the argument had started for a long time ago.

10:31:25 JUDGE SEBUTINDE: Mr Witness, we did caution you about saying "he called him". Please use names so that we can follow. Please repeat your answer.

THE WITNESS: Okay. Well, repeat the question.

MS BALY:

10:31:43 Q. The question was when you were referring to a heated argument I asked you whether the heated argument took place in the meeting that you have been giving evidence about?

A. After the meeting, but there had been arguments even before the meeting, before this mission there had been an argument. 10:32:07 Just at the time Sam Bockarie sent the message to all the stations, right from that time SAJ Musa was not happy about it. He was disgruntled right up to this mission time and after they had held the meeting. He sent the same order to SAJ Musa and he refused even before the Kono thing.

10:32:32 Q. I am going to come back to this issue about SAJ Musa in a moment, all right? One of the things you said was that the next target was to be Segbwema and Daru.

A. Yes.

Q. Who, if anyone, was given the role of taking Segbwema and

Daru?
A. I was.
Q. Now the second issue that you said that was discussed at the meeting was SAJ Musa.
10:33:21 A. Yes.
Q. What was it about SAJ Musa that was discussed at the meeting?
A. Well, Sam Bockarie told us that the complaint had gone up to Mr Taylor, that the man's complaints had been lodged about his
10:33:44 disloyalty towards the mission, and he too gave his own piece of advice just so that --
Q. Can I just ask you to pause there for a moment. Once again it's important that you use people's names. Sam Bockarie told you that a complaint had gone up to Mr Taylor, "That the man's
10:34:07 complaint", who is the man that made the complaint?
A. Sam Bockarie lodged the complaint to Mr Taylor against SAJ Musa regarding his attitude.
Q. What was it about SAJ Musa's attitude that he complained about?
10:34:30 A. He said he was a man who did not take any order from people. He was disloyal to the command.
Q. At the meeting was there any other discussion about SAJ Musa, apart from the fact that Sam Bockarie had made a complaint to Mr Taylor?
10:35:02 A. Yes, Mr Bockarie made us to understand that that man should not leave to tell the story and the only way we were to --
Q. What man?
A. SAJ Musa. SAJ Musa.
Q. SAJ Musa should not leave to tell the story. Continue from

there?

JUDGE SEBUTINDE: Not live. The record says "leave", but it is actually L-I-V-E, I imagine.

MS BALY: Yes:

10:35:34 Q. What did you say? Can you repeat your answer? You said, "Mr Bockarie made us to understand that that man should not ..." Can you continue from there?

A. He said we should go all out to ensure that that man should not live to tell the story.

10:35:54 PRESIDING JUDGE: Mr Interpreter, what word did the witness use?

THE INTERPRETER: Live to tell the story.

PRESIDING JUDGE: L-E-A-V-E?

THE INTERPRETER: L-I-V-E.

10:36:04 MS BALY:

Q. And just so it is clear, what man should not live to tell the story?

A. SAJ Musa.

Q. Did Sam Bockarie say anything else about SAJ Musa not

10:36:21 living to tell the story?

A. Yes, yes.

Q. Now, take it slowly and tell us what he said.

A. He said we should only be able to get him when there was a mission, when there was operation going on. He even made us to

10:36:43 understand that that was something he had been discussing with Gullit, that during any mission that man should not live. He should die because he was a traitor. He referred to him as a traitor.

Q. Did Sam Bockarie say how SAJ Musa was to die?

A. Well, in the military terms they say it should be during operations. You know, if they will mean arms. He should die during the battle. He should be shot.
Q. Did he say who should shoot him?
10:37:30 A. He just told us that he had spoken to Gullit and that the two of them had been discussing that even before Gullit went to where SAJ Musa was. That was what he made us to understand.
Q. He made you to understand that he had been discussing this with Gullit, is that what you are saying?
10:37:53 A. Yes, yes.
Q. Did he make you understand who was to do the killing of SAJ Musa?
A. It was the discussion that he had with Gullit. He did not specify who should do the shooting, but the discussion had been
10:38:13 going on together with Gullit.
Q. This particular meeting, how long did it go on for?
A. It was a very short meeting, just for three hours, because it was at night and we did not even want Johnny Paul to know.
PRESIDING JUDGE: Ms Baly, I am not clear from the record
10:38:41 when this meeting took place.
MS BALY: I think we actually have that. It is mid-December. He did give the evidence that the meeting took place in December of 1998 and he said around the middle, if I can just find it. I can clear it with the witness now:
10:39:12 Q. Mr Witness, I am going to ask you again when was it that this meeting - this second meeting - took place?
A. It was at night in December.
Q. December what year?
A. 1998.

Q. Are you able to say - and please tell us if you can't say - when in December the meeting took place, or when abouts?
A. I cannot recall the exact date now, but it was at night that we held the meeting. I cannot recall the date.
10:39:53 JUDGE SEBUTINDE: Ms Baly, the witness mentioned a phrase that SAJ Musa was disloyal to the command. What command? I would like to know.
MS BALY:
Q. What command was SAJ Musa disloyal to?
10:40:10 A. The RUF command.
Q. Was he disloyal to the RUF command generally, or was it some commander in the RUF specifically?
A. Well, I believe in the RUF if somebody was disloyal to Sam Bockarie's command then that should be that you are disloyal to
10:40:35 the RUF command because he was the head.
Q. Thank you.
A. Thank you too.
Q. This meeting - this three hour short meeting - was there anything else discussed apart from the plan to attack Freetown
10:40:54 and the SAJ Musa issue?
A. Yes.
Q. What?
A. Well, at that time even the leader who had his revolution was there. That should be the first target, to go to Pademba
10:41:18 Road and to free - to release the leader, and second we were to go to State House and overthrow the President and if possible, if we met him there, we should kill him.
Q. Just so it is clear, what President was to be overthrown and if possible killed?

A. President Kabbah.
Q. And what leader was to be released from Pademba Road?
A. Foday Sankoh.
Q. The person Jungle who you discussed yesterday, was he at this meeting?
10:42:02
A. Yes, yes, he was part of this 12 man meeting.
Q. Did Jungle speak at the meeting?
A. Yes, later, after the plan had gone on, Sam Bockarie spoke to Mr Taylor about the plan, how the mission was to carry on, and --
10:42:37
THE INTERPRETER: Your Honours, can the witness repeat his last answer?
PRESIDING JUDGE: Mr Witness, the interpreter asks that you repeat your last answer. Please pick up from the point where you said "... how the mission was to carry on". Continue from there.
10:42:48
THE WITNESS: They briefed President Taylor, the former President, about the plan how it was set. After that Jungle too buttressed the same topic to him, how the plan had been made, and he in turn thanked them and told them to carry on and that he said he would pray that the mission would be successful.
10:43:25
PRESIDING JUDGE: Just a moment. "Jungle too buttressed the same topic to him", who is him?
THE WITNESS: To Mr Taylor.
MS BALY:
Q. How did --
10:43:42
JUDGE SEBUTINDE: Ms Baly, the question you asked previously was did this man Jungle speak at the meeting and then the answer that follows doesn't answer your question.
MS BALY: I will go back to that:

Q. My question - and just listen carefully to the question - is I am referring to in the meeting, this three hour meeting, during the meeting did Jungle speak?
A. Yes.
10:44:12 Q. What did Jungle say in the meeting?
A. Well, in the first place Jungle himself told us about the material that Mr Bockarie had brought and that we should not fear this time round and that there was no force that could withstand us. That was what he said in the meeting and he said he had
10:44:39 discussed it with the Pa in Monrovia even before they came.
Q. And did he say what the Pa had said in Monrovia?
A. Yes, it was just what Sam Bockarie told us. He just spoke about the same issues Sam Bockarie had spoken about, that the Pa had said our first target should be Kono before we should
10:45:13 proceed. That was what he too explained.
Q. When you are saying "he", "he too explained", who are you referring to? Who was the "he too that explained"?
A. Mr Taylor.
JUDGE SEBUTINDE: Well, Mr Taylor was not in the meeting.
10:45:40 MS BALY: I know, your Honour:
Q. The questions I have been asking you are about what Jungle said in the meeting and you have told us that Jungle said he had some discussion with the Pa in Monrovia about the plan. I am going to ask you - my question is did Jungle say in the meeting
10:46:12 what the Pa had said to Jungle in Monrovia?
A. Yes, that is what I explained. I said they were the ones who came, so he too told us about the materials that had been brought for the mission and that the Pa - that they had discussed with the Pa how the mission should go on. That is Pa Taylor.

MR MUNYARD: I am sorry, but now I don't know who the "they" is. I said, "They were the ones who came". Can we please find out from the witness who he is talking about at this stage?

MS BALY:

10:46:54 Q. Now what you said a moment ago was, "I said they were the ones who came". Who are "they" that came?

A. Jungle. Jungle.

Q. So, Jungle is one person?

A. And Sam Bockarie.

10:47:14 Q. And Jungle and Sam Bockarie you have already told us were both at the meeting, is that right?

A. Yes, yes.

Q. Now apart from Jungle telling you that he had discussed the plan with the Pa in Monrovia, did Jungle say anything else at the

10:47:36 meeting? At the meeting?

A. Well, that is what he said. That is what he said.

Q. After the meeting, immediately after the meeting, what did you do?

A. After the meeting, I returned to my area of operation to be

10:48:09 able to start preparation for my own responsibility that was given to me so that I would carry it out.

Q. Before we go to that, this meeting you said was held at night. About what time in the night was the meeting held?

A. That meeting I will think it was 9 o'clock, or thereafter.

10:48:45 Q. It went for approximately three hours. Did it finish around midnight?

A. Yes, yes.

Q. On that night immediately after you left, or immediately after the meeting had finished, did you see Jungle?

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

MONDAY, 7 APRIL 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr William Romans Ms Sidney Thompson
For the Registry:	Ms Rachel Irura
For the Prosecution:	Mr Nicholas Koumjian Mr Mohamed A Bangura Mr Alain Werner Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Terry Munyard Mr Morris Anyah

things?
A. You mean the information regarding this particular letter that I have spoken about? Is that what you mean, my Lord?
Q. I do.
10:23:38 A. Yes, the person who first spoke to me, who tried to ensure that I talked to the Prosecution, he assured me of that even before I came to the Court.
Q. Right, thank you. I want to turn to something else, please. In your evidence in March when you were being taken
10:24:09 through your account by Mr Koumjian, you told this Court - and correct me if I have misunderstood - that the invasion of Freetown on 6 January 1999 was essentially Charles Taylor's idea, do you agree?
A. I said that, my Lord.
10:24:49 Q. So it was all down to Charles Taylor, was it, the idea that Freetown should be attacked in early January of 1999?
A. Well, it was a plan that they arranged that we should attack all the other places that we attacked and that we should attack Freetown. That was a plan brought - that Mosquito
10:25:28 brought.
Q. From?
A. The time he came from Monrovia. That was the time he called us to a meeting and he explained that to us.
Q. Are you sure it wasn't in fact a project of the AFRC, the
10:26:07 attack on Freetown in January 1999?
A. Well, the AFRC people went there. They went to Freetown, but the plan that was brought by Mosquito from Mr Taylor was for us to attack all the other places and to advance on Freetown, but they did not select a specific group that it was this group that

was supposed to go to Freetown. I am not saying that the AFRC and the RUF did not go to Freetown. They all went to Freetown on 6 January.

Q. And whose idea was it?

10:27:02 A. Well, the plan I have told you about was a plan that Mosquito brought when he came from Monrovia and he told us that he discussed with Mr Taylor and that was the same time he brought the ammunition for us to attack Kono and other places, and for us to advance on the capital city and to capture there.

10:27:28 Q. Now, I put to you on Friday that the relationship between the AFRC and the RUF was a difficult relationship and you didn't agree. Do you remember?

MR KOUMJIAN: I believe counsel on Friday put a timeframe of during the initial junta period, during the time that they

10:27:50 were in Freetown, as I recall.

MR MUNYARD: I think what I put was "from the outset". I think I used that expression "from the outset".

MR KOUMJIAN: That is correct.

MR MUNYARD: Meaning right from the start it was a

10:28:02 difficult relationship:

Q. And you would not agree with that, would you, Mr Mongor?

A. Yes, it was because you were talking about the start. You said the RUF and the AFRC and you were talking about the beginning. That was the one I said I did not agree with.

10:28:25 Q. Yes, you have just heard Mr Koumjian's intervention, haven't you, and that is why you are now coming out with that answer, isn't it?

A. That was not it, my Lord.

Q. All right, I suggest it was. When I was asking you

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

TUESDAY, 11 MARCH 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr William Romans Ms Sidney Thompson
For the Registry:	Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Mr Mohamed A Bangura Mr Nicholas Koumjian Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Terry Munyard Mr Morris Anyah

A. The first meeting took place at Hill Station where Sam Bockarie was residing. That is his house. That was where the first meeting took place and the meeting took place amongst us the RUF authorities and Ibrahim Bah.

09:34:34 MR KOUMJIAN: Unless I misheard, I believe the witness said Hill Station:

Q. Is that correct, Mr Witness?

PRESIDING JUDGE: I heard Hill Station.

THE WITNESS: Yes, Hill Station.

09:34:45 MR KOUMJIAN: H-I-L-L, capitalised:

Q. Sir, you said it was Sam Bockarie's house. Was Sam Bockarie present?

A. No, Sam Bockarie was not present, but it was in that house that Sam Bockarie resided at the time we went to Freetown.

09:35:10 Q. At the time you had this meeting, to your knowledge was Sam Bockarie in Freetown?

A. He was not in Freetown. He was in Kenema.

Q. Who was present at this first meeting at Bockarie's house with Bah?

09:35:29 A. Issa Sesay was there, Morris Kallon, CO Nya, who is also called Foday K Lansana, Gibril Massaquoi and then they sent for me, I was also present, and some other people.

Q. Thank you, Mr Witness. What happened at the meeting?

A. During that meeting Mr Bah came to talk to us, the RUF, for

09:36:38 us to join hands with the AFRC people whom had called on us for us to work together with them. He said it was that message that he brought from Mr Taylor for us.

Q. What was the reaction, if any, from the RUF members present?

A. Well, we did not do anything because we knew Ibrahim Bah. He had been with us before and we knew him to be a liaison officer who had been with the RUF, so when we saw him, and when he brought the message, we were happy and we received the message according to how he brought it.

09:37:56

Q. Mr Witness, this message from Mr Taylor that you should work - the RUF should work with the AFRC, did the members of the RUF discuss that, or was there any reaction given to General Bah about whether they accepted that?

09:38:20

A. Well, we accepted it because it was not that we went to have another meeting because of the message that he brought. We accepted it. We accepted that the message he brought, we received it and then we took him, the Bah - we took him, the Bah, to JPK's place, that is Johnny Paul Koroma, so that he will also get to know the message that Ibrahim Bah brought.

09:38:51

Q. Where was Johnny Paul Koroma's place that you took Mr Bah to?

A. Johnny Paul Koroma's house was at Spur Road.

Q. When you got to Johnny Paul Koroma's house who was present there?

09:39:15

A. Johnny Paul Koroma, he sent to call the other officers. Those were the SLA officers. They called SO Williams, they called Gullit, Bazzy. They called on all the other authorities who belonged to the AFRC and they were also present there.

Q. What was said at this meeting at JPK's house?

09:39:57

A. JPK and all of us who were there together with Ibrahim Bah, we went to introduce the man to him to tell him that, "This man was the man who has been with us and that it is the Pa who sent him for him to come and talk to all of us." When I say the Pa,

that is Mr Taylor. "So, he brought a message that we should all work hand in hand and that is the reason why Mr Taylor sent him here. So, we brought him so that you will also see him and then he will explain to you the reason why he was sent."

09:41:12 Q. When Mr Bah delivered this message, what was the reaction of those present?

A. Well, everybody was happy for the message. We all accepted it and we all agreed with him.

Q. Did Johnny Paul Koroma say anything?

09:41:43 A. Johnny Paul Koroma himself received the message and he was happy too for the reason being that for the message for which Mr Taylor had sent the man.

Q. You say that the reaction was that those present were happy. Can you explain why they were happy?

09:42:19 A. Well, they were happy because we also needed help and the reason why they also accepted it was because that man will be able to help us to get ammunition because we were fighting and the AFRC also never had enough ammunition that they would use to continue the war.

09:42:54 Q. Was this something that was stated at the meeting: That there was a need for ammunition?

A. Yes, we discussed that one. In fact, that was our main topic that we had in mind.

Q. How long, to your knowledge, did Ibrahim Bah stay in

09:43:25 Freetown on that occasion?

A. Well, after that day, the next morning I didn't see him again. He went.

Q. At the meeting when Bah delivered this message from Taylor, was there any response given to Bah to take back?

we were using vehicles. So I arrived in the evening and went to Sam Bockarie's house.

Q. What happened when you got to Sam Bockarie's house?

A. When I arrived at Sam Bockarie's house we went into his room, the two of us, we sat down there and he briefed me about his return and what he has brought. He told me that he's brought some ammunition, food, medicines.

Q. What did you observe about Sam Bockarie's mood at that time?

A. Well, Sam Bockarie, he was happy. I saw that he was happy. So when we entered his room we started talking and he was telling me how they did things, the result of the invitation that was extended him to by the Pa, he came with some ammunition, he came back so that we can run some missions. He said they went to Burkina Faso, he brought some pictures of the hotel where they lodged. He showed me the pictures and the swimming pools, the restaurants where they ate. He brought out those pictures and showed them to me and he told me that he brought some ammunition.

So in his room he had a door there leading to a place where he packed the ammunition. It was a shop like place. So he opened the door leading from his room into the shop. So we entered there and saw the ammunition that he had brought. He showed those ammunitions to me. When I saw the ammunitions I was happy because they were many.

Q. Okay, thank you. Now you said in Bockarie's room, next to his room, there was a shop like place. Before this was Bockarie's house do you know what kind of place this was, what it was used for?

A. Well, that place was owned by people. It's - the house had

a shop.
Q. And do you know, if you don't know or if you don't know just tell us, what kind of shop that was before it became Sam Bockarie's house?
14:38:09 A. Well, that shop, that was where we kept the ammunition. It's a store. That's where we kept the ammunition and the food stuff which he brought. That's where we kept them. It was not owned by Mosquito himself. The house was owned by civilians, but the house had a shop before Mosquito moved into that house. So
14:38:30 he just turned the shop into a store.
Q. Had you been inside that shop area in Mosquito's house before?
A. Yes, I went there.
Q. When you went into the shop, when he took you into the shop
14:38:51 area of his house this time what did you see?
A. I said I saw the ammunition that he'd brought. They were packed from the floor up to the ceiling, that was how the ammunition boxes were packed. The ammunition was plenty at the time that he brought them. So when I saw the ammunitions I was
14:39:17 very happy.
Q. You indicated that the ammunition was packed up to the ceiling. Can you point to something perhaps in this room or give us an idea of the height in comparison to my height or in comparison to something you see in the room as to how high the
14:39:35 ammunition was?
A. Well, the ceiling that was in the house, I can say this one is higher a little. This one is higher a little. But it could be where that - I don't know if that's a speaker, where that speaker is. From down here to where that speaker is. That's how

make the operation fearful than all the other operations that we had undertaken because we want to make sure that we take Freetown and hold on to power.

Q. Mr Witness, are you telling us now when you talk about the plan for a fearful operation that this is what Bockarie told you he discussed with Charles Taylor?

A. Yes, that was what Sam Bockarie said.

Q. What happened after your private discussion there in the storeroom and in the house with Bockarie?

14:55:13 A. After that, because they had sent for the commanders to come, the following morning the commanders came to Buedu. Then we had a meeting where he told us all I have explained here and what he had brought to show them to the commanders and what the mission was for those ammunitions that he's brought. So just 14:55:48 like he told me, that was what he also told the commanders after they had all come, including the SLA commanders who had come. We had the meeting and he explained the same thing that he had briefed me on. He also showed the ammunition to the people.

So when he spoke at the meeting the late Pa Rogers, SYB 14:56:18 Rogers that I spoke about with whom he came, he stood and told and thanked Sam Bockarie and he told us that if Sam Bockarie was the rebel leader at the time the war started then the war would have ended quickly because the ammunition which they brought, the man who was Foday Sankoh who was the rebel leader had never 14:56:55 brought that quantity of ammunition which they had now brought.

Q. Who was present at this meeting of commanders in Buedu that you just discussed?

A. I was there. Mike Lamin was there. Leather Boot was at that meeting. Akim Turay, Eddie Kanneh and other commanders from

other places, they too came and they were present.
Q. First, Mr Witness, can you tell us what faction Akim Turay belonged to?
A. Akim Turay was an SLA. He was a soldier in the Sierra
14:58:10 Leone Army.
Q. What faction did Leather Boot belong to?
A. Leather Boot too was a soldier, an SLA.
Q. What faction did Eddie Kanneh belong to? Who was Eddie Kanneh?
14:58:31 A. Eddie Kanneh was one of the soldiers. He too was a soldier, an SLA.
Q. Can you tell us if you recall any RUF commanders besides Mike Lamin being present at this meeting, and yourself?
A. You had Monkey Brown who was also another RUF commander.
14:59:12 Q. Thank you.
A. Issa Sesay too was there. Morris Kallon was there.
Q. Thank you. Do you recall any other names at this time?
A. Augustine Gbao, he too was there.
Q. Now, sir, you indicated that the plan for your own
14:59:52 assignment was to go and attack Joru and Zimmi to receive NPFL troops. What do you mean at this time in 1998 by NPFL forces?
A. NPFL fighters were those who came from Liberia who were Charles Taylor's men and who were in Liberia. They were the ones who were to join us. But I was to go and receive. That was why
15:00:36 he said I should attack Joru and advance on Zimmi for me to receive them. They were to join us for us all to run the operation.
Q. You did not mention Superman. Was Superman at the meeting?
A. No, Superman was not there. I had told you that Superman

RESTRICTED

(16)

REVOLUTIONARY UNITED FRONT OF SIERRA LEONE - RUFSL
2ND INF BRIGADE HEADQUARTERS - BOMBALI DISTRICT
REVOLUTION INTELLIGENT OFFICE

DATE: 21/1/1999

00025494

TO :- The BFC (Brigadier I. H. Sesay.

FROM:- The Over All Intelligent Officer Commander and B lack Guard Adjutant.

SUB :- REPORT

Upon hearing the confirm report that the Strike Force Commander Brigadier Goodisl entered Freetown with his troops, Colonel Boston Flomo(Alias Verndame) was instructed to meet with him with his troops date 05 Jan 1999, We lusanched a seriuos attack on Masiaka around 5:55 in the morning, the enemies were not able to with stand or confront us.

LOGISTICS CAPTURED:

1. One (1) American GMG.
2. Some Light suthomatic Riffles.
3. Some assort GMG rounds.

CASUALTY:- Two (2) wounded in action (WIA), with that seesl we advanced to RDF but no enemy confronted us, straight away we headed for Waterloo. with confidence that Waterloo may be out of enemy control, unfurthmately we got in the mist of Guinean troops we fight for the whole day unto the night.

LOGISTICS CAPTURED RDF:

1. Six (6) Rockets RPG Bombs with 6 TNT'S.
2. One (1) Box of Mortar Bombs.

Date:- 06 Jan, 1999. In the noon whilst resting at Waterloo displaced and Refugees Camp, the deployed soldiers sent some civilians to us from the Guineans saying that they want to go to Guinea.

Date:- 07 Jan, 1999. 0300 hrs we lusanched attack on their position at Pemusilar Secondary School Waterloo. This act gathered them from their deployment zone to the said Secondary School. In the afternoon the enemies comunicated with us through letter that they does'nt want to figth any longer with us, Colonel Boston Fomo replyed this letter to thier high commands.

Date:- 08 Jan, 1999. 1300 hrs we attacked them again. In the noon 1500 hrs heavy and thick enemy convoy left from Port Loko bombading whilst the Alpha Jet was flying ever as special escort 1545 hrs the convoy including the deployed enemies that were at Waterloo evaquated Waterloo back towards Port Loko Axis, We embarrassed them and with the panic in them because we tried them every where they left behind some logistics; 120mm Mortar Gun, 40 Barrel Missile with some assorted rounds of AK rounds, G3, GMG, Balibre, Bombs indeed the capturing of surrendered soldiers is eminent also at Waterloo and more Benguima, we do capture materials almost everyday Casualty on the operation overall operation at Waterloo 2 Killing in action (KIA) and around 15 Wounded in action (WIA).

Date:- 09 Jan, 1999. We deployed at Hastings, we discovered enemies at Jui and Kosso town earlier on thier number was not much, from this said date onto now, we everyday attack the guys, but the Air Raid is desperate on and we attaked Jui and Kosso town, however the Helicopter which landed every day at the point had re-inforced the enemies with both armament and menpower.

CASUALTY ON JUI OPERATION:-

1. One Killing in action (KIA)
2. A good number of Wounded in action (WIA)

...../2.

RESTRICTED

Date:- 15 Jan, 1999. It was agreed that the men in Freetown and the men at our point where to do joint operation on Jui and Kosso town. The Freetown men schedule to attack Jui and we to attack Kosso town, that night we attacked Kosso town clear the enemies but the Freetown men never turn up, therefore the enemies with the support of the Alpha Jet drove us from Kosso town .

Date:- 18 Jan, 1999. The Guinean troops from Port Loko entered vehemently at Waterloo with sporadic shelling and firing. Infact Two (2) Alpha Jets escorted the troops consisting of five (5) War Tanks, Two (2) Armourd Car, One (1) 40 Barrel Missile and serries of AA one Barrel and Twin Barrels. they occupied Waterloo from that evening onto the morning around 0300 hrs.

PROBLEMS:- For the main while the only problems thier at the front line are;- (1) We have not yet connected physically with our brothers in Freetown.
(2) Menpower indeed to be engaged on this Urban Warfare.
(3) The stratigic positions of the enemies mainly Port Loko, Lungi, Jui, Kabala are delaying our progress. These problems are to be looked into kindly and to find fast solution.

00025495

SUGGESTION:-
We suggested that as we are on Urban gaurrile Warfare, that we use mainly artilary weapons.

That we speedily recruits abled and gallant men as population matters.

All Units to be active especially at the frontline especially Units like IDU, G5, G4, and S4.

That Tombo Road should be engaged wile fighting force-enemies are at Tombo.

That monitary group should be formed, should assess and bring in situation report from at the Flanks Waterloo, Port Loko, Mile 91, and Kabala.

That the commanders should give chance to we the securities to be reached to you with processed situation report.

All Front lines to be re-inforce with correct combat medics.

RECOMMENDATION;-

Anyway the morale of the soldiers especially to the point I have visited is high. Bravo to Colonel Boston Flomo, Major Barkar, Lieut.ColVictor, Lieut.Col Amara Sallia (Alias Peleto) and all Black Guards. Only the regards for one another is lagging but I pray that we will put this together fastly I beg sir, that you look into my problems and you rectify it with General Sam Bockarie ie; the conflicting position between Ben Kenneh and me.

Best regards. 21-01-99

Signed:_____
Lieut Raymond Kartewu
Black Guard Adjutant.

Approved 21-01-99
Major Christ A. Mannah
Overall I.O. Commander.

RSG/MVA/CLN-528

MOST IMMEDIATE

CODE CABLE

TO: PREDERGAST,UNATIONS, NEW YORK

ATTN: FALL, UNATIONS, NEW YORK

FROM: DOWNES-THOMAS, RSG, UNOL, MONROVIA

DATE: 21 December 1999

SUBJECT: **Discussions on the Sierra Leonean Situation**

1. Further to our Code Cable-CLN-525 of 20 December 1999, we wish to inform you that during President Obasanjo's stop-over at the Robert International Airport(RIA), Presidents Taylor and Obasanjo held talks regarding the implementation of the Lome Peace Accord on Sierra Leone. UNOL has been informed that the two leaders have reached an agreement by which Sam Bockarie and some of his followers can be temporarily relocated to other countries.

2. During a Christmas Tree Lighting ceremony held at the Executive Mansion this evening, President Taylor announced that RUF leader Foday Sankoh will leave Monrovia for Freetown within the coming two days.

3. This afternoon, the BBC correspondent in Monrovia, Jonathan Pellele, reported that Presidents Obasanjo and Taylor had met with Sam Bockarie at the RIA. The two leaders reportedly informed Sam Bockarie that it had been decided that he would stay out of Sierra Leone until the end of the disarmament process. He was given the choice to stay in Liberia or in any other third country. It was also reported that the security officials along the Sierra Leone-Liberia border had been instructed to ensure that he does not cross the border into Sierra Leone during the specified period.

4. A detailed report will follow.

Best regards.

RSG/MVA/CLN – 529

MOST IMMEDIATE

CODE CABLE

TO: PREDERGAST, UNATIONS, NEW YORK

ATTN: FALL, UNATIONS, NEW YORK

FROM: for DOWNES-THOMAS, RSG, UNOL, MONROVIA

DATE: 22 December 1999

SUBJECT: Discussions on Sierra Leone, Liberia-Guinea Relations and the MRU Summit

1. Further to our Code Cable-CLN-528 of 21 December 1999, we wish to inform you that, at our request, Foreign Minister Monie Captan shared with us , today, some pertinent information regarding the talks between Presidents Taylor and Obasanjo during President Obasanjo's stop-over at the Roberts International Airport on Monday 21 December 1999. The Minister indicated that the talks centered on the question of the implementation of the Lome Peace Accord in Sierra Leone, Liberia-Guinea relations and the issue of the convening of the long awaited summit of the MRU, which he elaborated as follows:

Sierra Leone

> On the issue of the peace process in Sierra Leone, President Taylor informed his guest that he had been engaged in resolving the problems between Foday Sankoh and Sam Bockarie. It was his assessment that Sam Bockarie was defying the orders of the leader of his movement, at a critical moment in the implementation of the Accord. Under these circumstances, he felt that it was essential that the integrity of the Accord be protected by ensuring the continued participation of Sankoh as a signatory to the agreement. He had thus reached the conclusion that arrangements should be made to ensure that Sam Bockarie and his immediate followers stay out of Sierra Leone until the end of the disarmament process. President Taylor, however, indicated that the arrangement would entail substantial expenditures which Liberia alone could not shoulder. He, therefore, appealed to President Obasanjo and other leaders in the region to assist his country in meeting this challenge.

> President Obasanjo welcomed President Taylor's initiative and promosed to approach other colleagues in the region so as to solicit their support for such a worthy project.

RSG/MVA/CLN – 529

Liberia- Guinea relations

> With regard to Liberia -Guinea relations, President Obasanjo briefed his host of the discussions he had held with President Conteh on the problems undermining normal relations between the two countries. He indicated that President Conteh had informed him that there was no serious problem between the two countries and that the problem was essentially between him and the Liberian leader. It was President Conteh's contention that their commitments to peace differed. The Nigerian leader, therefore,appealed to President Taylor to do his utmost to contribute to the enhancement of confidence building among the two countries.

> In reacting to President Conteh's assessment of the state of relations between the two countries, President Taylor admitted that there was a degree of mistrust between him and the Guinean leader.He argued, however, that state of affairs has its roots in the activities of Liberian dissidents operating out of Guinea.

Mano River Union Summit

> On the issue of the summit, President Obasanjo appealed to President Taylor to agree to the convening of the proposed MRU summit in Conakry as suggested by President Kabbah. While welcoming the idea of the convening of the summit itself, President Taylor indicated to his guest that the new venue (Conakry) was not acceptable to him. He argued further that Liberia forfeited its initial opportunity to host the summit in Monrovia because it was felt that its convening in Freetown would have the advantage of giving a boost to the Sierra Leonean peace process. The two leaders agreed that, under the circumstance, it would be prudent to hold the summit in Abuja.

Minister Captan's Observations

2. Following his remarks on the issues which transpired in the talks mentioned above, the Minister underscored the risks that Liberia was taking by according Sam Bockarie and his immediate followers some sort of temporary asylum. He noted that the decision was reached primarily because it would not be possible to solve the problem by merely granting temporary asylum to Bockarie alone, as one of his officers in the field could assume the role of a field commander. It was also his contention that Sam Bockarie did not seem to be willing to reside in another country. In any case, the plan is to ensure that he lives in Monrovia, and not in the hinterland, so that the government can keep an eye on his movement. He appealed to the United Nations to assist Liberia in meeting this challenge.

Best regrds.

675)

SCSL-04-16-A
(1883-1999)

10147
1883

SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

Before: Justice George Gelaga King, Presiding Judge
Justice Emmanuel Ayoola
Justice Renate Winter
Justice Raja Fernando
Justice Jon M. Kamanda

Registrar: Herman von Hebel

Date: 22 February 2008

PROSECUTOR **Against** **ALEX TAMBA BRIMA**
BRIMA BAZZY KAMARA
SANTIGIE BORBOR KANU
(Case No. SCSL-2004-16-A)

JUDGMENT

Office of the Prosecutor:
Dr. Christopher Staker
Mr. Karim Agha
Mr. Chile Eboe-Osuji
Ms. Anne Althaus

Defence Counsel for Alex Tamba Brima:
Kojo Graham

Defence Counsel for Brima Bazzy Kamara:
Andrew Daniels

Defence Counsel for Santigie Borbor Kanu:
Ajibola E. Manly-Spain
Silas Chekera

concerning the burning of five young girls inside a house in Karina and the events in Freetown. In respect of the incident involving the death of five young girls in Karina, the Prosecution concedes that there are "variations in the details of how the crime was committed;" but notes that there is no dispute concerning what it calls the "essential features" of the evidence.[385]

3. Discussion

257. In addition to military commanders, superior responsibility under Article 6(3) of the Statute encompasses political leaders and other civilian superiors in positions of authority.[386] A superior is one who possesses the power or authority to either prevent a subordinate's crimes or punish the subordinate after the crime has been committed.[387] The power or authority may arise from a *de jure* or a *de facto* command relationship.[388] Whether it is *de jure* or *de facto*, the superior-subordinate relationship must be one of effective control, however short or temporary in nature. Effective control refers to the material ability to prevent or punish criminal conduct.[389] The test of effective control is the same for both military and civilian superiors.[390]

258. Kamara submits that a finding of superior responsibility requires proof of both command and control which he claims are inseparable.[391] The Appeals Chamber rejects this assertion. The terms "command" and "control" are two related but distinct concepts. The term "command" refers to powers that attach to a military superior, while the term "control," which has a wider meaning encompasses both military and civilian superiors.[392]

(a) Kamara's Responsibility for Crimes Committed by Savage

259. Kamara contends that the Trial Chamber erred in finding him liable as a superior for crimes committed by Savage in Kono District. According to Kamara, he did not have the material ability to control the acts of Savage because Savage was unruly in character.[393] The Trial Chamber noted that

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[384] *Ibid* at paras 5.34-5.37.
[385] *Ibid* at paras 5.56-5.61.
[386] *Čelebići* Appeal Judgment, para. 195.
[387] *Aleksovski* Appeal Judgment, para. 76, *Bagilishema* Appeal Judgment, para. 50, *citing Čelebići* Appeal Judgment, para. 192.
[388] *Bagilishema* Appeal Judgment, para. 50.
[389] *Čelebići* Appeal Judgment, para. 256.
[390] *Bagilishema* Appeal Judgment, para. 50, *citing Aleksovski* Appeal Judgment, para. 76.
[391] Kamara's Appeal Brief, para. 194.
[392] *Čelebići* Appeal Judgment, para. 196.
[393] Kamara Appeal Brief, para. 208.

enlisting children under the age of 15 years] was legitimate."[451] He contends that at all material times, he lacked the requisite criminal intent required for the crime of "conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities" punishable under Article 4.c of the Statute of the Special Court.

294. In the alternative, Kanu argues that conscripting or enlisting children under the age of 15 was not a war crime at the time alleged in the Indictment.

295. The Prosecution observes that the Appeals Chamber has already ruled that conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities was a crime entailing individual criminal responsibility at the time of the acts alleged in the Indictment. The Appeals Chamber refers to its dictum that:

> "The rejection of the use of child soldiers by the international community was widespread by 1994 . . . Citizens of Sierra Leone, and even less, persons in leadership roles, cannot possibly argue that they did not know that recruiting children was a criminal act in violation of international humanitarian law. Child recruitment was criminalized before it was explicitly set out as a criminal prohibition in treaty law and certainly by November 1996, the starting point of the time frame relevant to the indictments. As set out above, the principle of legality and the principle of specificity are both upheld."[452]

296. Kanu's submission that conscripting or enlisting children under the age of 15 was not a war crime at the time alleged in the Indictment is without merit. Furthermore it is frivolous and vexatious for Kanu to contend that the absence of criminal knowledge on his part vitiated the requisite *mens rea* in respect of the crimes relating to child soldiers.

297. Kanu's Seventh Ground of Appeal therefore fails.

D. Kanu's Ninth Ground of Appeal: Findings of Responsibility Pursuant to Article 6(1) of the Statute

1. The Parties' Submissions and the Findings of the Trial Chamber

298. In his Ninth Ground of Appeal, Kanu submits that the Trial Chamber erred in convicting him under Article 6(1) for planning the commission of sexual slavery (Count 9), the conscription and use of children for military purposes (Count 12), and abductions and forced labour (Count 13).

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[450] Kanu Appeal Brief, para. 7.1.
[451] *Ibid* at para. 7.8.
[452] Norman Child Recruitment Decision, paras 52-53.

The Trial Chamber held that Kanu "planned, organised and implemented the system to abduct and enslave civilians which was committed by AFRC troops in Bombali and Western Area." It further held that Kanu "had the direct intent to establish and implement the system of exploitation involving the three enslavement crimes, namely, sexual slavery, conscription and use of children under the age of 15 for military purposes, and abductions and forced labour."[453] The Trial Chamber was, therefore, satisfied beyond reasonable doubt that Kanu bore individual criminal responsibility under Article 6(1) for planning the commission of the above crimes in the Bombali District and the Western Area.[454]

299. Kanu argues that while the evidence shows that it fell upon him, as Chief of Staff, to manage the system of slavery within the AFRC faction, he could not be convicted on that basis for planning the crimes of sexual slavery, conscription and use of children for military purposes, and abductions and forced labour.[455] He further argues that at best, the evidence implicates him at the execution stage in the military training of children and the exploitation of women for sexual purposes.[456]

300. The Prosecution responds that Kanu's position of influence in the AFRC and his admission that he managed this system of slavery amply justify a reasonable inference that he was involved in planning the above crimes.[457]

2. Discussion

301. The Appeals Chamber concurs with the Trial Chamber's definition of planning under Article 6(1). The Trial Chamber stated that " 'planning' implies that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases."[458] Circumstantial evidence may provide proof of the existence of a plan, and an individual may incur responsibility for planning when his level of participation is substantial even though the crime may have actually been committed by another person.[459] According to the Trial Chamber, the *actus reus* for planning requires that "the accused, alone or together with others, designated [*sic*] the criminal

[453] AFRC Trial Judgment, para. 2095.
[454] *Ibid* at paras 2096-2098.
[455] Kanu Appeal Brief, para. 9.1-9.6.
[456] *Ibid* at para. 9.6.
[457] Response Brief of Prosecution, paras 6.61, 6.64, 6.66.
[458] AFRC Trial Judgment, para. 765.
[459] *Ibid* at para. 765.

(624) SCSL-04-16-T (22984 — 28019)

10151

22984

SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

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

Registrar: Herman von Hebel

Date: 19 July 2007

Case No.: SCSL-04-16-T

PROSECUTOR

Against

Alex Tamba BRIMA
Brima Bazzy KAMARA
Santigie Borbor KANU

SENTENCING JUDGEMENT

Office of the Prosecutor:
Christopher Staker
Karim Agha
Chile Eboe-Osuji
Anne Althaus

Defence Counsel for Alex Tamba Brima:
Kojo Graham
Glenna Thompson

Defence Counsel for Brima Bazzy Kamara:
Andrew Daniels
Mohamed Pa-Momo Fofanah

Defence Counsel for Santigie Borbor Kanu:
Geert-Jan Alexander Knoops
Agibola E. Manly-Spain
Carry Knoops

Leonean practice can only be considered as a guide but is not binding on the Trial Chamber.[57] It further refers to the *Serushago* Trial Chamber's assessment of mitigating circumstances in that case,[58] and cites a number of cases before the ICTY and ICTR in which high ranking officials convicted on numerous counts were given lighter sentences than those proposed by the Prosecutor in the instant case.[59]

30. The Kamara Defence notes that the Kamara was convicted of having ordered the killing of five girls in Karina, Bombali District, and submits that the average sentencing period at the ICTR for the offences of murder and extermination has been between ten and fifteen years.[60] It further argues that Sierra Leonean practice on sentencing for murder is not binding on the Trial Chamber.[61]

31. The Kanu Defence proposes that the Trial Chamber should take into consideration the sentencing practice of the ICTY, as it is a basis for ICTR practice, and may provide the Trial Chamber with additional guidance.[62] The Prosecution would appear to agree as it provided a chart on ICTY sentencing practice in Annex B of its Sentencing Brief. The Kanu Defence contends that in Sierra Leone, a sentence of life imprisonment can be imposed for a range of crimes including "rape, burglary and gilding coinage"[63] while the ICTR has only imposed life sentences on individuals convicted of the crime of genocide.[64] In oral arguments, the Kanu Defence further submitted that Sierra Leonean sentencing practice is only relevant for convictions under Article 5 of the Statute which deals with crimes under Sierra Leonean law, which crimes were not charged in the indictment.[65]

B. Deliberations

(a) Sentencing Practice in Sierra Leone

32. Article 19(1) states that as appropriate, the Trial Chamber shall have recourse to the practice regarding prison sentences in the national courts of Sierra Leone as and when appropriate. This does not oblige the Trial Chamber to conform to that practice, but rather to take into account

[57] Brima Sentencing Brief, paras 10 and 11.
[58] Brima Sentencing Brief, para. 42.
[59] Brima Sentencing Brief, paras 50-56 citing the cases: *Blaskić* Trial Judgement, para. 808; *Prosecutor v. Mladen Naletilić (aka "Tuta") and Vinko Martinović (aka "Štela")*, Case No. IT-98-34-T, Judgement, 31 March 2003 ("*Naletilić* Trial Judgement"), para. 74 before the ICTY and *Akayesu* before the ICTR.
[60] Kamara Sentencing Brief, paras 22-28. citing *Imanishimwe, Akayesu, Ntakirutimana, Muvunyi, Serushago* at the ICTR and *Kordić* at the ICTY.
[61] Kamara Sentencing Brief, para. 29.
[62] Kanu Sentencing Brief, para. 57.
[63] Kanu Sentencing Brief para. 72.
[64] Kanu Sentencing Brief, para. 72.
[65] Transcipt, 16 July 2007, p. 76.

that practice as and when appropriate.[66] The Trial Chamber finds that it is not appropriate to adopt the practice in the present case since none of the Accused was indicted for, nor convicted of, offences under Article 5 of the Statute.

(b) Sentencing Practice at other International Tribunals

33. Article 19(1) of the Statute provides that the Trial Chamber shall, where appropriate, have recourse to the practice regarding prison sentences in the ICTR in determining the terms of imprisonment. The Trial Chamber will also consider the sentencing practice of the ICTY as its statutory provisions are analogous to those of the Special Court and the ICTR. The Trial Chamber is therefore guided by the sentencing practices at both the ICTR and the ICTY. The Chamber further notes that the pronouncement of global sentences is a well established practice at those tribunals.[67] The mitigating and aggravating factors that the Trial Chamber has considered in the instant case have also been widely considered by the ICTR and ICTY.[68]

V. DETERMINATION OF SENTENCES

34. Brima, Kamara and Kanu have been found responsible for some of the most heinous, brutal and atrocious crimes ever recorded in human history. Innocent civilians – babies, children, men and women of all ages – were murdered by being shot, hacked to death, burned alive, beaten to death. Women and young girls were gang raped to death. Some had their genitals mutilated by the insertion of foreign objects. Sons were forced to rape mothers, brothers were forced to rape sisters. Pregnant women were killed by having their stomachs slit open and the foetus removed merely to settle a bet amongst the troops as to the gender of the foetus. Men were disembowelled and their intestines stretched across a road to form a barrier. Human heads were placed on sticks on either side of the road to mark such barriers. Hacking off the limbs of innocent civilians was commonplace. The victims were babies, young children and men and women of all ages. Some had

[66] See also *Serushago* Appeal Judgement, para. 30; Semanza Appeal Judgement, para. 377.
[67] *Kambanda* Appeal Judgement, para. 113. *Gacumbitsi* Trial Chamber Judgement, para. 356. *Nahimana* Trial Judgement, paras 1105, 1106, 1108. *Muvunyi*, Trial Chamber Judgement, para. 545; Simba Trial Judgement, para. 445.
[68] *Blaskić* Judgement, *supra* note 22, at para. 686 (citing *Čelebići* Appeal Judgement, para. 763); *Jokić* Sentencing Judgement, paras 61-62; *Tadić* Appeal Judgement, paras 55-56; *Vasiljević* Appeal Judgement, paras 172-173; *Vasiljević* Trial Judgement, para. 277; *Kunarac* Appeal Judgement, para. 357; *Todorović* Trial Judgement, para. 57; *Kunarac* Appeal Judgement, para. 356; *Todorović* Sentencing Judgement, para. 65; *Krstić* Trial Judgement, para. 708; *Furundžija* Trial Judgement, para. 281; *Čelebići* Appeal Judgement, paras 736-737; *Jelisic* Appeal Judgement, para. 86; *Kayishema* Appeal Judgement, para. 351; *Krstić* Trial Judgement, paras 711-712; *Krstić* Appeal Judgement, para. 258; *Kunarac* Trial Judgement, para. 867, and *Kunarac* Appeal Judgement, para. 353; *Kunarac et al.* Trial Judgement, para.

SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

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

Registrar: Herman von Hebel, Acting Registrar

Date: 20 June 2007

Case No.: SCSL-04-16-T

PROSECUTOR

Against

Alex Tamba BRIMA
Brima Bazzy KAMARA
Santigie Borbor KANU

JUDGEMENT

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Shyamala Alagendra

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Carry Knoops

International Law Commission consistently included 'enslavement' as a crime against humanity in its Draft Codes of Crimes Against the Peace and Security of Mankind.[1438] The ICTY Trial Chamber in the *Krnojelac* case held that

> the express prohibition of slavery in Additional Protocol II of 1977, which relates to internal armed conflicts, confirms the conclusion that slavery is prohibited by customary international humanitarian law outside the context of a crime against humanity. The Trial Chamber considers that the prohibition against slavery in situations of armed conflict is an inalienable, non-derogable (sic) and fundamental right, one of the core rules of general customary and conventional international law.[1439]

(b) Elements of the crime

744. In *Kunarac*, the ICTY Trial Chamber held that "enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the right of ownership over a person"[1440] (*actus reus*), while the *mens rea* of the violation consists in the intentional exercise of such powers".[1441]

745. The *Kunarac* Trial Chamber held that "[u]nder this definition, indications of enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking."[1442]

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violations of the laws or customs of war. Such violations shall include, but not be limited to, [...] deportation to slave labour: (c) Crimes against Humanity: namely [...] enslavement[...]"

[1437] *United States v. Erhard Milch* (Case 11), Judgement of 31 July 1948, reprinted in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, Vol. II (1997), p. 773; *United States v. Oswald Pohl and Others* (Case IV), Judgement of 3 November 1947, reprinted in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, Vol. V (1997), pp. 958-970. *See also* M. Lippman, War Crimes Trials of German Industrialists: the "other Schindlers", 9 Temple International and Comparative Law Journal, p. 180.

[1438] Draft Code of Crimes Against the Peace and Security of Mankind, Yearbook of the ILC (1954), Vol. II, Documents of the sixth session including the report of the Commission to the General Assembly, p. 150; Report of the ILC on the work of its 43rd session, 29 April-19 July 1991, GA, Supplement No. 10 (A/46/10), p. 265; Report of the ILC on the work of its 48th session, 6 May-26 July 1996, GA, Supplement No. 10 (A/51/10), p. 93.

[1439] *Krnojelac* Trial Judgement, para. 353.

[1440] *Kunarac* Judgement, para. 540.

[1441] *Kunarac* Judgement, para. 540.

[1442] *Kunarac* Judgement, para. 542.

(f) Participation in a Joint Criminal Enterprise

778. The Trial Chamber has already found that the pleading of common purpose in the Indictment was defective and that joint criminal enterprise as a mode of liability cannot be relied upon by the Prosecution.

3. Individual Criminal Responsibility Pursuant to Article 6(3) of the Statute

779. In addition, or alternatively, the Indictment charges pursuant to Article 6(3) of the Statute that the Accused, while holding positions of superior responsibility and exercising effective control over their subordinates, are each individually criminally responsible for the said crimes in that each Accused is responsible for the criminal acts of his subordinates which he knew or had reason to know that the subordinate was about to commit or had done so and which each Accused failed to take the necessary and reasonable measures to prevent or to punish the perpetrators thereof.[1507]

780. Article 6(3) of the Statute provides:

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

(a) Elements of Superior Responsibility

781. As is evident from its terms, Article 6(3) of the Statute requires a three-pronged test for criminal liability to attach:

1. The existence of a superior-subordinate relationship between the accused as superior and the perpetrator of the crime;

2. The accused knew or had reason to know that the crime was about to be or had been committed; and

3. The Accused failed to take necessary and reasonable measures to prevent the crime or punish the perpetrators thereof.[1508]

782. The principle that an individual may be held responsible as a superior in the course of an armed conflict is enshrined in customary international law.[1509] The scope of Article 6(3) does not

[1507] Indictment, para. 36.
[1508] Rule 98 Decision, para. 328, referring to *Čelebići* Trial Judgement, para. 346.

only include military commanders, but also political leaders and other civilian superiors in possession of authority.[1510]

783. Under Article 6(3) of the Statute, a superior is held responsible for an omission, *i.e.*, for the failure to perform an act required by international law.[1511] The culpable omission of a superior consists of his or her failure to prevent or punish crimes under the Statute committed by subordinates. Hence, a superior is responsible not for the principal crimes, but rather for what has been described as a 'dereliction' or 'neglect of duty' to prevent or punish the perpetrators of serious crimes.[1512] Responsibility of a superior is not limited to crimes committed by subordinates in person, but encompasses any modes of criminal liability proscribed in Article 6(1) of the Statute. It follows that a superior can be held responsible for failure to prevent or punish a crime which was planned, ordered, instigated or aided and abetted by subordinates.[1513]

(i) Existence of a Superior-Subordinate Relationship

784. The doctrine of command responsibility is "ultimately predicated upon the power of the superior to control the acts of his subordinates."[1514] It is immaterial whether the power of the superior over the subordinates is based on *de jure* or on *de facto* authority,[1515] as long as the

[1509] *Čelebići* Trial Judgement, para. 333, stating "[t]hat military commanders and other persons occupying positions of superior authority may be held criminally responsible for the unlawful conduct of their subordinates is a well-established norm of customary international law." See also *Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003 ("*Hadžihasanović* Appeal Decision on Jurisdiction"), para. 31, holding that "[i]n the opinion of the Appeals Chamber, the Trial Chamber was correct in holding, after a thorough examination of the matter, that command responsibility was at all times material to this case a part of customary international law in its application to war crimes committed in the course of an internal armed conflict."

[1510] *Aleksovski* Appeal Judgement, para. 76; *Stakić* Trial Judgement, para. 459; *Orić* Trial Judgement, para. 308; *Bagilshema* Appeal Judgement, para. 51; *Kajelijeli* Appeal Judgement, para. 85.

[1511] *Halilović* Trial Judgement, para. 54.

[1512] *Halilović* Trial Judgement, paras 42-54; *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-T, Judgement, 15 March 2006 ("*Hadžihasanović* Trial Judgement"), para. 75; see Judge Shahabuddeen's partly dissenting opinion in the *Hadžihasanović* Appeal Decision on Jurisdiction, stating that "[t]he position of the appellants seems to be influenced by their belief that Article 7(3) of the Statute has the effect, as they say, of making the commander 'guilty of an offence committed by others even he neither possessed the applicable mens rea nor had any involvement whatsoever in the actus reus.' No doubt, arguments can be made in support of that reading of the provision, but I prefer to interpret the provision as making the commander guilty for failing in his supervisory capacity to take the necessary corrective action after he knows or has reason to know that his subordinate was about to commit the act or had done so"; *Orić* Trial Judgement, para. 293. See also Brima Final Brief, para. 65.

[1513] *Orić* Trial Judgement, paras 301-302; see also *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-PT, Decision on Prosecution's Motion to Amend the Indictment, 26 May 2006, paras 18 et seq.

[1514] *Čelebići* Trial Judgement, para. 377.

[1515] *Orić* Trial Judgement, para. 309, stating that "the broadening of this liability as described above is supported by the fact that the borderline between military and civil authority can be fluid. This is particularly the case with regard to many contemporary conflicts where there may be only de facto self-proclaimed governments and/or de facto armies and paramilitary groups subordinate thereto" (footnotes omitted); see also *Kordić* Trial Judgement, paras 419, 422; Prosecutor v. Juvenal Kajelijeli, Case No. ICTR-98-44A-A, Judgement, 23 May 2005 ("*Kajelijeli* Appeal Judgement"), para. 87; *Prosecutor v. Mladen Naletilić aka "Tuta" and Vinko Martinović aka "Štela"*, Case No. IT-98-34-T, Judgement, 31 March 2003 ("*Naletilić* Trial Judgement"), para. 67.

(829)

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SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

Before:	Justice George Gelaga King, Presiding Judge Justice Emmanuel Ayoola Justice Renate Winter Justice Raja Fernando Justice Jon M. Kamanda
Registrar:	Herman von Hebel
Date:	28 May 2008

PROSECUTOR **Against** MOININA FOFANA
ALLIEU KONDEWA
(Case No.SCSL-04-14-A)

JUDGMENT

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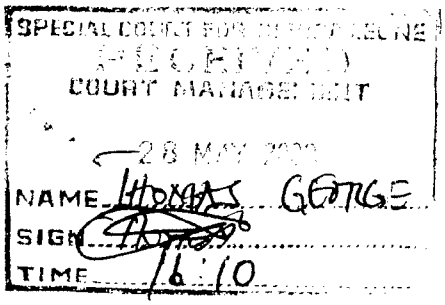

33. **In regard to errors of fact**: On appeal where errors of fact are alleged also pursuant to Article 20 of the Statute and Rule 106 of the Rules, the Appeals Chamber will not lightly overturn findings of fact reached by a Trial Chamber. Where it is alleged that the Trial Chamber committed an error of fact, the Appeals Chamber will give a margin of deference to the Trial Chamber that received the evidence at trial. This is because it is the Trial Chamber that is best placed to assess the evidence, including the demeanour of witnesses. The Appeals Chamber will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous.[62] The Appeals Chamber applies the same reasonableness standard to alleged errors of fact regardless of whether the finding of fact was based on direct or circumstantial evidence.[63]

34. The Appeals Chamber adopts the statement of general principle contained in the ICTY Appeals Chamber decision in *Kupreškić*, as follows:

> ". . . the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is wholly erroneous may the Appeals Chamber substitute its own finding for that of the Trial Chamber."[64]

35. **In regard to procedural errors**: Although not expressly so stated in Article 20 of the Statute, not all procedural errors vitiate the proceedings. Only errors that occasion a miscarriage of justice would vitiate the proceedings. Such are procedural errors that would affect the fairness of the trial. By the same token, procedural errors that could be corrected or waived or ignored (as immaterial or inconsequential) without injustice to the parties would not be regarded as procedural errors occasioning a miscarriage of justice.

Tadić, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 15 July 1999, para. 247 [*Tadić* Appeal Judgement].

[62] *Kupreškić* Appeal Judgement, para. 30. *Prosecutor v. Ntakirutimana*, ICTR-96-10-A & ICTR-96-17-A, International Criminal Tribunal for Rwanda, Appeals Chamber, Judgement, 13 December 2004, para. 12 [*Ntakirutimana* Appeal Judgement].

[63] *See Galić* Appeal Judgement, para. 9, fn. 21; *Stakić* Appeal Judgement, para. 219; *Prosecutor v. Delalić et al.*, IT-96-21-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 20 February 2001, para. 458 [*Čelebići* Appeal Judgement]. Similarly, the standard of proof at trial is the same regardless of the type of evidence, direct or circumstantial.

[64] *Kupreškić* Appeal Judgement, para. 30.

(c) Discussion

475. The Appeals Chamber notes that at the time the ICTY Statute took effect, the former Yugoslavia had domestic legislation criminalizing "acts against humanity and international law."[919] Similarly, at the time the ICTR Statute took effect, Rwanda had domestic legislation criminalizing war crimes, crimes against humanity and genocide.[920] In contrast, Sierra Leone has not criminalized war crimes and crimes against humanity as such, and consequently there is no specifically relevant sentencing practice for a Trial Chamber to refer to.

476. The Special Court has jurisdiction over crimes defined in Sierra Leone law in addition to certain international crimes. Bearing this in mind, the Appeals Chamber is of the view that the best interpretation of the word "appropriate" is that a Trial Chamber is to have recourse to the practice of the ICTR for convictions for war crimes and crimes against humanity and is to have recourse to the national courts in Sierra Leone for convictions under Sierra Leone law contained in Article 5 of the Statute.

477. In the result, the Appeals Chamber concludes that the Trial Chamber did not err in holding that it will not consider the sentencing practice of Sierra Leone.

4. Alleged Error in Considering Mitigating Factors

(a) Fofana's and Kondewa's Statements at the Sentencing Hearing

(i) Trial Chamber Findings

478. Under the heading "Remorse," the Trial Chamber stated the following:

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[919] *See The Criminal Code of the Socialist Federal Republic of Yugoslavia,* adopted by the SFRJ Assembly at the session of the Federal Council held on September 28, 1976, published in the Official Gazette SFRJ No. 44 of October 8, 1976, a correction was made in the Official Gazette SFRJ No. 36 of July 15, 1977, *available at* http://pbosnia.kentlaw.edu/resources/legal/bosnia/criminalcode_fry.htm#chap_16, Articles 141-156 (pertaining to genocide and war crimes).

[920] Rwandan Organic Law No. 8/96, on the Organization of Prosecutions for Offences constituting Genocide or Crimes Against Humanity committed since 1 October 1990, published in the Gazette of the Republic of Rwanda, 35th year. No. 17, 1 September 1996. *See Semanza* Appeal Judgement, para. 378; *Prosecutor v. Akayesu*, ICTR-96-4-T, International Criminal Tribunal for Rwanda, Trial Chamber, Sentencing Judgement, 2 October 1998, para. 16 [*Akayesu* Sentencing Judgement]. Under Rwandan law, genocide and crimes against humanity carry the possible penalties of death or life imprisonment, depending on the nature of the accused's participation. *See Prosecutor v. Simba*, ICTR-01-76-T, International Criminal Tribunal for Rwanda, Trial Chamber, Judgement and Sentence, 13 December 2005, para. 434 [*Simba* Judgement and Sentence].

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SPECIAL COURT FOR SIERRA LEONE
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TRIAL CHAMBER I

Before: Hon. Justice Benjamin Mutanga Itoe, Presiding Judge
Hon. Justice Bankole Thompson
Hon. Justice Pierre Boutet

Registrar: Herman von Hebel

Date: 9th of October 2007

PROSECUTOR Against MOININA FOFANA
ALLIEU KONDEWA
(Case No.SCSL-04-14-T)

Public Document

JUDGEMENT ON THE SENTENCING OF MOININA FOFANA AND ALLIEU KONDEWA

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Yada Williams
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Susan Wright

tribunals is instructive, and has considered these practices where appropriate. However, it is also aware of the limitations of the use that can be made of the sentencing practices of these tribunals. In particular, it notes that the practice of imposing global sentences at both tribunals makes it difficult to ascertain the sentence imposed for each individual crime. Moreover, the Chamber notes that many of the sentences at the ICTR were imposed in relation to the crime of genocide, which is not an offence within the jurisdiction of the Special Court.

5. Sentencing Practice of Sierra Leonean Courts

42. Article 19(1) authorizes the Trial Chamber to consider, where appropriate, the sentencing practices of Sierra Leonean domestic courts. The Prosecution contends that in determining the gravity of the offence, the Chamber should consider that the offences for which the Accused have been found guilty, would attract the death penalty or life imprisonment under Sierra Leonean law.[74] Both Fofana and Kondewa submit that given that the Accused were not convicted of any offences under Article 5 of the Statute which incorporates offences under Sierra Leonean legislation, the court should not consider Sierra Leonean sentencing practice.[75]

43. In this regard, the Chamber notes that the Accused were neither indicted nor convicted for any of the offences enumerated under Article 5 of the Statute. Furthermore, the Statute of the Special Court does not provide for either capital punishment or imposition of a "life sentence", which are the punishments that the most serious crimes under Sierra Leonean law attract. For these reasons, the Chamber finds that it would be inappropriate to rely on the sentencing practices of Sierra Leonean Courts in determining the punishment to be imposed on either Fofana or on Kondewa.

V. DELIBERATIONS

44. The Chamber has considered both the Parties' written briefs and their oral submissions, made in court during the Sentencing Hearing, as they relate to the gravity of the offence, as well as

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16). See also AFRC Sentencing Judgement, where the Chamber held that the sentencing practice of the ICTY should also be considered, as "its statutory provisions are analogous to those at the Special Court and the ICTR" (para 33).

[74] Prosecution Sentencing Brief, paras 78, 139-140.

[75] Fofana Sentencing Brief, para 7 and Kondewa Sentencing Brief, para 14. See also AFRC Sentencing Judgement, where the Chamber held that "it is not appropriate to adopt the practice in the present case since none of the Accused was indicted for, nor convicted of, offences under Article 5 of the Statute" (para 32).

SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

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

Acting Registrar: Binta Mansaray

Date: 26 October 2009

PROSECUTOR **Against** **ISSA HASSAN SESAY**
MORRIS KALLON
AUGUSTINE GBAO
(Case No. SCSL-04-15-A)

JUDGMENT

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John Cammegh
Scott Martin

obscure, contradictory, vague or suffer from other formal and obvious insufficiencies may be, on that basis, summarily dismissed without detailed reasoning.[75]

37. In the instant proceeding, the Appeals Chamber has identified the following seven types of deficiencies in the Parties' submissions.

38. First, some submissions are vague. An appellant is expected to identify the challenged factual finding and put forward its factual arguments with specificity.[76] As a general rule, where an appellant's references to the Trial Judgment or the evidence are missing, vague or incorrect, the Appeals Chamber will summarily dismiss that alleged error or argument.[77] The Appeals Chamber has summarily dismissed a number of the Parties' argument on this basis.[78]

39. Second, some submissions merely claim a failure to consider evidence. A Trial Chamber is not required to refer to the testimony of every witness and to every piece of evidence on the record, and failure to do so does not necessarily indicate lack of consideration.[79] This holds true as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence. Such disregard is shown "when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning."[80] Where the Appeals Chamber finds that an appellant merely asserts that the Trial Chamber failed to consider relevant evidence, without showing that no reasonable trier of fact, based on the totality of the evidence, could have reached the same conclusion as the Trial Chamber did, or without showing that the Trial Chamber completely disregarded the evidence, it will, as a general rule, summarily dismiss that alleged error or

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[75] *See Krajišnik* Appeal Judgment, para. 16; *Martić* Appeal Judgment, para. 14; *Strugar* Appeal Judgment, para. 16; *Orić* Appeal Judgment, para. 14.
[76] *Martić* Appeal Judgment, para. 18; *Strugar* Appeal Judgment, para. 20. *See* also *Halilović* Appeal Judgment para. 13; *Blagojević and Jokić* Appeal Judgment, para. 11; *Brđanin* Appeal Judgment, para. 15; *Gacumbitsi* Appeal Judgment, para. 10.
[77] *Martić* Appeal Judgment, para. 18; *Strugar* Appeal Judgment, para. 20.
[78] These arguments are found in parts of the following paragraphs of the Parties' Appeals: Sesay Appeal, paras 80 (Sesay Ground 23 in its entirety), 149 (in Ground 29), 169 (in Ground 32), 276-279 (in Ground 35); Kallon Appeal, paras 77-85 (Kallon Ground 7 in its entirety), 98 (in Ground 9), 147 (in Ground 15), 194 (in Ground 20), 198 (in Ground 20), 203 (in Ground 20); Gbao Appeal, para. 163 (in Ground 8(m)).
[79] *Strugar* Appeal Judgment, para. 24; *Kvočka et al.* Appeal Judgment, para. 23; *Kupreškić et al.* Appeal Judgment, para. 458.
[80] *Strugar* Appeal Judgment, para. 24; *Limaj* Appeal Judgment, para. 86.

argument.[81] The Appeals Chamber has summarily dismissed the arguments suffering from this type of deficiency.[82]

40. Third, some submissions merely seek to substitute alternative interpretations of the evidence. As a general rule, mere assertions that the Trial Chamber erred in its evaluation of the evidence, such as claims that the Trial Chamber failed to give sufficient weight to certain evidence, or should have interpreted evidence in a particular manner, are liable to be summarily dismissed.[83] Similarly, where an appellant merely seeks to substitute its own evaluation of the evidence for that of the Trial Chamber, such submissions may be dismissed without detailed reasoning. The same applies to claims that the Trial Chamber could not have inferred a certain conclusion from circumstantial evidence, without further explanation.[84] An appellant must address the evidence the Trial Chamber relied on and explain why no reasonable trier of fact, based on the evidence, could have evaluated the evidence as the Trial Chamber did, and the Appeals Chamber may summarily dismiss arguments that fail to make such a minimum pleading on appeal. The Appeals Chamber has summarily dismissed the arguments that fail to comply with this rule.[85]

41. Fourth, some submissions fail to identify the prejudice. Where the Appeals Chamber considers that an appellant fails to explain how the alleged factual error had an effect on the conclusions in the Trial Judgment, it will summarily dismiss that alleged error or argument. The arguments of the Parties suffering from this deficiency have been summarily dismissed.[86]

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[81] *See Brđanin* Appeal Judgment, para. 24; *Galić* Appeal Judgment, paras 257-258.
[82] These arguments are found in parts of the following paragraphs of the Parties' Appeals: Sesay Appeal, paras 109 (in Ground 24), 113 (in Ground 24), 142 (in Ground 29), 169 (in Ground 31); Kallon Appeal, para. 142 (in Ground 13).
[83] *See Martić* Appeal Judgment, para. 19; *Strugar* Appeal Judgment, para. 21; *Brđanin* Appeal Judgment, para. 24.
[84] *Martić* Appeal Judgment, para. 19; *Strugar* Appeal Judgment, para. 21.
[85] These arguments are found in parts of the following paragraphs of the Parties' Appeals: Sesay Appeal, paras 164 (in Ground 31), 177-182 (in Ground 28), 196-203 (in Ground 33), 219 (in Ground 33), 221 (in Ground 33), 222 (in Ground 33), 240 (in Ground 34), 248 (in Ground 34), 309 (in Ground 40), 310 (in Ground 40), 334 (in Ground 43); Kallon Appeal, paras 168 (in Ground 16), 194 (in Ground 20), 196 (in Ground 20), 197 (in Ground 20), 199 (in Ground 20), 201 (in Ground 20), 202 (in Ground 20), 204 (in Ground 20), 209 (in Ground 20), 217 (in Ground 20), 218 (in Ground 20); Gbao Appeal, paras 405-415 (in Ground 18(c)).
[86] These arguments are found in parts of the following paragraphs of the Parties' Appeals: Sesay Appeal, paras 113 (in Ground 24), 169 (in Ground 32), 276-279 (in Ground 35), 292 (in Ground 38); Kallon Appeal, paras 41 (in Ground 2), 196-198 (in Ground 20), 201-203 (in Ground 20), 223 (in Ground 21); Gbao Appeal, para. 140 (in Ground 8(i)).

the Rules. The Appeals Chamber finds the well-established jurisprudence of the ICTY and ICTR which interpret their identical provisions[798] persuasive as to the law in this regard.[799] As recently held by the ICTY Appeals Chamber:

> A reasoned opinion ensures that the accused can exercise his or her right of appeal and that the Appeals Chamber can carry out its statutory duty under Article 25 to review these appeals. The reasoned opinion requirement, however, relates to a Trial Chamber's Judgment rather than to each and every submission made at trial.[800]

345. As a general rule, a Trial Chamber is required only to make findings on those facts which are "essential to the determination of guilt in relation to a particular Count";[801] it "is not required to articulate every step of its reasoning for each particular finding it makes"[802] nor is it "required to set out in detail why it accepted or rejected a particular testimony."[803] However, the requirements to be met by the Trial Chamber may be higher in certain cases.[804] It is "necessary for any appellant claiming an error of law because of the lack of a reasoned opinion to identify the specific issues, factual findings or arguments, which he submits the Trial Chamber omitted to address and to explain why this omission invalidated the decision."[805]

346. Turning to the present case, the Appeals Chamber considers at the outset that Gbao's comparison between the length of parts of the Trial Judgment and the corresponding parts of other trial judgments in different cases is unhelpful,[806] as "general observations on the length of the Trial Judgment, or of particular parts of the Trial

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[797] Prosecution Response, para. 5.10.
[798] Article 23 of the ICTY Statute; Article 22 of the ICTR Statute; Rule 98*ter*(C) of the Rules of Procedure and Evidence of the ICTY; Rule 88(C) of the Rules of Procedure and Evidence of the ICTR.
[799] *See* Article 20(3) of the Statute.
[800] *Krajišnik* Appeal Judgment, para. 139, *quoting Limaj et al.* Appeal Judgment, para. 81 [references omitted]. *See* also *Hadžihasanović and Kubura* Appeal Judgment, para. 13; *Naletilić and Martinović* Appeal Judgment, para. 603; *Kvočka et al.* Appeal Judgment, paras 23 and 288.
[801] *Brima et al.* Appeal Judgment, para. 268; *Krajišnik* Appeal Judgment, para. 139; *Hadžihasanović and Kubura* Appeal Judgment, para. 13.
[802] *Krajišnik* Appeal Judgment, para. 139; *Musema* Appeal Judgment, para. 18. *See* also *Brđanin* Appeal Judgment, para. 39.
[803] *Krajišnik* Appeal Judgment, para. 139; *Musema* Appeal Judgment, para. 20.
[804] *Krajišnik* Appeal Judgment, para. 139; *Kvočka et al.* Appeal Judgment, para. 24.
[805] *Krajišnik* Appeal Judgment, para. 139; *Kvočka et al.* Appeal Judgment, para. 25 [reference omitted]. *See* also *Halilović* Appeal Judgment, para. 7; *Brđanin* Appeal Judgment, para. 9.
[806] Gbao Appeal, paras 101, 102.

provision has a "materially distinct element" that is not contained in the other statutory provision.[3301] Second, if this is not the case then the conviction for the criminal act should be upheld under the "more specific provision."[3302] It is the legal elements of each statutory provision, and not the acts themselves that must be considered when applying this test.[3303] The issue of whether the same act can lead to a conviction under multiple statutory provisions is a question of law.[3304]

(b) Cumulative convictions for extermination as a crime against humanity (Count 3) and murder as a crime against humanity (Count 4)

1192. The Appeals Chamber notes that the Trial Chamber correctly stated the law on cumulative convictions with respect to Counts 3 and 4 when it held that "[it] is impermissible to convict for both murder [as a crime against humanity] and extermination [as a crime against humanity] under Count 4 and Count 3 based on the same conduct. What makes a statutory provision materially distinct is whether "it requires proof of a fact not required by the other."[3305] Murder as a crime against humanity does not contain a materially distinct element from extermination as a crime against humanity; they are only distinguished by the fact that extermination requires killings "on a massive scale."[3306] The crime of murder is therefore subsumed in the crime of extermination and consequently convictions under Counts 3 and 4 for the same underlying acts are impermissibly cumulative.

1193. Turning to the second prong of the test, since the first part of the *Čelebići* test was not met, we now turn to the issue under which count the convictions should be upheld. Following the principle in *Čelebići* the statutory provision that is more specific, that is, "contains an additional materially distinct element" should stand.[3307] Extermination as a

[3301] *Čelebići* Appeal Judgment, para. 412. *See Ntakirutimana* Appeal Judgment, para. 542; *Musema* Appeal Judgment, paras 358-370.
[3302] *Čelebići* Appeal Judgment, para. 413.
[3303] *Strugar* Appeal Judgment, para. 322, *quoting Stakić* Appeal Judgment, para. 356. *See Kordić* & *Čerkez* Appeal Judgment, paras 1033, 1040; *Čelebići* Appeal Judgment, para. 322.
[3304] *Strugar* Appeal Judgment, para. 322. *See* also *Kunarac et al.* Appeal Judgment, para. 174; *Kordić* & *Čerkez* Appeal Judgment, para. 1032; *Stakić* Appeal Judgment, para. 356.
[3305] *Ntakirutimana* Appeal Judgment, para. 542. *See Čelebići* Appeal Judgment, para. 412. The standard was clarified in the *Kunarac et al.* Appeal Judgment, para. 168. *See* also *Vasiljević* Appeal Judgment, paras 135, 146; *Krstić* Appeal Judgment, para. 218.
[3306] *Ntakirutimana* Appeal Judgment, para. 542.
[3307] *Čelebići* Appeal Judgment, para. 413.

crime against humanity contains the additional element that the crime must be committed on a massive scale, which murder as a crime against humanity does not contain. Therefore, extermination as a crime against humanity is the more specific statutory provision and convictions for the above noted criminal conduct[3308] should stand under Count 3, but not under Count 4.

1194. The Appeals Chamber also notes that some of the conduct resulting in convictions under Count 4 is not part of the conviction under Count 3[3309] and therefore the convictions for these underlying acts are not cumulative. These convictions therefore stand under Count 4 since it is permissible to convict on both counts if each count is based on *distinct* conduct.[3310]

1195. Having found that the Trial Chamber impermissibly entered cumulative convictions, the Appeals Chamber will take this holding into consideration in its determination of the sentence imposed under Count 4 for each of the Appellants.

(c) Cumulative convictions for acts of terrorism (Count 1) and collective punishments (Count 2) with the war crimes of murder (Count 5), outrages upon personal dignity (Count 9), mutilations (Count 10) and pillage (Count 14)

1196. Kallon's second submission is that the war crimes of acts of terrorism (Count 1) and collective punishment (Count 2) are impermissibly cumulative with the convictions for war crimes of murder (Count 5), outrages upon personal dignity (Count 9), mutilations (Count 10) and pillage (Count 14).[3311] Kallon argues that the crimes of acts of terrorism and collective punishments have materially distinct elements, the intent to terrorise and the intent to punish, but the other war crimes that underlie these crimes do not have materially distinct elements "when they are encompassed within" the crimes of collective punishment and acts of terrorism.[3312] For example, Kallon explains if murder is included in the crime of collective punishment then the elements of murder becomes a part of the crime of collective punishment and "there is no added element of the death of the victim that is part

[3308] *See supra*, para. 1184.
[3309] Trial Judgment, para. 1974, Items 2.1.1 (iii) to (iv); Trial Judgment, para. 2050, Items 3.1.1 (i) to (ix); Trial Judgment, para. 2063, Items 4.1.1 (i), (ii) and (x) to (xii); Trial Judgment, para. 2156, Item 5.1.1 (ii).
[3310] Trial Judgment, para. 2304. *See Brima et al.* Trial Judgment, para. 2109.
[3311] Kallon Appeal, paras 297, 300.
[3312] Kallon Appeal, paras 299-300.

of murder, but not part of the collective punishment when *murder* is a form of collective punishment."[3313]

1197. The Appeals Chamber finds Kallon's appeal is misconceived and based on a misapplication of the law on cumulative convictions. Cumulative convictions are permissible if the different statutory provisions contain materially distinct elements, that is, the proof of a fact in one statutory provision is not required by the other statutory provision.[3314] In the *Fofana and Kondewa* Appeal Judgment the Appeals Chamber found that cumulative convictions "are permissible for collective punishment, in addition to murder, cruel treatment and pillage."[3315] The same reasoning applies to acts of terrorism.

1198. The Appeals Chamber agrees with the Trial Chamber's finding that the definition of the war crimes of collective punishment and acts of terrorism both contain materially distinct elements not present in the definitions of the crimes of murder, outrages upon personal dignity, mutilation and pillage.[3316] The crime of acts of terrorism requires proof of an intention to spread terror among the civilian population,[3317] and collective punishment requires proof of an intention to punish collectively.[3318] These elements are not contained in the war crimes of murder, outrages upon personal dignity, mutilations and pillage.[3319] Conversely, the war crime of murder requires proof of the death of the person,[3320] outrages upon personal dignity requires proof of humiliation, degradation or otherwise violation of the dignity of the person,[3321] mutilations requires proof of permanent disfigurement or disablement[3322] and pillage requires proof of unlawful appropriation of property,[3323] which the crimes of collective punishment and acts of terrorism do not contain.[3324] Consistent with the case law on cumulative convictions, the Appeals Chamber upholds the Trial Chamber's findings that each crime requires proof of a materially distinct

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[3313] Kallon Appeal, para. 299.
[3314] *Čelebići* Appeal Judgment, paras 412-413.
[3315] *Fofana and Kondewa* Appeal Judgment, para. 225.
[3316] Trial Judgment, para. 2309.
[3317] Trial Judgment, paras 113, 2309. *See Fofana and Kondewa* Appeal Judgment, para. 350.
[3318] Trial Judgment, para. 126. *See Fofana and Kondewa* Appeal Judgment, para. 224.
[3319] Trial Judgment, para. 2309.
[3320] *See Fofana and Kondewa* Appeal Judgment, paras 146, 225; *Kvočka et al.* Appeal Judgment, para. 261; *Čelebići* Appeal Judgment, para. 423; Trial Judgment, paras 142, 2308.
[3321] ICC Elements of Crimes, Article 8(2)(c)(ii); *see* Trial Judgment, paras 175, 2309.
[3322] ICC Elements of Crimes, Article 8(2)(c)(i); *see* Trial Judgment, para. 180.
[3323] *See Fofana and Kondewa* Appeal Judgment, para. 225; *Kordić and Čerkez* Appeal Judgment, paras 79, 84; Trial Judgment, paras 207, 2308.
[3324] *Fofana and Kondewa* Appeal Judgment, para. 225; Trial Judgment, paras 2308-2309.

element, and therefore cumulative convictions are permissible for the war crimes of collective punishment and acts of terrorism with the war crimes of murder, outrages upon personal dignity, mutilations and pillage.[3325]

4. Conclusion

1199. The Appeals Chamber holds that the Trial Chamber erred in entering cumulative convictions under Counts 3 and 4 for the following acts:

(i) in Bo District: the unlawful killings of an unknown number of civilians at Tikonko Junction; the unlawful killings of 14 civilians at a house in Tikonko; the unlawful killings of three civilians on the street in Tikonko; the unlawful killings of approximately 200 other civilians during an attack on Tikonko on 15 June 1997;

(ii) the unlawful killings of over 63 civilians at Cyborg Pit in Tongo Field in Kenema District;

(iii) in Kono District: the unlawful killings of about 200 civilians in Tombodu between February and March 1998; the unlawful killings of about 47 civilians in Tombodu between February and March 1998; the unlawful killings of three civilians in Tombodu sometime in March 1998; the unlawful killings of an unknown number of civilians by burning them alive in a house in Tombodu about March 1998; the unlawful killings of 30 to 40 civilians in April 1998 in Koidu Town; and

(iv) the unlawful killings of three civilians by Bockarie and the ordered unlawful killings of 63 civilians in Kailahun Town, Kailahun District.

1200. The Appeals Chamber holds that the verdict of guilt under Count 4, murder as a Crime against Humanity, shall be reversed for these offences and the verdict of guilt under Count 3, extermination as a Crime against Humanity, shall be sustained.

[3325] *See Fofana and Kondewa* Appeal Judgment, para. 225; Trial Judgment, para. 2310.

SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER I

Before:	Hon. Justice Pierre Boutet, Presiding Judge Hon. Justice Benjamin Mutanga Itoe Hon. Justice Bankole Thompson
Registrar:	Herman von Hebel
Date:	2 March 2009

PROSECUTOR	**Against**	ISSA HASSAN SESAY MORRIS KALLON AUGUSTINE GBAO (Case No. SCSL-04-15-T)

Public Document

JUDGEMENT

Office of the Prosecutor:
Pete Harrison
Vincent Wagona
Charles Hardaway
Reginald Fynn
Elisabeth Baumgartner
Régine Gachoud
Amira Hudroge
Bridget Osho

Defence Counsel for Issa Hassan Sesay:
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John Cammegh
Scott Martin

humanity and war crimes as set out in the Applicable Law section above clearly each contain a materially distinct element that does not exist in the other. As a result, the Chamber is satisfied that it is permissible to enter convictions for the same conduct under Article 2 (Crimes against humanity) and Article 3 (Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II).[3986]

2303. Therefore, it is permissible to enter convictions in relation to the same conduct as found under Counts 6, 7 and 8. Similarly, it is permissible to enter convictions in relation to the same conduct under Count 5, 10, 15 and under Counts 4, 11, 16 respectively.

2.2. Cumulative Convictions on separate Crimes Against Humanity

2.2.1. Murder and Extermination

2304. The Chamber considers that is impermissible to convict for both murder and extermination under Count 4 and 3 based on the same conduct.[3987] However, the Chamber finds that it is permissible to convict on both counts if each count is based on *distinct* conduct.[3988]

2.2.2. Rape and Sexual Slavery

2305. The Chamber considers that the crime charged under Count 7 (sexual slavery) requires a distinct element from the crime of rape (Count 6). The offence of rape requires sexual penetration, whereas sexual slavery requires the exercise of powers attaching to the right of ownership and acts of sexual nature. As the acts of a sexual nature do not necessarily require sexual penetration, and rape does not require that the right to ownership is exercised, the Chamber finds that sexual slavery is distinct from rape. Where the commission of sexual slavery, however, entails acts of rape, the Chamber finds that the act of rape is subsumed by the act of sexual slavery. In such a case, a conviction on the same conduct is not permissible for rape and sexual slavery.

[3986] *Kunarac et al.* Appeal Judgement, para. 176, citing *Kupreskic* Appeal Judgement, para. 288 and *Jelisic* Appeal Judgement, para. 82.
[3987] *Ntakirutimana* Appeal Judgement, para. 542.
[3988] AFRC Trial Judgement, para. 2109.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

CHAMBER I - CHAMBRE I

OR : ENG

Before:

Judge Laïty Kama, Presiding
Judge Lennart Aspegren
Judge Navanethem Pillay

Registry:

Mr. Agwu U. Okali

Decision of: 2 September 1998

THE PROSECUTOR
VERSUS
JEAN-PAUL AKAYESU

Case No. ICTR-96-4-T

JUDGEMENT

The Office of the Prosecutor:

Mr. Pierre-Richard Prosper

Counsel for the Accused:

Mr. Nicolas Tiangaye
Mr. Patrice Monthé

List of Contents

1. INTRODUCTION
1.1. The International Tribunal

"A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime".
Thus, in addition to responsibility as principal perpetrator, the Accused can be held responsible for the criminal acts of others where he plans with them, instigates them, orders them or aids and abets them to commit those acts.

473. Thus, Article 6(1) covers various stages of the commission of a crime, ranging from its initial planning to its execution, through its organization. However, the principle of individual criminal responsibility as provided for in Article 6(1) implies that the planning or preparation of the crime actually leads to its commission. Indeed, the principle of individual criminal responsibility for an attempt to commit a crime obtained only in case of genocide80. Conversely, this would mean that with respect to any other form of criminal participation and, in particular, those referred to in Article 6(1), the perpetrator would incur criminal responsibility only if the offence were completed.

474. Article 6 (1) thus appears to be in accord with the Judgments of the Nuremberg Tribunal which held that persons other than those who committed the crime, especially those who ordered it, could incur individual criminal responsibility.

475. The International Law Commission, in Article 2 (3) of the Draft Code of Crimes Against the Peace and Security of Mankind, reaffirmed the principle of individual responsibility for the five forms of participation deemed criminal referred to in Article 6 (1) and consistently included the phrase "which in fact occurs", with the exception of aiding and abetting, which is akin to complicity and therefore implies a principal offence.

476. The elements of the offences or, more specifically, the forms of participation in the commission of one of the crimes under Articles 2 to 4 of the Statute, as stipulated in Article 6 (1) of the said Statute, their elements are inherent in the forms of participation *per se* which render the perpetrators thereof individually responsible for such crimes. The moral element is reflected in the desire of the Accused that the crime be in fact committed.

477. In this respect, the International Criminal Tribunal for the former Yugoslavia found in the Tadic case that:

"a person may only be criminally responsible for conduct where it is determined that he knowingly participated in the commission of an offence" and that "his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident."81
478. This intent can be inferred from a certain number of facts, as concerns genocide, crimes against humanity and war crimes, for instance, from their massive and/or systematic nature or their atrocity, to be considered *infra* in the judgment, in the Tribunal's findings on the law applicable to each of the three crimes which constitute its *ratione materiae* jurisdiction.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ENGLISH
Original: French

APPEALS CHAMBER

Before:
Judge Claude Jorda, Presiding
Judge Mohamed Shahabuddeen
Judge David Hunt
Judge Fausto Pocar
Judge Theodor Meron

Registry: Adama Dieng

Judgement of: 3 July 2002

THE PROSECUTOR
(Appellant)
v.
Ignace BAGILISHEMA
(Respondent)

Case No. ICTR-95-1A-A

JUDGEMENT
(REASONS)

Office of the Prosecutor:
Carla Del Ponte
Norman Farrell
Sonja Boelaert-Suominen
Mathias Marcussen

Counsel for the Defence:
François Roux
Maroufa Diabira

chain of command.[79] The Prosecution submits that there is no indication that the Trial Chamber focused on the test of effective control.[80]

50. Under Article 6(3), a commander or superior is the one who possesses the power or authority in either a *de jure* or a *de facto* form to prevent a subordinate's crime or to punish the commission of a crime by a subordinate after the crime is committed".[81] The power or authority to prevent or to punish does not arise solely from a *de jure* authority conferred through official appointment.[82] Hence, "as long as a superior has effective control over subordinates, to the extent that he can prevent them from committing crimes or punish them after they committed the crimes, he would be held responsible for the commission of the crimes if he failed to exercise such abilities of control." [83] The *effective control* test applies to all superiors, whether *de jure* or *de facto,* military or civilian.[84]

51. Indeed, it emerges from international case-law that the doctrine of superior responsibility is not limited to military superiors, but also extends to civilian superiors. In the *Čelebići* case, it was held that:

> [...] the doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise *a degree of control over their subordinates which is similar to that of military commanders.*[85]

In this respect, the Appeals Chamber notes that the *Musema* Trial Judgement, which took into consideration the Rwandan situation, pointed out that "it is appropriate to assess on a case-by-case basis the power of authority actually devolved on an accused to determine whether or not he possessed the power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish their perpetration."[86]

52. Hence, the establishment of civilian superior responsibility requires proof beyond reasonable doubt that the accused exercised effective control over his subordinates, in the sense that he exercised a degree of control over them which is similar to the degree of control of military commanders. It is not suggested that "effective control" will necessarily be exercised by a civilian superior and by a military commander in the same way, or that it may necessarily be established in the same way in relation to both a civilian superior and a military commander.

53. In the instant case, the Trial Chamber relied on the *Čelebići* Trial Judgement, which was affirmed by the ICTY Appeals Chamber, in holding that:

> [...] for a civilian superior's degree of control to be "similar to" that of a military commander, the control over subordinates must be "effective", and the superior must have the "material ability" to prevent and punish any offences. Furthermore, the exercise of *de facto* authority must be accompanied by the "the trappings of the exercise of *de jure* authority". The present Chamber concurs. The Chamber is of the view that these trappings of authority include, for example, awareness of a chain of command, the practice of issuing and obeying orders, and the expectation that insubordination may lead to disciplinary action. It is by these trappings that the law distinguishes civilian superiors from mere rabble-rousers or other persons of influence.[87]

UNITED NATIONS
NATIONS UNIES

Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: **Judge Mohamed Shahabuddeen, Presiding**
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: **Mr. Adama Dieng**

Judgement of: **7 July 2006**

SYLVESTRE GACUMBITSI

v.

THE PROSECUTOR

Case No. ICTR-2001-64-A

JUDGEMENT

Counsel for Sylvestre Gacumbitsi:

Mr. Kouengoua
Ms. Anne Ngatio Mbattang

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. James Stewart
Mr. Neville Weston
Mr. George Mugwanya
Ms. Inneke Onsea

> *subordinate relationship between the Accused and the population and attackers, the circumstances of the case suggest that the Accused's words of incitement were perceived as orders within the meaning of Article 6(1) of the Statute.*[397]

182. Thus, after finding that no formal superior-subordinate relationship existed, the Trial Chamber proceeded to consider whether, under the circumstances of the case, the Appellant's statements nevertheless were perceived as orders. This is in accordance with the most recent judgements of the Appeals Chamber. In the *Semanza* Appeal Judgement, the Appeals Chamber explained:

> As recently clarified by the ICTY Appeals Chamber in *Kordić and Cerkez*, the *actus reus* of "ordering" is that a person in a position of authority instruct another person to commit an offence. No formal superior-subordinate relationship between the accused and the perpetrator is required. It is sufficient that there is proof of some position of authority on the part of the accused that would compel another to commit a crime in following the accused's order.[398]

The Appeals Chamber notes that this element of "ordering" is distinct from that required for liability under Article 6(3) of the Statute, which does require a superior-subordinate relationship (albeit not a formal one but rather one characterized by effective control).[399] Ordering requires no such relationship -- it requires merely authority to order, a more subjective criterion that depends on the circumstances and the perceptions of the listener.

183. Accordingly, this sub-ground of appeal is dismissed.

2. Alleged Error of Fact

184. The Trial Chamber found that, as *bourgmestre*, the Appellant was the highest authority and most influential person in the commune, with the power to take legal measures binding all residents.[400] His role in the genocide demonstrated his authority: he convened meetings with the *conseillers*; asked them to organize meetings to tell people to kill Tutsis, and verified that these meetings had been held; and directly instructed *conseillers*, other leaders, and the Hutu population to kill and rape Tutsis.[401] The Trial Chamber pointed to several instances in which the Appellant "instructed", "ordered", or "directed" the attackers in general, not just the communal policemen:

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[397] Trial Judgement, paras. 282, 283 (emphasis added, internal citations omitted).
[398] *Semanza* Appeal Judgement, para. 361, referring to *Kordić and Cerkez* Appeal Judgement, para. 28. *See also Kamuhanda* Appeal Judgement, para. 75 ("To be held responsible under Article 6(1) of the Statute for ordering a crime, on the contrary, it is sufficient that the accused have authority over the perpetrator of the crime, and that his order have a direct and substantial effect on the commission of the illegal act." (internal citations omitted)).
[399] *See supra* section III.B.3.
[400] Trial Judgement, paras. 241-243.
[401] Trial Judgement, paras. 101, 104.

- On 14 April 1994, after giving a speech telling people "to arm themselves with machetes and [...] to hunt down all the Tutsi", the Appellant led assailants to Kigarama, where they engaged in an attack on Tutsis "carried out under [the Appellant's] personal supervision".[402]
- At Nyarubuye Parish on 15 April 1994, the Appellant "*instructed* the communal police and the *Interahamwe* to attack the refugees and prevent them from escaping", which they did.[403]
- On 16 April 1994, the Appellant "directed" an attack at Nyarubuye Parish, during which the assailants "finished off" survivors and looted the parish building.[404]
- On 17 April 1994, the Appellant ordered a group of attackers to kill fifteen Tutsi survivors of previous attacks at Nyarubuye Parish, which they immediately did.[405]

185. These findings made clear that the Appellant had authority over the attackers in question and that his orders had a direct and substantial effect on the commission of these crimes. In view of these facts, no reasonable trier of fact could find that the Appellant's words were not perceived as orders by the attackers in general, not just the communal police, to commit these crimes.

186. In *Semanza*, the Appeals Chamber found that the Trial Chamber had unreasonably failed to conclude that Laurent Semanza was liable for ordering a massacre.[406] This conclusion was based on the facts that Mr. Semanza had "directed attackers, including soldiers and *Interahamwe*, to kill Tutsi refugees who had been separated from the Hutu refugees"[407] and that the refugees "were then executed on the directions" of Mr. Semanza.[408] The Appeals Chamber concluded as follows:

> On these facts, no reasonable trier of fact could hold otherwise than that the attackers to whom the Appellant gave directions regarded him as speaking with authority. That authority created a superior-subordinate relationship which was real, however informal or temporary, and sufficient to find the Appellant responsible for ordering under Article 6(1) of the Statute.[409]

The Trial Chamber in the *Kamuhanda* case reached a similar conclusion under similar facts, and the Appeals Chamber affirmed it.[410] The present case is materially indistinguishable from these cases.

187. Accordingly, the Trial Chamber erred in fact by not convicting the Appellant for ordering the crimes committed by all attackers, not just the communal policemen, at Nyarubuye Parish on 15, 16, and 17 April 1994 and on 14 April 1994 at Kigarama. This sub-ground of appeal is upheld.

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[402] Trial Judgement, para. 98.
[403] Trial Judgement, paras. 152, 154 (emphasis added). *See also ibid.*, paras. 168, 172 (the Appellant "directed attacks" at Nyarubuye), 173 (the Appellant led the attacks at Nyarubuye "by instructing the attackers to kill the refugees").
[404] Trial Judgement, para. 171.
[405] Trial Judgement, para. 163.
[406] *Semanza* Appeal Judgement, paras. 363, 364.
[407] *Semanza* Appeal Judgement, para. 363.
[408] *Semanza* Appeal Judgement, para. 363, quoting *Semanza* Trial Judgement, paras. 178, 196.
[409] *Semanza* Appeal Judgement, para. 363.

[410] *Kamuhanda* Appeal Judgement, para. 76 (holding that "a reasonable trier of fact could conclude from the fact that the order to start the massacre was directly obeyed by the attackers that this order had direct and substantial effect on the crime, and that the Appellant had authority over the attackers, regardless of their origin").

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ORIGINAL: ENGLISH

TRIAL CHAMBER III

Before: Judge Khalida Rachid Khan, presiding
Judge Lee Gacuiga Muthoga
Judge Aydin Sefa Akay

Registrar: Adama Dieng

Date: 31 March 2011

THE PROSECUTOR

v.

Jean-Baptiste GATETE

Case No. ICTR-2000-61-T

JUDGEMENT AND SENTENCE

Office of the Prosecutor:

Richard Karegyesa
Drew White
Adelaide Whest
Didace Nyirinkwaya
Yasmine Chubin
Leo Nwoye

Counsel for the Defence:

Marie-Pierre Poulain
Kate Gibson

572. In sum, the Chamber concludes that the Indictment and the Prosecution's post-Indictment submissions have provided timely, clear and consistent notice that it would be relying on all modes of liability, including commission through a joint criminal enterprise, with respect to all of the Counts in the Indictment. Accordingly, the Chamber considers all forms of individual criminal responsibility under Article 6 (1), where relevant, in its legal findings.

1.3 Law

573. "Planning" requires that one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated.[699] It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.[700] The *mens rea* for this mode of responsibility entails the intent to plan the commission of a crime or, at a minimum, the awareness of the substantial likelihood that a crime will be committed in the execution of the acts or omissions planned.[701]

574. "Instigating" implies prompting another person to commit an offence.[702] It is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused; it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.[703] The *mens rea* for this mode of responsibility is intent to instigate another person to commit a crime or at a miminum, awareness of the substantial likelihood that a crime will be committed in the execution of the act or omission instigated.[704]

575. "Ordering" requires that a person in a position of authority instruct another person to commit an offence. No formal superior-subordinate relationship between the accused and the perpetrator need exist. It is sufficient that there is proof of some position of authority on the part of the accused that would compel another to commit a crime pursuant to the accused's order. The authority creating the kind of relationship envisaged under Article 6 (1) of the Statute for ordering may be informal or of a purely temporary nature.[705]

576. The Appeals Chamber has held that commission covers, primarily, the physical perpetration of a crime (with criminal intent) or a culpable omission of an act that is mandated by a rule of criminal law.[706] "Committing" has also been interpreted to contain three forms of joint criminal enterprise: basic, systemic, and extended.[707] The Prosecution has

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alleged joint criminal enterprise. The Chamber, however, does not make any findings with respect to such participants.

[699] *Nahimana et al.* Appeal Judgement para 479, citing *Kordić and Čerkez* Appeal Judgement para. 26.

[700] *Nahimana et al.* Appeal Judgement para. 479, citing *Kordić and Čerkez* Appeal Judgement para. 26.

[701] *Nahimana et al.* Appeal Judgement para. 479, citing *Kordić and Čerkez* Appeal Judgement paras. 29, 31.

[702] *Nahimana et al.* Appeal Judgement para. 480, citing *Ndindabahizi* Appeal Judgement para. 117; *Kordić and Čerkez* Appeal Judgement para. 27.

[703] *Nahimana et al.* Appeal Judgement para. 480, citing *Gacumbitsi* Appeal Judgement para. 129; *Kordić and Čerkez* Appeal Judgement para. 27.

[704] *Nahimana et al.* Appeal Judgement para. 480, citing *Kordić and Čerkez* Appeal Judgement paras. 29, 32.

[705] *Bagosora et al.* Trial Judgement para. 2008, citing *Semanza* Appeal Judgement paras. 361, 363.

[706] *Nahimana et al.* Appeal Judgement para. 478.

[707] *Simba* Trial Judgement para. 386, citing *Kvočka et al.* Appeal Judgement paras. 82-83; *Ntakirutimana* Appeal Judgement paras. 463-465; *Vasiljević* Appeal Judgement paras. 96-99; *Krnojelac* Appeal Judgement para. 30. See also *Nahimana et al.* Appeal Judgement para. 478; *Brđanin* Appeal Judgement para. 364.

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron

Registrar: **Mr. Adama Dieng**

Judgement of: **2 February 2009**

FRANÇOIS KARERA

v.

THE PROSECUTOR

Case No. ICTR-01-74-A

JUDGEMENT

Counsel for the Appellant

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Mr. Alexandre Bergevin
Mr. Christian Deslauriers, Assistant

Office of the Prosecutor

Mr. Hassan Bubacar Jallow
Mr. Alex Obote-Odora
Ms. Dior Sow Fall
Mr. Abdoulaye Seye
Mr. François-Xavier Nsanzuwera
Mr. Alfred Orono Orono
Ms. Florida Kabasinga
Ms. Béatrice Chapaux

the accused; it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.[727]

318. Contrary to the Appellant's contention, the specific identification of the perpetrators, who were identified in the Trial Judgement as *Interahamwe*, was not required for a finding that the Appellant instigated the killing of Gakuru. In any event, the Trial Chamber did identify the perpetrators. It is implicit, but certain, in the Trial Judgement that the Trial Chamber found that Gakuru was killed by the *Interahamwe* who were informed by the Appellant that Gakuru was an "*Inyenzi*" and who received his order to arrest him. The Trial Chamber found that "[b]y doing so, Karera left him [Gakuru] in the hands of *Interahamwe*" and that "[u]nder the prevailing circumstances, he must have understood that Gakuru would be killed".[728] That the Trial Chamber made such a finding is implicit in its recollection of the evidence of Witnesses BMO and BMN.[729] While it would have been preferable for the Trial Chamber to explicitly state that it identified the perpetrators of Gakuru's murder as being the *Interahamwe* to whom the Appellant indicated that Gakuru was an "*Inyenzi*" and who received the order to arrest him, this omission does not amount to an error.

319. However, based on the Trial Chamber's factual findings, the Trial Chamber could not have reasonably concluded that the Appellant prompted the perpetrators to kill Gakuru. The Trial Chamber made no factual findings supporting such a conclusion. It merely concluded that the Appellant had informed the *Interahamwe* who later killed Gakuru that he was an "*Inyenzi*" and ordered them to arrest him. The Trial Chamber should have further explained how, on the basis of these factual findings, it inferred that the Appellant had prompted the *Interahamwe* to kill Gakuru. In the absence of such an explanation, the Appeals Chamber finds that the Trial Chamber erred in convicting the Appellant for instigating Gakuru's murder.

320. The Appeals Chamber now turns to the Appellant's submission that the Trial Chamber erred in entering a conviction for aiding and abetting murder as a crime against humanity.

321. The *actus reus* of aiding and abetting is constituted by acts or omissions that assist, further, or lend moral support to the perpetration of a specific crime, and which substantially contribute to the perpetration of the crime.[730] The *mens rea* for aiding and abetting is knowledge that acts

[727] *Nahimana et al.* Appeal Judgement, para. 480; *Gacumbitsi* Appeal Judgement, para. 129; *Kordić and Čerkez* Appeal Judgement, para. 27.
[728] Trial Judgement, para. 456.
[729] *See* Trial Judgement, paras. 445, 447.
[730] *Nahimana et al.* Appeal Judgement, para. 482.

performed by the aider and abettor assist in the commission of the crime by the principal.[731] It is well established that it is not necessary for an accused to know the precise crime which was intended and which in the event was committed, but he must be aware of its essential elements.[732] If an accused is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime.[733]

322. The Trial Chamber found that the Appellant told the *Interahamwe* that Gakuru was an "*Inyenzi*" and that he ordered his arrest by the *Interahamwe*, which he must have understood would result in his murder.[734] On the basis of these findings, it was reasonable for the Trial Chamber to conclude that the Appellant aided and abetted the murder of Gakuru.[735] By instructing the *Interahamwe* to arrest Gakuru and telling them that Gakuru was an "*Inyenzi*", it was reasonable to conclude that the Appellant substantially contributed to the commission of his murder through specifically assisting and providing moral support to the principal perpetrators. Furthermore, in light of the evidence adduced, the Appeals Chamber finds no error in the Trial Chamber's finding that the Appellant had the requisite *mens rea.*

323. For the foregoing reasons, the Appeals Chamber grants this sub-ground of appeal in part and reverses the Appellant's conviction for instigating murder as a crime against humanity based on this event. The Appellant's conviction for aiding and abetting murder as a crime against humanity based on the killing of Gakuru is upheld.

F. Conclusion

324. The Appeals Chamber grants the Appellant's First Ground of Appeal and reverses the Appellant's conviction for aiding and abetting genocide and extermination as a crime against humanity, based on the alleged weapons distribution in Rushashi commune.

325. The Appeals Chamber further grants the Seventh Ground of Appeal, in part, and reverses the Appellant's conviction for instigating murder as a crime against humanity based on the killing of Gakuru.

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[731] *Nahimana et al.* Appeal Judgement, para. 482.
[732] *Nahimana et al.* Appeal Judgement, para. 482.
[733] *See Stakić* Appeal Judgement, para. 50; *Nahimana et al.* Appeal Judgement, para. 482.
[734] Trial Judgement, para. 456.
[735] Trial Judgement, para. 560.

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Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before:	**Judge Patrick Robinson, Presiding** **Judge Mehmet Güney** **Judge Liu Daqun** **Judge Andrésia Vaz** **Judge Carmel Agius**
Registrar:	**Mr. Adama Dieng**
Judgement of:	**28 September 2011**

THE PROSECUTOR

v.

YUSSUF MUNYAKAZI

Case No. ICTR-97-36A-A

JUDGEMENT

The Office of the Prosecutor:

Hassan Bubacar Jallow
James J. Arguin
Alphonse Van
François Nsanzuwera
Lydia Mugambe
Dennis Mabura
Ndeye Maria Ka

Counsel for Yussuf Munyakazi:

Barnabé Nékuie

particular, he highlights inconsistencies between the accounts of Witnesses MM and MP with respect to the number of gendarmes who addressed the assailants, their ability to see Munyakazi or vehicles within the parish premises, where the refugees were killed, how the attack started, and whether there was a victim selection process.[267] Munyakazi argues that these discrepancies cannot be reasonably explained by the passage of time or confusion given Witnesses MM's and MP's similar vantage points during the attack and their shared role in ensuring the welfare of the refugees.[268] Munyakazi also highlights the discrepancy between Witnesses MM's and MP's contention that the gendarmes tried to prevent the attack and Witness BWW's assertion that the gendarmes welcomed the attackers.[269]

102. Munyakazi argues that the Trial Chamber failed to appreciate the differences in Witnesses MM's, LCQ's, and BWW's respective accounts concerning the location and manner of the killings.[270] Munyakazi further contends that Witnesses MM and LCQ could not corroborate each other given their different vantage points during the attack.[271] Furthermore, Munyakazi submits that the evidence of Witness BWW is exaggerated and lacking in key details.[272] Munyakazi also points to differences among the witnesses' descriptions of the assailants' attire, the gender of the refugees at the parish, and the involvement of certain attackers.[273] Finally, Munyakazi submits that, had the Trial Chamber not cancelled the site visit, it would have determined that the discrepancies between the testimonies of Witnesses MM, MP, LCQ, and BWW were significant.[274]

103. A review of the Trial Judgement and record reflects that there are certain differences between the accounts of the Prosecution witnesses, which are partly reflected in the summary of their evidence in the Trial Judgement. Contrary to Munyakazi's submissions, however, these differences are generally minor and do not call into question the reasonableness of the Trial Chamber's reliance on the accounts of the witnesses. The Appeals Chamber recalls that the Trial Chamber has the main responsibility to resolve any inconsistencies that may arise within or among witnesses' testimonies.[275] It is within the discretion of the Trial Chamber to evaluate inconsistencies in the evidence, to consider whether the evidence taken as a whole is reliable and credible, and to

[267] Munyakazi Appeal Brief, paras. 204, 205, 207, 214-217, 223, 224.
[268] Munyakazi Appeal Brief, paras. 207, 216, 217, 232.
[269] Munyakazi Appeal Brief, paras. 223-225, 230.
[270] Munyakazi Appeal Brief, paras. 211, 212, 218-220, 229.
[271] Munyakazi Appeal Brief, para. 213.
[272] Munyakazi Appeal Brief, paras. 226, 228, 232.
[273] Munyakazi Appeal Brief, paras. 206-210, 221, 222, 229, 231.
[274] Munyakazi Appeal Brief, paras. 233, 234; Munyakazi Reply Brief, para. 57.
[275] *Renzaho* Appeal Judgement, para. 269; *Rukundo* Appeal Judgement, para. 207; *Simba* Appeal Judgement, para. 103.

accept some but reject other parts of a witness's testimony.[276] Furthermore, corroboration does not require witnesses' accounts to be identical in all aspects since "[e]very witness presents what he has seen from his own point of view at the time of the events, or according to how he understood the events recounted by others."[277] Rather, the main question is whether two or more credible accounts are incompatible.[278]

104. Witness MP's account of how the attack unfolded is mostly incompatible with those of Witnesses MM, LCQ, and BWW.[279] Specifically, according to the Trial Judgement, Witness MP described an attack involving killings which occurred in the classrooms on the premises of the parish.[280] In contrast, Witnesses MM, LCQ, and BWW indicated that the victims were first gathered at the parish, removed from its premises, stripped naked, and killed elsewhere.[281] The Trial Chamber considered that this discrepancy could be explained by the passage of time and confusion due to the frequency of attacks on the parish during that period.[282] The Appeals Chamber is satisfied that these circumstances reasonably explain why Witness MP may have been mistaken about some of the specific details of the attack on 30 April 1994. Accordingly, the Appeals Chamber finds that the Trial Chamber acted within its discretion in rejecting many of the inconsistent details of the attack given by Witness MP and in preferring the corroborated version of events provided by Witnesses MM, LCQ, and BWW.[283]

105. The other discrepancies between Witnesses MM and MP, which were not expressly addressed in the Trial Judgement, are minor and could also be explained by confusion and the passage of time. It was within the discretion of the Trial Chamber to nonetheless rely on other aspects of Witness MP's evidence on points where his evidence was consistent with that of other witnesses, such as the time and date of the attack, the number of victims, and the leader of the attack.[284] Accordingly, Munyakazi has not demonstrated that the discrepancies between Witness MP's testimony about the attack and the other evidence call into question the reasonableness of the Trial Chamber's findings.

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[276] *Rukundo* Appeal Judgement, para. 207; *Simba* Appeal Judgement, para. 103. *See also Muvunyi II* Appeal Judgement, para. 26; *Muvunyi I* Appeal Judgement, para. 128.
[277] *Nahimana et al.* Appeal Judgement, para. 428.
[278] *Nahimana et al.* Appeal Judgement, para. 428.
[279] Trial Judgement, para. 413.
[280] Trial Judgement, para. 413.
[281] Trial Judgement, para. 413. *See also* Witness MM, T. 27 April 2009 p. 63; Witness LCQ, T. 28 April 2009 p. 21; Witness BWW, T. 29 May 2009 p. 21. The Trial Chamber noted, however, that Witness BWW testified that the *Interahamwe* killed some of the refugees inside the parish itself as night time approached. *See* Trial Judgement, para. 400.
[282] Trial Judgement, para. 413.
[283] Trial Judgement, para. 413.
[284] Trial Judgement, paras. 390, 397, 414, 415, 422, 496.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Original: ENGLISH

Trial Chamber I

Before Judges:
Judge Lennart Aspegren, President
Judge Laïty Kama
Judge Navanethem Pillay

Registry: Mr. Agwu U. Okali

Judgement of: 27 January 2000

THE PROSECUTOR
v.
ALFRED MUSEMA

Case No. ICTR-96-13-A

JUDGEMENT AND SENTENCE

Office of the Prosecutor:
Ms Carla Del Ponte
Ms Jane Anywar Adong
Mr Charles Adeogun-Philips
Ms Holo Makwaia

Counsel for the Defence:
Mr Steven Kay, QC
Prof Michaïl Wladimiroff

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18. The Appeals Chamber recalls that in determining whether or not a Trial Chamber's finding was reasonable, it "will not lightly disturb findings of fact by a Trial Chamber."[25] In the first place, the task of weighing and assessing evidence lies with the Trial Chamber. Furthermore, it is for the Trial Chamber to determine whether a witness is credible or not. Therefore, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber.[26] But the Trial Chamber's discretion in weighing and assessing evidence is always limited by its duty to provide a "reasoned opinion in writing,"[27] although it is not required to articulate every step of its reasoning for each particular finding it makes.[28] The question arises as to the extent that a Trial Chamber is obliged to set out its reasons for accepting or rejecting a particular testimony.[29] There is no guiding principle on this point and, to a large extent, testimony must be considered on a case by case basis. The Appeals Chamber of ICTY held that:[30]

> [t]he right of an accused under Article 23 of the Statute to a reasoned opinion is an aspect of the fair trial requirement embodied in Articles 20 and 21 of the Statute. The case-law that has developed under the European Convention on Human Rights establishes that a reasoned opinion is a component of the fair hearing requirement, but that "the extent to which this duty . . . applies may vary according to the nature of the decision" and "can only be determined in the light of the circumstances of the case."[31] The European Court of Human Rights has held that a "tribunal' is not obliged to give a detailed answer to every argument.[32]

19. In addition, the Appeals Chamber of ICTY has stated that although the evidence produced may not have been referred to by a Trial Chamber, based on the particular circumstances of a given case, it may nevertheless be reasonable to assume that the Trial Chamber had taken it into account.[33]

20. It does not necessarily follow that because a Trial Chamber did not refer to any particular evidence or testimony in its reasoning, it disregarded it. This is particularly so in the evaluation of witness testimony, including inconsistencies and the overall credibility of a witness. A Trial Chamber is not required to set out in detail why it accepted or rejected a particular testimony. Thus, in the *Čelebići* case, the Appeals Chamber of ICTY found that it is open to the Trial Chamber to accept what it described as the "fundamental features" of testimony.[34] It also stated that:

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[25] *Furundžija* Appeal Judgement, para. 37; *Tadić* Appeal Judgement, para. 35; *Aleksovski* Appeal Judgement, para. 63.
[26] *Akayesu* Appeal Judgement, para. 232; *Tadić* Appeal Judgement, para. 64; *Furundžija* Appeal Judgement, para. 37; *Aleksovski* Appeal Judgement, para. 63; *Serushago* Appeal Judgement, para 22.
[27] Article 22(2) of the Statute and Rule 88(C) of the Rules.
[28] *Čelebići* Appeal Judgement, para. 481.
[29] In particular, the Prosecution has submitted that the "parameters of what constitutes a 'reasoned opinion' have yet to be articulated by any Trial Chamber of this Tribunal or ICTY, or by the Appeals Chamber." Prosecution's Response, footnote 59 and para. 4.108.
[30] *Furundžija* Appeal Judgement, para. 69.
[31] Footnote reference: "See the case of *Ruiz Torija v. Spain,* Judgement of 9 December 1994, Publication of the European Court of Human Rights ("Eur. Ct. H. R."), Series A, vol. 303, para. 29."
[32] Footnote reference: "Case of *Van de Hurk v. The Netherlands,* Judgement of 19 April 1994. Eur. Ct. H. R., Series A, vol. 288, para. 61."
[33] *Čelebići* Appeal Judgement, para. 483.
[34] *Ibid.*, para. 485.

> [t]he Trial Chamber is not obliged in its Judgement to recount and justify its findings in relation to every submission made during trial. It was within its discretion to evaluate the inconsistencies highlighted and to consider whether the witness, when the testimony is taken as a whole, was reliable and whether the evidence was credible. Small inconsistencies cannot suffice to render the whole testimony unreliable.[35]

21. It is for an appellant to show that the finding made by the Trial Chamber is erroneous and that the Trial Chamber indeed disregarded some item of evidence, as it did not refer to it. In Čelebići, the Appeals Chamber found that the Appellant had "failed to show that the Trial Chamber erred in disregarding the alleged inconsistencies in its overall evaluation of the evidence as being compelling and credible, and in accepting the totality of the evidence as being sufficient to enter a finding of guilt beyond reasonable doubt on these grounds."[36]

B. The Burden and Standard of Proof at Trial: General principles governing assessment of evidence by the Trial Chamber

22. Musema has raised six preliminary points largely based on what he alleges to be errors in the Trial Chamber's observations as to how it intended to or did assess the evidence at trial. He claims that the Trial Chamber consistently committed the said errors in its assessment of the evidence and that the failure of the Trial Chamber to apply the correct burden and standard of proof to the facts before it meant that he was wrongly convicted.[37]

23. Before examining the Trial Chamber's precise factual findings, the Appeals Chamber will first briefly consider these general allegations.

1. Burden and standard of proof

(a) Arguments of the parties

24. Musema alleges that the Trial Chamber "consistently erred in its statements of the law regarding the burden and standard of proof."[38] He maintains that the Trial Chamber failed to apply the correct test in assessing evidence, whereby it is the duty of the Prosecution, save in certain cases, to prove the guilt of the accused beyond all reasonable doubt.[39] He cited the *Tadić* Appeal Judgement where "the Appeals Chamber found that the Trial Chamber had, in effect, wrongly directed itself on the law."[40]

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[35] *Ibid.*, para. 498.
[36] *Ibid.*,
[37] Appellant's Brief, para. 23.
[38] *Ibid.*, para. 101.
[39] *Ibid.*, para. 9. Musema points out that in some national jurisdictions, there is a burden on the Defence to prove certain "special defences" on the balance of probabilities (referring to diminished responsibility) as well as the burden in the case of confessions, (Appellant's Brief, paras. 16 to 18). Otherwise, Musema submits that "[t]here is nothing in the Rules to state that the burden of proof rests on the Defence in any other circumstances." Appellant's Brief, para. 19.
[40] *Ibid.*, para. 48.

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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: Adama Dieng

Judgement of: 28 November 2007

Ferdinand NAHIMANA
Jean-Bosco BARAYAGWIZA
Hassan NGEZE
(*Appellants*)

v.

THE PROSECUTOR
(Respondent)

Case No. ICTR-99-52-A

JUDGEMENT

Counsel for Ferdinand Nahimana
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Diana Ellis

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The Office of the Prosecutor
Hassan Bubacar Jallow
James Stewart
Neville Weston
George Mugwanya
Abdoulaye Seye
Linda Bianchi
Alfred Orono Orono

> evidence other than hearsay that Ngeze was arrested at all. Their sources of information were vague, with the exception of three witnesses who learned of the arrest from Ngeze himself.

427. The Trial Chamber summarized the Defence witnesses' testimonies in support of the alibi as follows:

> A number of Defence witnesses testified to the date of Ngeze's arrest in April 1994. Witness BAZ2, Witness RM1, Witness RM5, Witness BAZ6, Witness RM19, Witness BAZ9 and Witness BAZ15 testified that Ngeze was arrested on 6 April 1994. Witnesses RM13 and Witness BAZ3 testified that Ngeze was arrested just after Habyarimana's death. Witness RM2 testified that Ngeze was arrested on 6-7 April 1994. Witness BAZ1 testified that Ngeze was arrested the day before 6 April 1994 and was detained for three days. Witness RM117 testified that Ngeze was arrested on 7 April 1994. Witness RM112 testified that he found out on 7 April 1994 that Ngeze had been arrested. As to the date of Ngeze's release from prison, Witness RM5 and Witness RM2 testified that Ngeze was released on 9 April 1994. Witness BAZ2, Witness RM112 and Witness RM1 testified that Ngeze was released on 10 April 1994. Witness BAZ15 testified that Ngeze was released after about six days in custody. Witness BAZ9 testified that she saw Ngeze on 10 April 1994. Witness BAZ31 testified that Ngeze went into hiding from 6 April 1994. All of these witnesses learned of Ngeze's arrest from other people. Witness RM112, Witness RM19 and Witness BAZ15 testified that they heard about the arrest from Ngeze himself. The other witnesses heard about the arrest from people on the street or other Muslims, or knew of it as a matter of common knowledge.[1000]

428. The Appeals Chamber considers that the Trial Chamber could validly conclude that "none of the Defence witnesses had evidence other than hearsay that Ngeze was arrested at all" and that in most cases their sources of information were vague.[1001] However, the Appeals Chamber is of the view that an analysis of Defence witnesses testimonies relating to the alibi from 6 to 9 April 1994 does not demonstrate that those testimonies are "thoroughly inconsistent" (in the words of the authentic, English, text of the Judgement).[1002] From the outset, the Appeals Chamber is of the view that two testimonies corroborate one another 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. It is not necessary that both testimonies be identical in all aspects or describe the same fact in the same way. Every witness presents what he has seen from his own point of view at the time of the events, or according to how he understood the events recounted by others. It follows that corroboration may exist even when some details differ between testimonies, provided that no credible testimony describes the facts in question in a way which is not compatible with the description given in another credible testimony.

429. Here, the testimonies of Witnesses BAZ-2,[1003] RM-1,[1004] RM-5,[1005] BAZ-6,[1006] RM-19[1007] and BAZ-15[1008] are consistent regarding the allegation that the Appelant Ngeze was

[1000] Judgement, para. 808 (footnotes omitted).
[1001] *Ibid.*, para. 828.
[1002] *Idem.*
[1003] T. 29 January 2003, p. 4.
[1004] T. 14 March 2003, p. 62.
[1005] T. 21 March 2003, p. 4.
[1006] T. 15 March 2003, p. 25.
[1007] T. 3 March 2003, p. 6.
[1008] *Ibid.*, p. 23.

478. The Appeals Chamber recalls that commission covers, primarily, the physical perpetration of a crime (with criminal intent) or a culpable omission of an act that is mandated by a rule of criminal law, but also participation in a joint criminal enterprise.[1153] However, it does not appear that the Prosecutor charged the Appellants at trial with responsibility for their participation in a joint criminal enterprise,[1154] and the Appeals Chamber does not deem it appropriate to discuss this mode of participation here.[1155]

479. The *actus reus* of "planning" requires that one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated.[1156] It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.[1157] The *mens rea* for this mode of responsibility entails the intent to plan the commission of a crime or, at a minimum, the awareness of substantial likelihood that a crime will be committed in the execution of the acts or omissions planned.[1158]

480. The *actus reus* of "instigating" implies prompting another person to commit an offence.[1159] It is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused; it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.[1160] The *mens rea* for this mode of responsibility is the intent to instigate another person to commit a crime or at a miminum the awareness of the substantial likelihood that a crime will be committed in the execution of the act or omission instigated.[1161]

481. With respect to ordering, a person in a position of authority[1162] may incur responsibility for ordering another person to commit an offence,[1163] if the person who received the order actually proceeds to commit the offence subsequently. Responsibility is also incurred when an individual in a position of authority orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that

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[1153] *Tadić* Appeal Judgement, para. 188.
[1154] Even if such a charge could possibly be inferred from certain paragraphs of the Indictments, for example: *Nahimana* Indictment, para. 6.27; *Barayagwiza* Indictment, para. 7.13; *Ngeze* Indictment, para. 7.15.
[1155] For a more detailed discussion of this form of participation, see *Brđanin* Appeal Judgement, paras. 389-432; *Stakić* Appeal Judgement, paras. 64-65; *Kvočka et al.* Appeal Judgement, paras. 79-119; *Ntakirutimana* Appeal Judgement, paras. 461-468; *Vasiljević* Appeal Judgement, paras. 94-102; *Krnojelac* Appeal Judgement, paras. 28-33, 65 *et seq.*; *Tadić* Appeal Judgement, paras. 185-229.
[1156] *Kordić and Čerkez* Appeal Judgement, para. 26.
[1157] *Kordić and Čerkez* Appeal Judgement, para. 26. Although the French version of the Judgement uses the terms "*un élément determinant*", the English version – which is authoritative – uses the expression "factor substantially contributing to".
[1158] *Kordić and Čerkez* Appeal Judgement, paras. 29 and 31.
[1159] *Ndindabahizi* Appeal Judgement, para. 117; *Kordić and Čerkez* Appeal Judgement, para. 27.
[1160] *Gacumbitsi* Appeal Judgement, para. 129; *Kordić and Čerkez* Appeal Judgement, para. 27. Once again, although the French version of the *Kordić and Čerkez* Judgement reads "*un élément déterminant*", the English version – which is authoritative – reads "factor substantially contributing to".
[1161] *Kordić and Čerkez* Appeal Judgement, paras. 29 and 32.
[1162] It is not necessary to demonstrate the existence of an official relationship of subordination between the accused and the perpetrator of the crime: *Galić* Appeal Judgement, para. 176; *Gacumbitsi* Appeal Judgement, para. 182; *Kamuhanda* Appeal Judgement, para. 75; *Semanza* Appeal Judgement, para. 361; *Kordić and Čerkez* Appeal Judgement, para. 28.
[1163] *Galić* Appeal Judgement, para. 176; *Ntagerura et al.* Appeal Judgement, para. 365; *Kordić and Čerkez* Appeal Judgement, paras. 28-29.

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before:	**Judge Patrick Robinson, Presiding** **Judge Fausto Pocar** **Judge Liu Daqun** **Judge Theodor Meron** **Judge Carmel Agius**
Registrar:	**Mr. Adama Dieng**
Judgement of:	**18 March 2010**

SIMÉON NCHAMIHIGO

v.

THE PROSECUTOR

Case No. ICTR-2001-63-A

JUDGEMENT

Counsel for the Appellant	**Office of the Prosecutor**
Mr. Denis Turcotte Ms. Nathalie Leblanc	Mr. Hassan Bubacar Jallow Mr. Alex Obote-Odora Mr. George Mugwanya

Witness BRJ or that no reasonable trier of fact could have relied on his evidence to find that he recruited people for militia training in absence of corroboration. In any event, the Appeals Chamber recalls that Witness BRJ's evidence was corroborated by that of Witness LDC.[399] The Appeals Chamber therefore dismisses the Appellant's argument.

C. Alleged Failure to Provide a Reasoned Opinion in Relation to Defence Witnesses

163. In discussing the allegations of the Appellant's political connections, the Trial Chamber explicitly noted that several Defence witnesses testified that they never saw the Appellant carry a weapon or wear military attire between 6 April 1994 and 18 July 1994.[400] The Appellant submits that the Trial Chamber erred by failing to provide reasons for not accepting their testimony.[401]

164. While the Appellant does not specifically identify the witnesses to whom he is referring, the Appeals Chamber understands that they are Witnesses SBM, ZSA, Colette Uwubuheta, and the Appellant himself, as they are referred to in the relevant section of the Trial Judgement.[402]

165. The Appeals Chamber recalls that a Trial Chamber is required to provide a reasoned opinion under Article 22(2) of the Statute and Rule 88(C) of the Rules.[403] A reasoned opinion ensures that the accused can exercise his right of appeal and that the Appeals Chamber can carry out its statutory duty under Article 24 of the Statute.[404] However, this requirement relates to the Trial Judgment as a whole, not to each submission made at trial.[405] In addition, a Trial Chamber "is not required to set out in detail why it accepted or rejected a particular testimony."[406]

166. Furthermore, although certain evidence may not have been referred to by a Trial Chamber, in the particular circumstances of a given case it may nevertheless be reasonable to assume that the Trial Chamber took it into account.[407] A Trial Chamber need not refer to every witness testimony or every piece of evidence provided there is no indication that the Trial Chamber completely

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[398] Trial Judgement, paras. 50, 53.
[399] *See* Trial Judgement, paras. 42, 50-53.
[400] Trial Judgement, para. 45, *citing* T. 29 August 2007 p. 21 (Witness SBM); T. 18 September 2007 p. 29 (Siméon Nchamihigo); T. 24 April 2007 p. 56 (Witness ZSA); T. 26 April 2007 pp. 30, 31 (Colette Uwubuheta).
[401] Appellant's Brief, para. 151.
[402] Trial Judgement, para. 45 and fn. 43.
[403] *Muvunyi* Appeal Judgement, para. 144, *citing Simba* Appeal Judgement, para. 152; *Kamuhanda* Appeal Judgement, para. 32; *Kajelijeli* Appeal Judgement, para. 59; *Semanza* Appeal Judgement, paras. 130, 149.
[404] *Karera* Appeal Judgement, para. 20. *See also Musema* Appeal Judgement, para. 18 (noting that the Trial Chamber is not required to articulate every step of its reasoning for each particular finding it makes).
[405] *Karera* Appeal Judgement, para. 20. *See also Limaj et al.* Appeal Judgement, para. 81; *Kvočka et al.* Appeal Judgement, para. 23.
[406] *Musema* Appeal Judgement, para. 20.
[407] *Musema* Appeal Judgement, para. 19.

UNITED NATIONS
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Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron
Judge Carmel Agius

Registrar: **Mr. Adama Dieng**

Judgement of: **20 October 2010**

EMMANUEL RUKUNDO

v.

THE PROSECUTOR

Case No. ICTR-2001-70-A

JUDGEMENT

Counsel for Emmanuel Rukundo:

Ms. Aïcha Condé
Mr. Benoît Henry

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Ms. Christine Graham
Mr. Abubacarr Tambadou
Mr. Ousman Jammeh
Mr. Shamus Mangan

was consistent with Witness BLC's evidence.[183] According to Witness BLC, Rukundo had said that Louis Rudahunga had escaped but that Madame Rudahunga and her children had been killed.[184]

80. The Appeals Chamber finds no error in the Trial Chamber's reasoning that this evidence is corroborative of Witness BLP's evidence despite coming from different perspectives.

81. The Appeals Chamber further recalls that minor inconsistencies commonly occur in witness testimony without rendering the testimony unreliable and that it is within the discretion of the Trial Chamber to evaluate such inconsistencies and to consider whether the evidence as a whole is credible, without explaining its decision in every detail.[185]

82. The Appeals Chamber is not convinced that the evidence of Witnesses BLP, BLJ, and BLC regarding the dates of the abductions from Saint Joseph's College is sufficiently inconsistent to render unreasonable the Trial Chamber's finding that these witnesses corroborated each other. Witnesses BLP and BLJ placed the event in late April 1994 and on 27 April 1994 respectively,[186] whereas Witness BLC testified that it was in May when Rukundo boasted that they had killed Madame Rudahunga and her children after coming from the Rudahunga home.[187] While Witness BLC's evidence about the date of the attacks varies from that of Witnesses BLP and BLJ, the latter two witnesses' testimony is consistent. As Witnesses BLP and BLJ were the two eyewitnesses to the attack, the Appeals Chamber does not consider that this minor inconsistency in Witness BLC's evidence undermines the general finding that these witnesses corroborated each other.

83. Similarly, while the Trial Chamber did not explicitly address at what time the abductions and attacks on Madame Rudahunga, her children, and the two others took place, the Appeals Chamber considers that the inconsistencies between the witnesses' evidence were minor and that their testimonies on this point were largely consistent. All the witnesses placed the abductions in the

[183] Trial Judgement, para. 168. *See also* Trial Judgement, para. 158.
[184] Trial Judgement, para. 154.
[185] *Karera* Appeal Judgement, para. 174; *Kvočka et al.* Appeal Judgement, para. 23.
[186] Trial Judgement, paras. 96, 101.
[187] T. 7 December 2006 p. 39. Witness BLC did not specify the date on which he heard Rukundo boasting about the killing of the Rudahunga family during his examination-in-chief. T. 4 December 2006 pp. 21, 22. However, during cross-examination he stated: "A. I'm talking about a particular day but not a date that I recall. I'm talking about the images that I recall, the weather. It had just rained, for example, and I did not say that it was such a date. Q. Witness, are you able to situate this event in April, May, early – early April, early May – early April, early – end of May, early April, end of May? A. It is true that it was a certain period, obviously not in April. It must have been in May, certainly. Q. (Microphones overlapping) A. It was – I believe it was around mid May, but it's certain that it was in May, not in April. That I recall." *See* T. 7 December 2006 p. 39. When confronted with the assertion that Madam Rudahunga died in the middle of April 1994, Witness BLC stated: "Of course. You can contest or question the time. You see, when I came here, I said, 'Let me not be asked questions about specific dates.'" *See* T. 7 December 2006 p. 41.

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Tribunal Pénal International pour le Rwanda

International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Fausto Pocar
Judge Inés Mónica Weinberg de Roca

Registrar: **Mr Adama Dieng**

Judgement of: **20 May 2005**

LAURENT SEMANZA

v.

THE PROSECUTOR

Case No. ICTR-97-20-A

JUDGEMENT

The Office of the Prosecutor:

Mr James Stewart
Ms Amanda Reichman
Mr Neville Weston

Counsel for the Appellant

Mr Charles Achaleke Taku

ordering. That being said, in the view of the Appeals Chamber, the evidence before the Trial Chamber in relation to Musha church does not support the Trial Chamber's finding that the Appellant did not possess any form of authority over the attackers.

363. It should be recalled that authority creating the kind of superior-subordinate relationship envisaged under Article 6(1) of the Statute for ordering may be informal or of a purely temporary nature. Whether such authority exists is a question of fact. In the present case, the evidence is that the Appellant directed attackers, including soldiers and *Interahamwe*, to kill Tutsi refugees who had been separated from the Hutu refugees at Musha church. According to the Trial Chamber, the refugees "were then executed on the directions" of the Appellant.[767] On these facts, no reasonable trier of fact could hold otherwise than that the attackers to whom the Appellant gave directions regarded him as speaking with authority. That authority created a superior-subordinate relationship which was real, however informal or temporary, and sufficient to find the Appellant responsible for ordering under Article 6(1) of the Statute.

364. Consequently, the Appeals Chamber rejects the Prosecution submission that the Trial Chamber committed a legal error by making the legal qualification of ordering under Article 6(1) of the Statute dependent upon proof of a formal superior-subordinate relationship. The Trial Chamber presented the correct definition for ordering under Article 6(1) of the Statute. However, the Appeals Chamber finds that the Trial Chamber erred in its application of this correct legal standard to the facts. It is clear from the evidence that the Appellant had the necessary authority to render him liable for ordering the attacks and killings at Musha church. The Appeals Chamber, Judge Pocar dissenting, therefore enters a conviction for ordering genocide and for ordering extermination in relation to the massacre at Musha church.

B. War Crimes (Ground 4)

365. The Prosecution's fourth ground of appeal concerns the Trial Chamber's acquittal of the Appellant for serious violations of Common Article 3 to the Geneva Conventions and of Additional Protocol II under Article 4(a) of the Statute (Counts 7 and 13 of the Indictment). Although the Trial Chamber found that a number of the acts of the Appellant constituted serious violations of Common Article 3 to the Geneva Conventions and of Additional Protocol II (Article 4 of the Statute), the Trial Chamber declined to enter convictions for these acts due to the application of the law on cumulative convictions. The Prosecution argues that the Trial Chamber's failure to do so is against

[766] *Ibid.*
[767] Trial Judgement, paras 178, 196.

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International Criminal Tribunal for Rwanda

Tribunal Pénal International pour le Rwanda

UNITED NATIONS

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TRIAL CHAMBER III

Original: English

Before Judges: Yakov Ostrovsky, Presiding
Lloyd G. Williams, QC
Pavel Dolenc

Registrar: Adama Dieng

Judgement of: 15 May 2003

2003 MAY 15 A 11:19
ICTR

THE PROSECUTOR

v.

LAURENT SEMANZA

Case No. ICTR-97-20-T

JUDGEMENT AND SENTENCE

Counsel for the Prosecution:

Chile Eboe-Osuji

Counsel for the Defence:

Charles Acheleke Taku
Sadikou Ayo Alao

are punishable only for the crime of genocide pursuant to Article 2(3)(b), (c), and (d).[627]

379. To satisfy Article 6(1), an individual's participation must have *substantially* contributed to, or have had a *substantial* effect on, the completion of a crime.[628]

a. Forms of Participation

(i) Planning

380. "Planning" envisions one or more persons formulating a method of design or action, procedure, or arrangement for the accomplishment of a particular crime.[629] The level of participation in the planning must be substantial such as actually formulating the criminal plan or endorsing a plan proposed by another.[630]

(ii) Instigating

381. "Instigating" refers to urging, encouraging, or prompting another person to commit a crime.[631] Instigation need not be direct and public.[632] Proof is required of a causal connection between the instigation and the commission of the crime.[633]

(iii) Ordering

382. "Ordering" refers to a situation where an individual has a position of authority and uses that authority to order – and thus compel – another individual, who is subject to that authority, to commit a crime.[634] Criminal responsibility for ordering the commission of a crime under the Statute implies the existence of a superior-

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[627] *Musema*, Judgement, TC, para. 115; *Rutaganda*, Judgement, TC, para. 34; *Akayesu*, Judgement, TC, para. 473.
[628] *Kayishema and Ruzindana*, Judgement, AC, paras. 186, 198; *Ntakirutimana*, Judgement, TC, para. 787; *Bagilishema*, Judgement, TC, paras. 30, 33; *Musema*, Judgement, TC, para. 126; *Rutaganda*, Judgement, TC, para. 43; *Kayishema and Ruzindana*, Judgement, TC, paras. 199, 207; *Akayesu*, Judgement, TC, para. 477.
[629] BLACK'S LAW DICTIONARY p. 1150 (6th ed. 1990) (defining "plan"); *Rutaganda*, Judgement, TC, para. 37.
[630] *Bagilishema*, Judgement, TC, para. 30.
[631] *Bagilishema*, Judgement, TC, para. 30; *Akayesu*, Judgement, TC, para. 482.
[632] *Akayesu*, Judgement, AC, paras. 478-482.
[633] *Bagilishema*, Judgement, TC, para. 30.
[634] *Bagilishema*, Judgement, TC, para. 30; *Rutaganda*, Judgement, TC, para. 39; *Akayesu*, Judgement, TC, para. 483.

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before:	**Judge Patrick Robinson, Presiding** **Judge Mehmet Güney** **Judge Fausto Pocar** **Judge Liu Daqun** **Judge Carmel Agius**
Registrar:	**Mr. Adama Dieng**
Judgement of:	**28 September 2011**

Ephrem SETAKO

v.

THE PROSECUTOR

Case No. ICTR-04-81-A

JUDGEMENT

Counsel for the Appellant	**Office of the Prosecutor**
Prof. Lennox Hinds	Mr. Hassan Bubacar Jallow Mr. James J. Arguin Ms. Deborah Wilkinson Mr. Ousman Jammeh Ms. Thembile Segoete Ms. Christina Fomenky Ms. Betty Mbabazi

30. Setako avers that the Trial Chamber erred in finding Witnesses SLA and SAT credible.[82] In particular, he submits that the Trial Chamber erred in its assessment of: (a) their prior confessions and statements;[83] (b) inconsistencies between Witness SLA's testimony in the present case and his testimony in the *Ndindiliyimana et al.* case;[84] (c) inconsistencies between the testimonies of Witnesses SLA and SAT in the present case;[85] (d) allegations of fabrication and manipulation of evidence;[86] (e) allegations of collusion;[87] and (f) Witnesses SLA's and SAT's evidence in light of the fact that they were accomplice witnesses.[88]

31. The Appeals Chamber will consider these challenges in turn. At the outset, it recalls that it is within the discretion of a trial chamber to evaluate inconsistencies in the evidence, to consider whether the evidence taken as a whole is reliable and credible, and to accept or reject the fundamental features of the evidence.[89] The Appeals Chamber will defer to a trial chamber's judgement on issues of credibility, including its resolution of disparities among different witnesses' accounts, and will only find an error of fact if it determines that no reasonable trier of fact could have made the impugned finding.[90] Furthermore, corroboration may exist even when some details differ between testimonies, provided that no credible testimony describes the facts in question in a way which is not compatible with the description given in another credible testimony.[91]

(a) Prior Confessions and Statements

32. Witnesses SLA and SAT made several confessions to the Rwandan judicial authorities about their participation in crimes committed during the genocide. Witness SLA made a *pro justitia* statement in January 1997[92] and a confession and guilty plea in July[93] and August 1999.[94] Witness SAT confessed and entered a guilty plea in March 2001[95] and May 2005.[96] Both witnesses

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[82] Setako Notice of Appeal, paras. 13, 25, 41-52; Setako Appeal Brief, paras. 98, 99, 154-185; AT. 29 March 2011 pp. 4-15, 37-40. *See also* Setako Brief in Reply, paras. 19, 20, 22-43.
[83] Setako Notice of Appeal, paras. 36, 41-47; Setako Appeal Brief, paras. 89-92, 94-96, 140, 154-175.
[84] Setako Notice of Appeal, paras. 48-50, 52; Setako Appeal Brief, paras. 93, 97, 169, 176-184.
[85] Setako Notice of Appeal, paras. 24, 31, 51; Setako Appeal Brief, paras. 79-82, 87, 128-139, 185.
[86] Setako Notice of Appeal, para. 37, 40; Setako Appeal Brief, paras. 142-145, 152, 153. *See also* Setako Brief in Reply, paras. 22-24.
[87] Setako Notice of Appeal, paras. 38, 39; Setako Appeal Brief, paras. 146-151.
[88] Setako Notice of Appeal, para. 25; Setako Appeal Brief, paras. 98, 99, 141, 166; AT. 29 March 2011 pp. 8, 39. *See also* Setako Brief in Reply, para. 29.
[89] *Rukundo* Appeal Judgement, para. 207; *Simba* Appeal Judgement, para. 103.
[90] *See supra*, para. 10. *See also Renzaho* Appeal Judgement, para. 355; *Gacumbitsi* Appeal Judgement, para. 70.
[91] *Rukundo* Appeal Judgement, para. 201; *Karera* Appeal Judgement, para. 173; *Nahimana et al.* Appeal Judgement, para. 428.
[92] Defence Exhibit 47.
[93] Prosecution Exhibit 21.
[94] Defence Exhibit 48.
[95] Prosecution Exhibit 23.
[96] Prosecution Exhibit 24.

> A. Mr. President. Your Honour, wherever I was, in Nyamagumba or elsewhere, my duty was to supply provisions to my friends; that is, I brought foodstuff. And in order to bring foodstuff in the morning, I left the position at about 10 o'clock in the morning. And to provide the evening meal, I left the position at about 3 p.m. or 4 p.m., and I came back at 6 p.m. to spend the night at the position. And the next morning I would go to the camp at about 6 a.m. to take care of the morning meal.
>
> Q. So is it your testimony here, Witness, that as you went to all of the various camps, that you left on a daily basis to go back to Mukamira in order to get supplies? Is that your testimony, Witness?
>
> A. Yes, Mr. President.[214]

95. The Appeals Chamber finds that it was reasonable for the Trial Chamber to accept Witness SLA's explanation for his presence at Mukamira camp on 11 May 1994 in the present case and conclude that it was compatible with the witness's testimony in *Ndindiliyimana et al.* case. Furthermore, Witness SLA's testimony in respect of various details of the 11 May Killings was corroborated by Witness SAT.[215] Consequently, even if Witness SLA's explanations about his presence at Mukamira camp were inconsistent, any difference was minor and did not call into question the overall credibility of his account. For the same reason, it is irrelevant that Witness SLA made no mention of his daily returns to Mukamira camp in his April 2003 statement.[216]

96. Setako's arguments are therefore dismissed.

(c) Inconsistencies Between the Testimonies of Witnesses SLA and SAT at Trial

97. The Trial Chamber found that the fundamental features of Witnesses SAT's and SLA's accounts of the events at Mukamira camp were largely consistent.[217] It further found that, although there were differences in their testimonies, many of those differences were reasonably explained by the witnesses' varying vantage points and the passage of time.[218]

98. Setako submits that the Trial Chamber ignored significant contradictions between Witnesses SLA's and SAT's testimonies at trial.[219] The Appeals Chamber will consider Setako's specific challenges relating to the 25 April and 11 May Killings in turn.

(i) The 25 April Meeting and 25 April Killings

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[214] T. 18 September 2008 pp. 36, 37.
[215] *See infra*, Section III.B.1.(c)(ii).
[216] The Trial Chamber considered this fact in its assessment of Witness SLA's testimony. *See* Trial Judgement, para. 358.
[217] Trial Judgement, paras. 340, 345. *See also* Trial Judgement, para. 367.
[218] *See* Trial Judgement, para. 341.
[219] Setako Notice of Appeal, paras. 24, 30-35; Setako Appeal Brief, paras. 79-82, 95, 118-140. *See also* Setako Appeal Brief, paras. 29, 41.

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No.: IT-02-60-A

Date: 9 May 2007

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: **Mr. Hans Holthuis**

Judgement of: **9 May 2007**

PROSECUTOR

v.

VIDOJE BLAGOJEVIĆ
AND
DRAGAN JOKIĆ

JUDGEMENT

The Office of the Prosecutor:

Mr. Norman Farrell
Ms. Antoinette Issa
Ms. Marie-Ursula Kind
Mr. Matteo Costi

Counsel for Vidoje Blagojević:

Mr. Vladimir Domazet

Counsel for Dragan Jokić:

Mr. Peter Murphy
Ms. Chrissa Loukas

forms of liability under Article 7(1) of the Statute, including ordering, instigating, and planning, which, in its view, require only an awareness of the substantial likelihood that the crime will be committed.[579]

221. In describing the applicable law for aiding and abetting, the Trial Chamber restated the formulation of the *mens rea* for aiding and abetting found in the *Vasiljević* Appeal Judgement:

> [I]t is not required that the aider and abettor shared the *mens rea* required for the crime; it is sufficient that the aider and abettor had knowledge that his or her own acts assisted in the commission of the specific crime by the principal offender. The aider and abettor must also be aware of the "essential elements" of the crime committed by the principal offender, including the state of mind of the principal offender.[580]

The Appeals Chamber has applied this formulation consistently in its judgements.[581] Consequently, the Appeals Chamber finds no legal error on the part of the Trial Chamber in this regard.

222. The Prosecution faults the Trial Chamber for not recalling the following additional language from the *Blaškić* Appeal Judgement and applying it in this case:

> The Trial Chamber agreed with the statement in the *Furundžija* Trial Judgement that "it is not necessary that the aider and abettor [...] know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor." The Appeals Chamber concurs with this conclusion.[582]

The Appeals Chamber, however, recalls its position from the *Blaškić* Appeal Judgement that there are no reasons to depart from the definition of *mens rea* of aiding and abetting found in the *Vasiljević* Appeal Judgement.[583] The *Blaškić* Appeal Judgement did not extend the definition of *mens rea* of aiding and abetting.

223. The Prosecution also points to the Trial Chamber's statement that it had reasonable doubt that Blagojević "knew" that his acts furthered the mass killing operation,[584] suggesting that this indicates that the Trial Chamber examined the evidence to determine whether Blagojević knew that the mass killings were a virtual certainty. The Appeals Chamber, however, can identify no error on the part of the Trial Chamber based on the use of this formulation. The Appeals Chamber has employed the same formulation in its examination of the *mens rea* of aiding and abetting in other

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[578] *See* Prosecution Appeal Brief, paras. 2.28-2.58.
[579] Prosecution Appeal Brief, paras. 2.35-2.38, 2.55-2.58.
[580] Trial Judgement, para. 727.
[581] *See, e.g.*, *Blaškić* Appeal Judgement, para. 45; *Vasiljević* Appeal Judgement, para. 102; *Tadić* Appeal Judgement, para. 229.
[582] *Blaškić* Appeal Judgement, para. 50 (internal citations omitted).
[583] *Blaškić* Appeal Judgement, para. 45.
[584] Prosecution Appeal Brief, para. 2.17, citing Trial Judgement, paras. 742, 743 (emphasis in Prosecution Appeal Brief).

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-95-14-A

Date: 29 July 2004

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Florence Ndepele Mwachande Mumba
Judge Mehmet Güney
Judge Wolfgang Schomburg
Judge Inés Mónica Weinberg de Roca

Registrar: **Mr. Hans Holthuis**

Judgement of: **29 July 2004**

PROSECUTOR

v.

TIHOMIR BLAŠKIĆ

JUDGEMENT

The Office of the Prosecutor:

Mr. Norman Farrell
Ms. Sonja Boelaert-Suominen
Ms. Michelle Jarvis
Ms. Marie-Ursula Kind
Ms. Kelly Howick

Counsel for the Appellant:

Mr. Anto Nobilo
Mr. Russell Hayman

circumstances, and suggests that the Trial Chamber underscored what was entailed in the trench-digging exercises: forced labour in dangerous conditions.[1194]

588. The Appeals Chamber notes that the Appellant does not contest the finding of the Trial Chamber that detained Bosnian Muslims were used by HVO troops to dig trenches at various times and locations.[1195] HVO documents submitted by the Prosecution, and admitted as evidence, prove that so-called "work platoons" consisting of Bosnian Muslims were created and used to dig trenches.[1196] The Appeals Chamber will consider whether the Trial Chamber erred in fact or in law in determining that the Appellant is criminally responsible for the crimes associated with trench-digging by virtue of having ordered that conduct.

589. The question as to the proper care and maintenance of prisoners of war within the context of forced labour was considered in *The German High Command Trial,*[1197] where the United States Military Tribunal of Nuremberg articulated the following standard:

> Also, [applicable are] the provisions prohibiting their use in dangerous localities and employment, and in this connection it should be pointed out that we consider their use by combat troops in combat areas for the construction of field fortifications and otherwise to constitute dangerous employment under the conditions of modern war.[1198]

590. In the Digest of Laws and Cases of the United Nations War Crimes Commission,[1199] the position was quite clearly stated: "There is nothing illegal in the mere employment of prisoners of war."[1200] Causing prisoners of war to perform unhealthy or dangerous work was, however, clearly recognised as a war crime.[1201]

[1194] Repsondent's Brief, para. 3.40 (citing Trial Judgement, para. 700).
[1195] *See* Appellant's Brief, pp. 109-110 (specifying, however, that civilians of all ethnicities were mobilized to dig trenches). The Trial Chamber found that men detained in Kiseljak barracks and Rotilj village were compelled by the HVO to dig trenches, and that some detainees deployed near the front-line were killed or wounded during exchanges of fire; that forced labour sometimes lasted a long time and the detainees were exposed to bad weather; that detainees digging trenches were mistreated by the Military Police who occasionally inflicted sadistic bodily harm on them and prevented the detainees from taking cover whilst fire was being exchanged; Trial Judgement, para. 693. Detainees imprisoned in Kaonik prison (Trial Judgement, para. 688), the Vitez Cultural Centre, the veterinary station, Dubravica school, and the SDK building were also forced to dig trenches (Trial Judgement, para. 699). Some detainees at the front-line were killed or wounded, and were prevented from taking cover when under fire. In at least one incident, detainees were killed and threatened with death (Trial Judgement, paras. 693, 699). *See generally* Trial Judgement, para. 735. Various evidence admitted at trial supports these conclusions, including *inter alia* Ex. P514, Ex. P677, and Ex. P714.
[1196] *See* P715 HVO "Report on the organization of work platoons", 10 September 1993, and further reports of 20 and 21 September 1993 (P717 and P716 respectively).
[1197] Case No. 72, Law Reports of the Trials of War Criminals, p. 1. The case considered, *inter alia*, the Hague Rules of Land Warfare.
[1198] Law Reports of the Trials of War Criminals, pp. 91-92. As to the compulsory use of civilian labour, this case's application *in casu* is limited, as it finds only that the recruitment of labour in the occupied countries *for use within the Reich* was illegal. *See* p. 93.
[1199] Law Reports Digest of Laws and Cases, Vol. XV.
[1200] Law Reports Digest of Laws and Cases, p. 103, n. 5.
[1201] Law Reports Digest of Laws and Cases, p. 103.

591. As to the position of civilians in occupied territories, it has been established that putting civilians to forced labour may in certain circumstances be a war crime.[1202] Those circumstances include their employment in armament production, and in carrying out military operations against the civilians' own country.[1203]

592. The Appeals Chamber must therefore consider the following two issues: first, whether the compelling of detainees to dig trenches of a military character is *per se* illegal because it necessarily constitutes cruel treatment in breach of common Article 3 of the Geneva Conventions; and second, whether by deliberately running a risk that personnel under his command would perpetrate crimes against the detainees digging trenches, the Appellant incurred criminal responsibility.

(a) Whether the compelling of detainees to dig trenches of a military character is *per se* illegal

593. The first issue for the Appeals Chamber to determine is whether international law criminalises the use of detainees to dig trenches of a military character *per se* because it necessarily constitutes cruel treatment. As regards the employment of civilians for such purposes, Article 51 of Geneva Convention IV, governing the treatment of civilians,[1204] precludes the 'Occupying Power' from compelling 'protected persons' to serve in its armed or auxiliary forces.[1205] The Occupying Power may in fact compel protected persons to work if they are over eighteen years of age, and subject to certain other conditions.[1206] 'Protected persons' may not, however, be compelled to undertake any work which would involve them in the obligation to take part in military operations, and in no case shall the requisition of labour lead to a mobilization of workers "in an organisation of a military or semi-military character."[1207]

[1202] Law Reports Digest of Laws and Cases, p. 119.
[1203] Law Reports of the Trials of War Criminals, p. 120.
[1204] Found by the Trial Chamber to be applicable in this case; *see* Trial Judgement, paras. 133, 143, and 147.
[1205] Article 51 of Geneva Convention IV reads as follows: "The Occupying Power may not compel protected persons to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing voluntary enlistment is permitted.

The Occupying Power may not compel protected persons to work unless they are over eighteen years of age, and then only on work which is necessary either for the needs of the army of occupation, or for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country. Protected persons may not be compelled to undertake any work which would involve them in the obligation of taking part in military operations. The Occupying Power may not compel protected persons to employ forcible means to ensure the security of the installations where they are performing compulsory labour.

The work shall be carried out only in the occupied territory where the persons whose services have been requisitioned are. Every such person shall, so far as possible, be kept in his usual place of employment. Workers shall be paid a fair wage and the work shall be proportionate to their physical and intellectual capacities. The legislation in force in the occupied country concerning working conditions, and safeguards as regards, in particular, such matters as wages, hours of work, equipment, preliminary training and compensation for occupational accidents and diseases, shall be applicable to the protected persons assigned to the work referred to in this Article.

In no case shall requisition of labour lead to a mobilization of workers in an organization of a military or semi-military character."
[1206] *Ibid.*
[1207] *Ibid.*

594. Violations of Article 51 of Geneva Convention IV would ordinarily fall within the ambit of Article 3 of the Statute, and more specifically within the category - as defined by the Appeals Chamber - constituted by infringements of the Geneva Conventions other than those classified as grave breaches.[1208] However, the Appeals Chamber has not been seized of determining such violations in this case, since the Appellant was not indicted for violations of these provisions, but only for inhuman treatment (recognised by Article 2 of the Statute) and cruel treatment of detainees as a violation of the laws or customs of war (recognised by Article 3 of the Statute and common Article 3(1)(a) (cruel treatment) of the Geneva Conventions). The Appeals Chamber must therefore determine whether compelling persons taking no active part in hostilities to dig trenches for military purposes is *ipso facto* unlawful, because it constitutes cruel treatment for the purposes of common Article 3(1)(a) of the Geneva Conventions.

595. The Appeals Chamber has defined "cruel treatment" as follows:

> Cruel treatment as a violation of the laws or customs of war is
>
> a. an intentional act or omission [...] which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity,
>
> b. committed against a person taking no active part in the hostilities.[1209]

596. The Appeals Chamber has considered evidence that the Appellant ordered the use of work platoons to dig trenches,[1210] and the Appellant himself admits having ordered work platoons to dig trenches, but submits that these orders were not unlawful.[1211] If the Appeals Chamber concludes that the Appellant's orders to use detainees to dig trenches either caused serious mental or physical suffering or injury, or constituted a serious attack on human dignity, then it will have established that these orders of the Appellant were such as to satisfy the definition of cruel treatment.

597. The Appeals Chamber has noted that the use of forced labour is not always unlawful.[1212] Nevertheless, the treatment of non-combatant detainees may be considered cruel where, together with the other requisite elements, that treatment causes serious mental or physical suffering or

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[1208] *Tadić* Jurisdiction Decision, para. 89. *See also Naletilić* Trial Judgement, paras. 245 *et seq.* In order for the relevant provisions to apply, the detainees must all have been 'protected persons' within the meaning of Geneva Convention III or IV, depending on their status either as prisoners of war or as civilians respectively.

[1209] *Čelebići* Appeal Judgement, paras. 424, 426 (footnotes omitted) (where the Appeals Chamber distinguished "cruel treatment" from "wilfully causing great suffering or serious injury to body or health" and "inhuman treatment" under Article 2, in that the second two offences each contain an element not present in the offence of cruel treatment under Article 3: the protected person status of the victim. The offence of cruel treatment does not require proof that the victims are protected persons). *See also* para. 426.

[1210] *See* P715, HVO "Report on the organization of work platoons", 10 September 1993; and further reports of 20 and 21 September 1993 (P717 and P716 respectively).

[1211] Trial Judgement, paras. 686 and 736. *See also* T 22,693 *et seq.* (26 May 1999) (Open Session).

injury or constitutes a serious attack on human dignity. The Appeals Chamber notes that Geneva Conventions III and IV require that when non-combatants are used for forced labour, their labour may not be connected with war operations[1213] or have a military character or purpose.[1214] The Appeals Chamber finds that the use of persons taking no active part in hostilities to prepare military fortifications for use in operations and against the forces with whom those persons identify or sympathise is a serious attack on human dignity and causes serious mental (and depending on the circumstances physical) suffering or injury. Any order to compel protected persons to dig trenches or to prepare other forms of military installations, in particular when such persons are ordered to do so against their own forces in an armed conflict, constitutes cruel treatment. The Appeals Chamber accordingly finds that a reasonable trier of fact could have come to the conclusion that the Appellant has violated the laws or customs of war under Article 3 of the Statute, and common Article 3(1)(a) of the Geneva Conventions, and is guilty under Count 16 for ordering the use of detainees to dig trenches.

(b) Whether the Appellant was aware of a substantial likelihood that personnel under his command would perpetrate crimes against the detainees digging trenches

598. In addition to the Trial Chamber's conclusion that the Appellant ordered the use of detainees to dig trenches, including under dangerous conditions at the front, the Trial Chamber further found that the Appellant, by ordering the forced labour, knowingly took the risk that his soldiers might commit violent acts against vulnerable detainees, especially in a context of extreme tensions.[1215] This conclusion relied on the premise that the Appellant knew that crimes were occurring elsewhere, or that he knew of the propensity of the soldiers concerned to commit unlawful acts.

599. The Appellant submits that the Trial Judgement cites no evidence enabling it to conclude that the Appellant knew of any such propensity for violence against detainees, and that the finding of the Trial Chamber is based on the application of a strict liability *mens rea* standard.[1216] The Prosecution explains the reasoning of the Trial Chamber as inferring that the Appellant knew (actual knowledge) or "must have known" (constructive knowledge) of conditions in the detention

[1212] Indeed, Article 49 of Geneva Convention III begins: "The Detaining Power may utilize the labour of prisoners of war". Geneva Convention IV (Article 51) specifies what labour is prohibited – there is no blanket prohibition against the use of protected persons for labour.
[1213] Commentary to Geneva Convention III, p. 266, and Article 51 of Geneva Convention IV.
[1214] Commentary to Geneva Convention III, p. 267. Commentary to Geneva Convention IV, p. 294: "it is generally agreed that the inhabitants of the occupied territory cannot be requisitioned for such work as the construction of fortifications, trenches or aerial bases".
[1215] Trial Judgement, para. 738.
[1216] Respondent's Brief, p. 110.

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UNITED
NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-04-82-A
		Date:	19 May 2010
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Patrick Robinson, Presiding**
Judge Mehmet Güney
Judge Liu Daqun
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: **Mr. John Hocking**

Judgement of: **19 May 2010**

PROSECUTOR

v.

LJUBE BOŠKOSKI
JOHAN TARČULOVSKI

PUBLIC

JUDGEMENT

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Ms. Laurel Baig

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Mr. Antonio Apostolski
Mr. Jordan Apostolski

74. The conclusion of the Trial Chamber regarding the identity of the police group was based not only on the evidence of Ljuboten residents.[211] The Trial Chamber also considered the testimony of military and police personnel, Tarčulovski's statements to a Commission for Inquiry as well as other documentary evidence.[212] Furthermore, although the Trial Chamber noted that "[t]he evidence is not specific as to the movements of the police through Ljuboten on 12 August",[213] Tarčulovski does not show that there was any basis for the Trial Chamber to have a reasonable doubt as to the number of the police groups. Hence, based on the totality of the evidence, the Trial Chamber reasonably reached its conclusion on this issue. Tarčulovski fails to show any error on the part of the Trial Chamber in this regard.

75. The Appeals Chamber notes that the Trial Chamber was unable to identify the direct perpetrators of the alleged murders or other crimes by name, but with respect to the crimes for which Tarčulovski was convicted the Trial Chamber did find that the direct perpetrators were members of the police who entered Ljuboten on the morning of 12 August 2001[214] and that Tarčulovski directed the actions of the police in the village that day.[215] These findings were sufficiently specific to identify the direct perpetrators as persons being directed by Tarčulovski for the purposes of establishing his criminal liability.[216] Tarčulovski's arguments in this respect are rejected.

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[211] *See* also *supra* paras 56 and 59.

[212] *See* Trial Judgement, paras 36, 38, 41-74, 312, 546-547 and 552-560, and evidence cited in footnotes to those paragraphs. The Trial Chamber's cautious approach can be also seen when the Trial Chamber rejected part of Ljuboten residents' incriminating evidence when it found it unreliable (*e.g.*, Trial Judgement, para. 46).

[213] Trial Judgement, para. 552.

[214] Trial Judgement, paras 42, 58, 60-61, 66, 312-313, 316, 319, 325, 328, 380, 383, 385, 552, 555, 560 and 564.

[215] Trial Judgement, paras 555, 560, 564 and 574.

[216] *See* also for: Planning: *Kordić and Čerkez* Appeal Judgement, paras 26, 29 and 31; *Nahimana et al.* Appeal Judgement, para. 479. Instigating: *Kordić and Čerkez* Appeal Judgement, paras 27, 29 and 32; *Karera* Appeal Judgement, paras 317-318; *Nahimana et al.* Appeal Judgement, para. 480. *See* also, *e.g.*, *Gacumbitsi* Appeal Judgement, 99 and 105-108, affirming the Trial Chamber's finding that Gacumbitsi is responsible for instigating, referring to, in particular, Trial Judgement, paras 213, 215 and 328, where physical perpetrators are described as a "group of attackers on which the *bourgmestre* had influence", and "young men who, being in the neighbourhood, heard the *bourgmestre*'s instigation". Ordering: *Galić* Appeal Judgement, para. 176; *Kordić and Čerkez* Appeal Judgement, paras 28-30; *Karera* Appeal Judgement, para. 211; *Nahimana et al.* Appeal Judgement, para. 481; *Gacumbitsi* Appeal Judgement, para. 182; *Semanza* Appeal Judgement, para. 361. *See* also, *e.g.*, *Blaškić* Appeal Judgement, paras 588 (fn. 1195) and 597, finding Blaškić responsible for ordering, and confirming the Trial Chamber's findings, in particular paras 688, 693, 699 and 735, in which physical perpetrators are referred to as the "HVO" or "HVO soldiers" and the "Military Police"; *Gacumbitsi* Appeal Judgement, paras 184-187, finding Gacumbitsi responsible for ordering, and referring to, in particular, Trial Judgement, paras 98, 152, 154, 163, 168 and 171-173, where physical perpetrators are referred to as "*conseillers*", the "communal police", "gendarmes", and the "*Interahamwe*"; *Semanza* Appeal Judgement, para. 363, finding Semanza responsible for ordering, and confirming the Trial Chamber's findings, in particular in paras 178 and 196, where physical perpetrators are described as "soldiers", "gendarmes", and the "*Interahamwe*". *Cf.* for superior responsibility: *Orić* Appeal Judgement, para. 35; *Blagojević and Jokić* Appeal Judgement, para. 287; *Blaškić* Appeal Judgement, para. 216, with reference to *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, paras 38 and 40. As regards joint criminal enterprise: *Krajišnik* Appeal Judgement, paras 156-157.

Boris Trajkovski, it failed to make a reasonable and favourable inference from this evidence, thereby violating the principle of *in dubio pro reo*.[451]

166. The Prosecution responds that the Trial Chamber's finding that Tarčulovski was in charge of the operation on the ground is consistent with the finding that he was not the person who initiated it.[452] The Prosecution further argues that the fact that an accused has acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility.[453]

167. The Appeals Chamber recalls that the Trial Chamber found that Tarčulovski had been ordered to lead the police in the operation in Ljuboten without making a positive finding as to who gave the order.[454] This is, however, irrelevant: the fact that Tarčulovski was ordered to lead the operation does not exonerate him from criminal responsibility if in the execution of the order he in turn instructed other persons to commit a crime.[455] Moreover, the fact that someone else ordered Tarčulovski to lead the operation does not mean that he did not order the operation to be carried out. Tarčulovski fails to show that the Trial Chamber's findings in this respect were unreasonable,[456] and that the *in dubio pro reo* principle was violated. His arguments in this regard are therefore dismissed.

E. Alleged improper expansion of *actus reus* and *mens rea* of planning, ordering and instigating

168. Tarčulovski contends that the Trial Chamber erred in finding that an accused is criminally responsible for planning, instigating or ordering an operation with a legitimate goal, if he did so with the awareness of the substantial likelihood that crimes would be committed in the execution of the operation.[457]

1. Alleged expansion of the *actus reus*

169. First, Tarčulovski argues that the Trial Chamber misapplied the Appeals Chamber's jurisprudence and erroneously expanded the *actus reus* of planning, instigating and ordering by

criminally liable although it could not even determine whether the President was directly involved (citing Trial Judgement, para. 563); AT. 35 and 51.

[451] Tarčulovski Appeal Brief, para. 197(f) (citing Trial Judgement, para. 114); Tarčulovski Amended Notice of Appeal, para. 104 (E) (citing Trial Judgement, para. 114).

[452] Prosecution Response Brief, paras 95 (citing Trial Judgement, paras 564, 574 and 594) and 159 (citing Trial Judgement, paras 113-114 and 594).

[453] Prosecution Response Brief, paras 95 and 159 (both referring to Article 7(4) of the Statute).

[454] Trial Judgement, paras 114 and 541.

[455] *Cf.* Article 7(4) of the Statute.

[456] Trial Judgement, paras 572, 574 and 577.

[457] Tarčulovski Appeal Brief, para. 127 (citing Trial Judgement, para. 576); Tarčulovski Amended Notice of Appeal, para. 39 (citing Trial Judgement, para. 576); Tarčulovski Reply Brief, para. 32.

finding that it can encompass the planning, instigating or ordering of conduct that does not constitute a crime.[458]

170. The Prosecution responds that this argument ignores and misrepresents the Trial Chamber's findings that the predominant object of the operation was to commit the crimes and that "ordering, planning or instigating an operation primarily designed to commit crimes is the same as ordering planning or instigating the crimes themselves."[459] The Prosecution further contends that "the plan, instigation or order need not be explicitly to commit crimes" and that an accused can be held responsible when planning, instigating or ordering an act or omission with the awareness of the substantial likelihood that it will result in a crime.[460]

171. The Trial Chamber reasonably found that the predominant purpose of the operation in Ljuboten was to indiscriminately attack Albanian villagers and their property and that the evidence established that Tarčulovski planned, instigated and ordered this operation.[461] In other words, the Trial Chamber found that Tarčulovski planned, instigated and ordered conduct *which constituted crimes*.[462] In so doing, the Trial Chamber did not expand the *actus reus* of planning, instigating and ordering. Tarčulovski's arguments misinterpret the Trial Chamber's findings and are thus dismissed.[463]

172. Furthermore, the Appeals Chamber notes that the legitimate character of an operation does not exclude an accused's criminal responsibility for planning, instigating and ordering crimes committed in the course of this operation. In other words, even if the goal of an operation is to root

[458] Tarčulovski Appeal Brief, paras 127 and 129 (citing Trial Judgement, para. 576); Tarčulovski Amended Notice of Appeal, para. 39 (citing Trial Judgement, para. 576). *See* also Tarčulovski Reply Brief, paras 47-49. Tarčulovski further argues that requiring that an accused solely planned, instigated or ordered an act or omission, including a legitimate operation, with the awareness of the substantial likelihood that it will result in a crime, effectively turns into criminals "commanding officers of any country whose troops have gone to war, especially against terrorists who hide among civilians". According to Tarčulovski, "in wartime, there is a substantial likelihood – if not a near certainty – that some soldiers will behave improperly and engage in behaviour that IHL law proscribes" (Tarčulovski Reply Brief, para. 46). *See* also AT. 95-96.

[459] Prosecution Response Brief, paras 70 (citing Trial Judgement, paras 572-573) requesting summarily dismissal and 97 (citing Trial Judgement, paras 572-573). *See* also Prosecution Response Brief, Section V (in particular, paras 63-65).

[460] Prosecution Response Brief, paras 98-99 (referring to *Nahimana et al.* Appeal Judgement, paras 479-481; *Karera* Appeal Judgement, para. 211; *Blaškić* Appeal Judgement, paras 41-42 and 471; *Kordić and Čerkez* Appeal Judgement, paras 30-32; *Martić* Appeal Judgement para. 261, and citing Trial Judgement, para. 577 and fn. 2502).

[461] *See supra* paras 135, 153-154, 157 and 161.

[462] *See* Planning: *Kordić and Čerkez* Appeal Judgement, paras 26; *Nahimana et al.* Appeal Judgement, para. 479. Instigating: *Kordić and Čerkez* Appeal Judgement, paras 27; *Nahimana et al.* Appeal Judgement, para. 480. Ordering: *Galić* Appeal Judgement, para. 176; *Kordić and Čerkez* Appeal Judgement, para. 28; *Nahimana et al.* Appeal Judgement, para. 481; *Semanza* Appeal Judgement, para. 361. *See* also Trial Judgement, paras 398-400.

[463] Consequently, the Appeals Chamber dismisses Tarčulovski's arguments that even if the jurisprudence of the Appeals Chamber had expanded the *actus reus* of ordering, planning or instigating, their holdings must not be applied "retroactively" to the charged crimes in August 2001 (Tarčulovski Appeal Brief, paras 134-135; Prosecution Response Brief, paras 100-101).

out "terrorists", this must not be achieved by an act that constitutes a crime.[464] In addition, the Appeals Chamber recalls "that motive is generally not an element of criminal liability".[465]

2. Alleged expansion of the *mens rea*

173. Tarčulovski also submits that the Trial Chamber erroneously expanded the *mens rea* of planning, instigating and ordering when it held that an accused must only know of the *possibility* that a crime will be committed, although the correct standard is that an accused must be aware of a "substantial likelihood" that a crime will occur.[466] Tarčulovski further asserts that the Trial Chamber failed to address whether the risk of crimes being committed under the "perceived threat" by the NLA was unjustifiable or unreasonable.[467]

174. The Appeals Chamber recalls the Trial Chamber's finding that the crimes "were foreseen [...] to be a substantial likelihood of the execution of the operation."[468] This finding is consistent with the established *mens rea* standard of planning, instigating and ordering.[469] The jurisprudence does not require the risk of crimes to be committed to be "reasonable" or "justified"; therefore the Trial Chamber did not err when it did not address this issue.[470] Tarčulovski's arguments in this regard are therefore dismissed.

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[464] *Cf.* HCJ 5100/94 *The Public Committee against Torture in Israel v. The State of Israel*, 53(4) PD 817, 854. (Supreme Court in Israel)

> "This is the destiny of a democracy - it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one arm tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties."

[465] *Limaj et al.* Appeal Judgement, para. 109; *Jelisić* Appeal Judgement, para. 71; *Tadić* Appeal Judgement, para. 269. *See also Kvočka et al.* Appeal Judgement, para. 106; *Jelisić* Appeal Judgement, para. 49. As regards Tarčulovski's argument that too broad an interpretation of the legal requirements for planning, instigating and ordering would effectively turn into criminals commanding officers of any country whose troops have gone to war, the Appeals Chamber is not satisfied that he has shown that the Trial Chamber erred in the definition of these modes of liability.

[466] Tarčulovski Appeal Brief, paras 130-132 (referring to *Blaškić* Appeal Judgement, paras 32, 34-42; *Kordić and Čerkez* Appeal Judgement, paras 29-32); Tarčulovski Amended Notice of Appeal, para. 39 (citing Trial Judgement, para. 576). It is not clear from Tarčulovski's submissions whether he considers this notion of *mens rea* different from, or akin to, "recklessness" in common law.

[467] Tarčulovski Appeal Brief, para. 133 (referring to *Blaškić* Appeal Judgement, para. 38); Tarčulovski Amended Notice of Appeal, para. 39 (citing Trial Judgement, para. 576); Tarčulovski Reply Brief, para. 50. The Prosecution responds that the Trial Chamber reasonably applied the Tribunal's jurisprudence that in order to hold a person criminally responsible for planning, instigating and ordering a crime, that person must have acted at least with the awareness of the substantial likelihood that the crime will occur (Prosecution Response Brief, paras 98-99 (citing Trial Judgement, para. 576)).

[468] Trial Judgement, para. 576.

[469] Planning: *Martić* Appeal Judgement, fn. 553; *Kordić and Čerkez* Appeal Judgement, para. 31; *Nahimana et al.* Appeal Judgement, para. 479. Instigating: *Martić* Appeal Judgement, fn. 553; *Kordić and Čerkez* Appeal Judgement, para. 32; *Nahimana et al.* Appeal Judgement, para. 480. Ordering: *Martić* Appeal Judgement, paras 221-222; *Blaškić* Appeal Judgement, para. 42; *Kordić and Čerkez* Appeal Judgement, para. 30; *Nahimana et al.* Appeal Judgement, para. 481.

[470] The Appeals Chamber notes that para. 38 of the *Blaškić* Appeal Judgement refers to the notion of "unjustifiable or unreasonable" only in the context of the *mens rea* of "recklessness" in common law jurisdictions.

bodies in Ljuboten and alleged acts of terrorism by Albanians was not sufficient to satisfy Boškoski's duty under Article 7(3) of the Statute and asserts that it is not obliged to address every argument and document in evidence.[606] The Prosecution further submits that it did not vary or add any grounds of appeal, contending that the Prosecution Notice of Appeal explicitly argues that the Reports were insufficient to satisfy Boškoski's obligation under Article 7(3) of the Statute. As such, the Prosecution argues that it was entitled to develop this ground in its appeal brief to encompass its claims that the Reports "(1) needed to mention the subordinates' alleged criminal conduct and (2) were unlikely to trigger an investigation into such conduct [...]."[607]

(b) Discussion

244. The Appeals Chamber recalls that a party is required to raise formally any issue of contention before the Trial Chamber either during trial or pre-trial;[608] failure to do so may result in the complainant having waived his right to raise the issue on appeal.

245. The Appeals Chamber observes that the Prosecution has consistently argued during pre-trial and trial that Boškoski failed to take the necessary and reasonable measures to punish his subordinates.[609] The Appeals Chamber is satisfied that, in so doing, the Prosecution effectively argued that the Reports were defective and insufficient to fulfil Boškoski's duty to punish as they did not amount to criminal reports and were therefore insufficient to trigger a criminal investigation. Thus, the Prosecution does not raise this matter for the first time on appeal.[610] Instead, it legitimately raises an issue that allegedly constitutes an error of fact made by the Trial Chamber and warrants the attention of the Appeals Chamber.

246. The Appeals Chamber further recalls that pursuant to Rule 108 of the Rules, a party seeking to appeal a judgement must set forth the grounds of appeal in a notice of appeal, indicating "the substance of the alleged errors and the relief sought."[611] The notice of appeal does not need to detail the arguments that the parties intend to use in support of the grounds of appeal, as this has to be

[606] Prosecution Reply Brief, para. 6. The Prosecution also avers that Rule 90(H)(ii) of the Rules only requires the Prosecution to put to the witness the nature of its case, and that this occurred, *see ibid.*, para. 8.
[607] Prosecution Reply Brief, paras 10 and 12. *See* also *Mrkšić and Šljivančanin* Decision of 26 August 2008, para. 8. In the alternative, the Prosecution moves to vary its notice of appeal under Rule 108 of the Rules to encompass these new arguments. The Appeals Chamber notes that in its Decision of 19 May 2009 it was decided that this matter would be determined on the facts in the judgement. *See* Prosecution Reply Brief, para. 14; Decision on Alternative Prosecution Motion to Vary Notice of Appeal, 19 May 2009, para. 5.
[608] *Krajišnik* Appeal Judgement, para. 654; *Blaškić* Appeal Judgement, para. 222; *Čelebići* Appeal Judgement, para. 640.
[609] Indictment, paras 11, 13 and 15-17; Prosecution Pre-Trial Brief, paras 74 and 83; T. 372-376; Prosecution Final Trial Brief, paras 356, 366, 378 and 382; T. 11029, 11035-11036; T. 11155-11158.
[610] *Cf. Čelebići* Appeal Judgement, para. 640. *Furundžija* Appeal Judgement, para. 174.
[611] *Mrkšić and Šljivančanin* Decision of 26 August 2008, para. 8. *See* also Practice Direction on Formal Requirements for Appeals from Judgement (IT/201), 7 March 2002, para. 1(c) (i), (ii) and (v).

done in an appellant's brief.[612] Instead, the notice of appeal must "focus the mind of the Respondent, right from the day the notice of appeal is filed, on the arguments which will be developed subsequently in the Appeal brief."[613] In the present case, the Prosecution Notice of Appeal includes the Prosecution's only ground of appeal. Furthermore, it indicates the relief sought and the substance of the alleged errors when it *inter alia* states that the Reports were insufficient to satisfy Boškoski's obligation under Article 7(3) of the Statute.[614] The allegation that the Reports were unlikely to trigger an investigation into police criminal conduct is an argument that did not need to be included in the Prosecution Notice of Appeal and that was properly made in the Prosecution Appeal Brief.

247. The Appeals Chamber accordingly rejects Boškoski's claim that the Prosecution waived or otherwise forfeited its right to raise on appeal that (i) it was unreasonable for the Trial Chamber to conclude that the Reports were insufficient to fulfil Boškoski's duty to punish; (ii) the Reports were defective; (iii) the Reports did not amount to criminal reports; and (iv) the Reports were insufficient to trigger a criminal investigation.

3. Alleged factual errors concerning failure to punish responsibility

(a) Submissions of the parties

248. Under this sub-ground of appeal, the Prosecution claims that no reasonable trier of fact could have found the notifications described in the Reports sufficient to satisfy Boškoski's duty under Article 7(3) of the Statute to take the necessary and reasonable measures to punish his subordinates.[615] It maintains that the information provided by the MoI to the judicial authorities was insufficient and deficient,[616] since it failed to mention police criminal conduct[617] or identify any of the perpetrators.[618] Consequently, the notifications described in the Reports were incapable of triggering a criminal investigation into the conduct of police involved in the killings in Ljuboten on 12 August 2001 or the death of Atulla Qaili on the following day.[619]

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[612] *Mrkšić and Šljivančanin* Decision of 26 August 2008, para. 8.
[613] *Prosecutor v. Ignace Bagilishema*, ICTR-95-1A-A, Decision on Motion to Have the Prosecution's Notice of Appeal Declared Inadmissible, 26 October 2001, p. 3.
[614] Prosecution Notice of Appeal, paras 6-9.
[615] Prosecution Notice of Appeal, para. 6 (citing Trial Judgement, paras 521-522, 529 and 534-536); Prosecution Appeal Brief, paras 3, 9, 41, 51 and 74. The Appeals Chamber notes that it is not disputed that Boškoski had command responsibility over police officers, including special and reserve units. *See* Trial Judgement, paras 513-516 and 519-520.
[616] Prosecution Appeal Brief, paras 4 (citing Trial Judgement, paras 529 and 536) and 64 (citing Trial Judgement, para. 536).
[617] Prosecution Appeal Brief, paras 4, 42, 52, 63-64, 72, 77 and 85.
[618] Prosecution Appeal Brief, paras 69 and 85.
[619] Prosecution Appeal Brief, paras 9, 30, 52, 74, 76, 78, 83-84 and 86.

UNITED
NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-04-82-T
		Date:	10 July 2008
		Original:	English

IN TRIAL CHAMBER II

Before: **Judge Kevin Parker, Presiding**
Judge Christine Van Den Wyngaert
Judge Krister Thelin

Registrar: **Mr Hans Holthuis**

Judgement of: **10 July 2008**

PROSECUTOR

v.

LJUBE BOŠKOSKI
JOHAN TARČULOVSKI

PUBLIC

JUDGEMENT

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Ms Edina Rešidović and Mr Guénaël Mettraux for Ljube Boškoski

Mr Antonio Apostolski and Ms Jasmina Živković for Johan Tarčulovski

397. The perpetrators carrying out the *actus reus* of the crimes set out in the indictment do not have to be members of the JCE. What matters in such cases is whether the crime in question forms part of the common purpose[1577] and whether at least one member of the JCE used the perpetrator acting in accordance with the common plan.[1578] In this respect, when a member of the JCE uses a person outside the JCE to carry out the *actus reus* of a crime, the fact that this person knows of the existence of the JCE, *i.e.* of the common purpose, may be a factor taken into consideration when determining whether the crime forms part of the common criminal purpose.[1579] When the direct perpetrator commits a crime beyond the common purpose of the JCE, but which is its natural and foreseeable consequence[1580] the accused may be found responsible if he participated in the common criminal purpose with the requisite intent and if, in the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or more of the persons used by him (or by any other member of the JCE) in order to carry out the *actus reus* of the crimes forming part of the common purpose; and (ii) the accused willingly took that risk – that is the accused, with the awareness that such a crime was a possible consequence of the implementation of that enterprise, decided to participate in that enterprise.[1581]

(b) Planning

398. The *actus reus* of "planning" requires that one or more persons plan or design, at both the preparatory and execution phases, the criminal conduct constituting one or more crimes, provided for in the Statute, which are later perpetrated.[1582] Such planning need only be a feature which contributes substantially to the criminal conduct.[1583] As regards the *mens rea*, the accused must have acted with an intent that the crime be committed, or with an awareness of the substantial likelihood that a crime will be committed in the execution of that plan.[1584]

(c) Instigating

399. The term "instigating" has been defined to mean "prompting another to commit an offence."[1585] Both acts and omissions may constitute instigating, which covers express and implied

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1577 *Brđanin* Appeals Judgement, paras 410, 418.
1578 *Brđanin* Appeals Judgement, paras 413, 430.
1579 *Brđanin* Appeals Judgement, para 410.
1580 *Brđanin* Appeals Judgement, paras 413, 431.
1581 *Brđanin* Appeals Judgement, para 411.
1582 *Brđanin* Trial Judgement, para 268; *Krstić* Trial Judgement, para 601; *Stakić* Trial Judgement, para 443; *Kordić* Appeals Judgement, para 26, citing *Kordić* Trial Judgement, para 386.
1583 *Kordić* Appeals Judgement, para 26; *Limaj* Trial Judgement, para 513.
1584 *Kordić* Appeals Judgement, para 31.
1585 *Krstić* Trial Judgement, para 601; *Akayesu* Trial Judgement, para 482; *Blaškić* Trial Judgement, para 280; *Kordić* Appeals Judgement, para 27; *Kordić* Trial Judgement, para 387; *Limaj* Trial Judgement, para 514.

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No. IT-99-36-A

Date: 3 April 2007

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Christine Van Den Wyngaert

Registrar: **Mr. Hans Holthuis**

Judgement of: **3 April 2007**

PROSECUTOR

v.

RADOSLAV BRĐANIN

JUDGEMENT

The Office of the Prosecutor:

Mr. Peter Kremer
Ms. Helen Brady
Ms. Kristina Carey
Ms. Katharina Margetts

Counsel for the Accused:

Mr. John Ackerman

430. The other requirements for a conviction under the JCE doctrine are no less stringent. A trier of fact must find beyond reasonable doubt that a plurality of persons shared the common criminal purpose; that the accused made a contribution to this common criminal purpose; and that the commonly intended crime (or, for convictions under the third category of JCE, the foreseeable crime) did in fact take place.[911] 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. In establishing these elements, the Chamber must, among other things: identify the plurality of persons belonging to the JCE (even if it is not necessary to identify by name each of the persons involved); 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); make a finding that this criminal purpose is not merely the same, but also common to all of the persons acting together within a joint criminal enterprise;[912] and characterize the contribution of the accused in this common plan. On this last point, the Appeals Chamber observes that, although the contribution need not be necessary or substantial,[913] it should at least be a significant contribution to the crimes for which the accused is to be found responsible.[914]

431. Where all these requirements for JCE liability are met beyond a reasonable doubt, the accused has 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. Pursuant to the jurisprudence, which reflects standards enshrined in customary international law when ascertaining the contours of the doctrine of joint criminal enterprise, he is appropriately held liable not only for his own contribution, but also for those actions of his fellow JCE members that further the crime (first category of JCE) or that are foreseeable consequences of the carrying out of this crime, if he has acted with *dolus eventualis* (third category of JCE). It is not decisive whether these fellow JCE members carried out the *actus reus* of the crimes themselves or used principal perpetrators who did not share the common objective.[915]

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[911] *See Tadić* Appeal Judgement, para. 227.
[912] *Stakić* Appeal Judgement, para. 69.
[913] *Kvočka et al.* Appeal Judgement, paras 97-98.
[914] *See supra*, para. 427. Moreover, "[i]n practice, the significance of the accused's contribution will be relevant to demonstrating that the accused shared the intent to pursue the common purpose." *Kvočka et al.* Appeal Judgement, para. 97.
[915] *See supra*, paras 410-414.

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-99-36-T

Date: 1 September 2004

Original: English

IN THE TRIAL CHAMBER II

Before: **Judge Carmel Agius, Presiding**
Judge Ivana Janu
Judge Chikako Taya

Registrar: **Mr. Hans Holthuis**

Judgement of: **1 September 2004**

PROSECUTOR

v.

RADOSLAV BRĐANIN

JUDGEMENT

The Office of the Prosecutor:

Ms. Joanna Korner
Ms. Anna Richterova
Ms. Ann Sutherland
Mr. Julian Nicholls

Counsel for the Accused:

Mr. John Ackerman
Mr. David Cunningham

Articles 2 to 5 of the Statute, proof is required that the crime in question has actually been committed by the principal offender(s).[705]

(a) Planning

268. Planning implies that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases.[706] Moreover, it needs to be established that the accused, directly or indirectly, intended the crime in question to be committed.[707] Where an accused is found guilty of having committed a crime, he or she cannot at the same time be convicted of having planned the same crime.[708] Involvement in the planning may however be considered an aggravating factor.[709]

(b) Instigating

269. Instigating means prompting another to commit an offence.[710] Both acts and omissions may constitute instigating, which covers express as well as implied conduct.[711] The *nexus* between instigation and perpetration requires proof.[712] It is not necessary to demonstrate that the crime would not have been perpetrated without the accused's involvement;[713] it is sufficient to prove that

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[705] For 'planning', *see Akayesu* Trial Judgement, para. 473; *Blaškić* Trial Judgement, para. 278; *Kordić* Trial Judgement, para. 386. For 'instigating', *see Akayesu* Trial Judgement, para. 482; *Blaškić* Trial Judgement, para. 280; *Krstić* Trial Judgement, para. 601; *Kordić* Trial Judgement, para. 387. For 'ordering', implicitly, *see Stakić* Trial Judgement, para. 445. For 'aiding and abetting', implicitly, *see Tadić* Appeal Judgement, para. 229; *Aleksovski* Appeal Judgement, para. 164; *Čelebići* Appeal Judgement, para. 352; *Furundžija* Trial Judgement, paras 235, 249; *Vasiljević* Trial Judgement, para. 70; *Naletilić* Trial Judgement, para. 63; *Simić* Trial Judgement, para. 161.

[706] *Akayesu* Trial Judgement, para. 480, reiterated in *Krstić* Trial Judgement, para. 601; in *Blaškić* Trial Judgement, para. 279; in *Kordić* Trial Judgement, para. 386; and in *Naletilić* Trial Judgement, para. 59.

[707] *Blaškić* Trial Judgement, para. 278; *Kordić* Trial Judgement, para. 386.

[708] *Kordić* Trial Judgement, para. 386.

[709] *Stakić* Trial Judgement, para. 443.

[710] *Akayesu* Trial Judgement, para. 482; *Blaškić* Trial Judgement, para. 280; *Krstić* Trial Judgement, para. 601, *Kordić* Trial Judgement, para. 387.

[711] *Blaškić* Trial Judgement, para. 280.

[712] *Blaškić* Trial Judgement, para. 280.

[713] *Kordić* Trial Judgement, para. 387; *Galić* Trial Judgement, para. 168.

[714] *Kordić* Trial Judgement, para. 387; *Kvočka* Trial Judegment, para. 252.

[715] *Kvočka* Trial Judgement, para. 252.

[716] *Krstić* Trial Judgement, para. 601; *Galić* Trial Judgement, para. 168.

[717] *Akayesu* Trial Judgement, para. 483; *Blaškić* Trial Judgement, paras 281-282; *Kordić* Trial Judgement, para. 388.

[718] *Blaškić* Trial Judgement, para. 281.

[719] *Blaškić* Trial Judgement, para. 282.

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-96-21-A

Date: 20 February 2001

Original: ENGLISH

IN THE APPEALS CHAMBER

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

Registrar: **Mr Hans Holthuis**

Judgement of: **20 February 2001**

PROSECUTOR

V

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

("^*ELEBICI* Case")

JUDGEMENT

Counsel for the Accused:
Mr John Ackerman and Ms Edina Rešidovi} for Zejnil Delalic
Mr Tomislav Kuzmanovic and Mr Howard Morrison for Zdravko Mucic
Mr Salih Karabdic and Mr Tom Moran for Hazim Delic
Ms Cynthia Sinatra and Mr Peter Murphy for Esad Landžo

The Office of the Prosecutor:
Mr Upawansa Yapa
Mr William Fenrick
Mr Christopher Staker
Mr Norman Farrell
Ms Sonja Boelaert-Suominen
Mr Roeland Bos

255. It is clear that the Trial Chamber drew a considerable measure of assistance from the ICRC Commentary (Additional Protocols) on Article 86 of Additional Protocol I (which refers to the circumstances in which a superior will be responsible for breaches of the Conventions or the Protocol committed by his subordinate) in finding that actual control of the subordinate is a necessary requirement of the superior-subordinate relationship.[372] The Commentary on Article 86 of Additional Protocol I states that:

> [...] we are concerned only with the superior who has a personal responsibility with regard to the perpetrator of the acts concerned because the latter, *being his subordinate, is under his control*. The direct link which must exist between the superior and the subordinate clearly follows from the duty to act laid down in paragraph 1 [of Article 86]. Furthermore only that superior is normally in the position of having information enabling him to conclude in the circumstances at the time that the subordinate has committed or is going to commit a breach. However it should not be concluded from this that the provision only concerns the commander under whose direct orders the subordinate is placed. The concept of the superior is broader and should be seen in terms of a hierarchy encompassing the concept of control.[373]

The point which the commentary emphasises is the concept of control, which results in a relationship of superior and subordinate.

256. The Appeals Chamber agrees that this supports the Trial Chamber's interpretation of the law on this point. The concept of effective *control* over a subordinate - in the sense of a material ability to prevent or punish criminal conduct, however that control is exercised - is the threshold to be reached in establishing a superior-subordinate relationship for the purpose of Article 7(3) of the Statute.[374]

257. In considering the Prosecution submissions relating to "substantial influence", it can be noted that they are not easily reconcilable with other Prosecution submissions in relation to command responsibility. The Prosecution expressly endorses the requirement that the superior have effective *control* over the perpetrator,[375] but then espouses, apparently as a matter of general application, a theory that in fact "substantial influence" alone may suffice, in that "where a person's powers of influence amount to a *sufficient* degree of authority or control in the circumstances to put that person in a position to take preventative action, a failure to do so

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[372] Trial Judgement, paras 354, 371 and 647, referring to para 3544 of the ICRC Commentary (Additional Protocols). Article 86(2) provides: "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."

[373] ICRC Commentary (Additional Protocols), para 3544.

[374] It has been elsewhere accepted in the jurisprudence of the Tribunal that, where there is no effective control, there is no superior responsibility: *Aleksovski* Trial Judgement, para 108 (HVO soldiers with arms forced their way into the prison without the guards being able to stop them) and para 111 (no finding was made on any existence of control by Aleksovski over the HVO soldiers).

war crimes."[642] In the *Trial of Josef Altstötter and Others (The Justice Trial)*, the tribunal found numerous defendants guilty of war crimes as well as crimes against humanity based on exactly the same acts,[643] thus appearing to uphold the possibility of cumulative convictions, at least when war crimes and crimes against humanity are involved.

412. Having considered the different approaches expressed on this issue both within this Tribunal and other jurisdictions, this Appeals Chamber holds that reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.

413. Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision.

414. In this case, defendants Mucic and Delic have been convicted of numerous crimes under Articles 2 and 3 of the Statute, which crimes arise out of the same acts. The chart below summarises their convictions.

Article 2 (Grave Breaches of Geneva Convention No. IV	Article 3 (Violations of the Laws or Customs of War—Common Article 3)
1. wilful killings	1. murders
2. wilfully causing great suffering or serious injury to body or health	2. cruel treatment
3. torture	3. torture
4. inhuman treatment	4. cruel treatment

[642] *Id.*

[643] *Ibid* at 75-76. *See also* Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), U.N. Doc S/25274 ("The Commission notes that fundamental rules of human rights law often are materially identical to rules of the law of armed conflict. It is therefore possible for the same act to be a war crime and a crime against humanity."). However, the Report does not indicate whether *convictions* based on the same acts are possible under provisions for war crimes and crimes against humanity.

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-95-17/1-T

Date: 10 December 1998

Original: English

IN THE TRIAL CHAMBER

Before: **Judge Florence Ndepele Mwachande Mumba, Presiding**
Judge Antonio Cassese
Judge Richard May

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Judgement of: **10 December 1998**

PROSECUTOR

v.

ANTO FURUND@IJA

JUDGEMENT

The Office of the Prosecutor:

Ms. Brenda Hollis
Ms. Patricia Viseur-Sellers
Ms. Michael Blaxill

Counsel for the Accused:

Mr. Luka Misetić
Mr. Sheldon Davidson

213. The prosecution in the *Dachau Concentration Camp* case, did not base its case on the direct participation of the accused in the crime. Regardless of whether the accused themselves had beaten or murdered the concentration camp inmates, the assistance they afforded to those who did, or the system, formed the basis of their guilt. The level of assistance required was low: any participation in the enterprise was sufficient, although as the accused were all members of staff of the camps, their contribution to the commission of the crimes was tangible - the carrying out of their respective duties - so that none were convicted on the basis of having lent moral support or encouragement alone.

214. The same approach underlies the judgement of the German courts in the *Auschwitz Concentration Camp*[233] trial. In summarising with approval the findings of the court of first instance in the case of the accused Hö cker, the German Supreme Court stated:

> The assize court found that the accused 's deeds had been proved on the basis of the fact that the accused was adjutant to the camp commander, and that participation at the arrival of the detainees were part of the adjutant 's duties, as well as on the basis of the testimony of the witnesses Wal. and Pa., who witnessed such participation.[234]

215. In the same case the court remarked how the accused Mulka, by means of his presence on the ramp at the moment of arrival of the detainees "psychologically strengthened the SS-men"[235] in charge of separating the Jews destined for labour from those destined for the gas chambers. However, account was taken of the accused 's role as adjutant to the camp commander, of his administrative duties related to the preparation of the mass killings, and of the specific characteristics of concentration camp trials outlined above.

216. This distinction between participation in a common criminal plan or enterprise, on the one hand, and aiding and abetting a crime, on the other, is also supported by the

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[233] Massenvernichtungsverbrechen und NS-Gewaltverbrechen in Lagern; Kriegsverbrechen. KZ Auschwitz, 1941-1945, reported in *Justiz und NS-Verbrechen*, 1979, vol. XXI, pp. 361-887.
[234] *Ibid.*, p. 858 (unofficial translation).

Rome Statute for an International Criminal Court,[236] hereafter "Rome Statute", adopted on 17 July 1998 by the Rome Diplomatic Conferences. Article 25 of the Rome Statute distinguishes between, on the one hand, a person who "contributes to the commission or attempted commission of [...] a crime by a group of persons acting with a common purpose" where the contribution is intentional and done with the purpose of furthering the criminal activity or criminal purpose of the group or in the knowledge of the intention of the group to commit the crime",[237] from, on the other hand, a person who, "for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission".[238] Thus, two separate categories of liability for criminal participation appear to have crystallised in international law – co-perpetrators who participate in a joint criminal enterprise, on the one hand, and aiders and abettors, on the other.

(iii) Effect of Assistance on the Act of the Principal

217. Back to aiding and abetting, in the *Einsatzgruppen* case,[239] heard by a US Military Tribunal sitting at Nuremberg, all of the accused except for one (Graf) were officers charged with war crimes and crimes against humanity pursuant to Control Council Law No. 10. The Tribunal held that the acts of the accomplices had to have a substantial effect on those of the principals to constitute the *actus reus* of the war crimes and crimes against humanity charged. This conclusion is illustrated by the cases of four of the accused: Klingelhoefer, Fendler, Ruehl and Graf. Klingelhoefer held a variety of positions, the least important of which was that of interpreter. The court said that even if this were his only function,

> it would not exonerate him from guilt because in locating, evaluating and turning over lists of Communist party functionaries to the executive

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[235] *Schutzstaffel der Nationalsozialistische Deutsche Arbeiterpartei*, hereafter "SS'", p. 446 (unofficial translation).
[236] On the legal status of this Statute, see para. 227 below.
[237] Art. 25(3)(d).
[238] Art. 25(3)(c).
[239] *Trial of Otto Ohlendorf and Others (Einsatzgruppen)*, in *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10*, Vol. IV.

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-98-29-T

Date: 5 December 2003

Original: English

IN TRIAL CHAMBER I

Before: **Judge Alphons Orie**
Judge Amin El Mahdi
Judge Rafael Nieto-Navia

Registrar: **Mr. Hans Holthuis**

Judgement Of: **5 December 2003**

PROSECUTOR

v.

STANISLAV GALIĆ

JUDGEMENT AND OPINION

The Office of the Prosecutor:

Mr. Mark Ierace
Mr. Chester Stamp
Mr. Daryl Mundis
Ms. Prashanthi Mahindaratne
Mr. Manoj Sachdeva

Counsel for the Accused:

Ms. Mara Pilipović
Mr. Stéphane Piletta-Zanin

166. Article 7 of the Statute provides for imposition of individual and superior responsibility on persons on the following basis:

> 1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
>
> 2. [...]
>
> 3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

1. Individual Responsibility under Article 7 (1) of the Statute

167. The Indictment, in describing the Accused's responsibility, makes reference to each head of responsibility in Article 7(1).[275] In the Prosecution's Final Trial Brief reference is made to "ordering" as the basis of responsibility. It is within the Trial Chamber's discretion to convict, if at all, the Accused under the appropriate head of responsibility within the limits set by the Indictment and insofar as the evidence permits.[276]

168. The Trial Chamber considers, briefly, the case-law of the International Tribunals which elaborates the elements of the various heads of individual criminal responsibility in Article 7(1) of the Statute.[277] Considering them in the order in which they appear in the Statute, "planning" has been defined to mean that one or more persons designed the commission of a crime, at both the preparatory and execution phases,[278] and the crime was actually committed within the framework of that design[279] by others.[280] "Instigating" means prompting another to commit an offence, which is actually committed.[281] It is sufficient to demonstrate that the instigation was "a clear contributing factor to the conduct of other person(s)".[282] It is not necessary to demonstrate that the crime would not have occurred without the accused's involvement.[283] "Ordering" means a person in a position of authority using that authority to instruct another to commit an offence. The order does not need to

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[275] Id., para. 10.
[276] *Furundžija* Trial Judgement, para. 189, *Kupreškić* Trial Judgement, para. 746; *Kunarac* Trial Judgement, para. 388, *Krstić* Trial Judgement, para. 602.
[277] *Cf.* Article 6(1) of the Statute of the ICTR. See also the Prosecution Pre-trial Brief (paras 69 *et seq.*) and the Defence's submissions on Article 7 in its Pre-trial Brief (paras 6.1-6.35).
[278] *Akayesu* Trial Judgement, para. 480. See also *Blaškić* Trial Judgement, para. 279; *Kordić* Trial Judgement, para. 386 quoting the *Akayesu* Trial Judgement.
[279] *Akayesu* Trial Judgement, para. 473.
[280] If the person planning a crime also commits it, he or her is only punished for the commission of the crime and not for its planning, *Kordić* Judgement, para. 386 (quoting the *Blaškić* Trial Judgement, para. 278).
[281] *Akayesu Trial* Judgement, para. 482; *Blaškić* Trial Judgement, para. 280; *Kordić* Trial Judgement, para. 387.
[282] *Kvočka* Trial Judgement, para. 252, citing *Kordić* Trial Judgement, para. 387.
[283] *Kvočka* Trial Judgement, para. 252, citing *Kordić* Trial Judgement, para. 387.

be given in any particular form.[284] "Committing" means that an "accused participated, physically or otherwise directly, in the material elements of a crime under the Tribunal's Statute".[285] Thus, it "covers first and foremost the physical perpetration of a crime by the offender himself."[286] "Aiding and abetting" means rendering a substantial contribution to the commission of a crime.[287] These forms of participation in a crime may be performed through positive acts or through culpable omission.[288] It has been held in relation to "instigating" that omissions amount to instigation in circumstances where a commander has created an environment permissive of criminal behaviour by subordinates.[289] The Defence contests the applicability of that case-law and considers that "in all the cases [under Article 7(1)] a person must undertake an action that would contribute to the commission of a crime".[290]

169. In the Majority's opinion, a superior may be found responsible under Article 7(1) where the superior's conduct had a positive effect in bringing about the commission of crimes by his or her subordinates, provided the *mens rea* requirements for Article 7(1) responsibility are met. Under Article 7(3) (see further below) the subordinate perpetrator is not required to be supported in his conduct, or to be aware that the superior officer knew of the criminal conduct in question or that the superior did not intend to investigate or punish the conduct. More generally, there is no requirement of any form of active contribution or positive encouragement, explicit or implicit, as between superior and subordinate, and no requirement of awareness by the subordinate of the superior's disposition, for superior liability to arise under Article 7(3). Where, however, the conduct of the superior supports the commission of crimes by subordinates through any form of active contribution or passive encouragement (stretching from forms of ordering through instigation to aiding and abetting, by action or inaction amounting to facilitation), the superior's liability may be brought under Article 7(1) if the necessary *mens rea* is a part of the superior's conduct. In such cases the subordinate will most likely be aware of the superior's support or encouragement, although that is not strictly necessary. In the Majority's view, the key point in all of this is that a superior with a guilty mind may not avoid Article 7(1) responsibility by relying on his or her silence or omissions or apparent omissions or understated participation or any mixture of overt and non-overt actions, where the effect of such conduct is to commission crimes by subordinates.

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[284] *Krstić* Trial Judgement, para. 601, citing *Akayesu* Trial Judgement, para. 483; *Blaškić* Trial Judgement, para. 281; *Kordić* Trial Judgement, para. 388.
[285] *Kvočka* Trial Judgement, paras 250-1.
[286] *Tadić* Appeal Judgement, para. 188.
[287] *Aleksovski* Appeal Judgement, paras 162-4.
[288] *Tadić* Appeal Judgement, para. 188.
[289] *Blaškić* Trial Judgement, para. 337.
[290] Defence Pre-trial Brief, paras 6.3-6.4.

UNITED
NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-06-90-A
		Date:	16 November 2012
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Carmel Agius
Judge Patrick Robinson
Judge Mehmet Güney
Judge Fausto Pocar

Registrar: **Mr. John Hocking**

Judgement of: **16 November 2012**

PROSECUTOR

v.

ANTE GOTOVINA
MLADEN MARKAČ

JUDGEMENT

The Office of the Prosecutor
Ms. Helen Brady
Mr. Douglas Stringer
Ms. Laurel Baig
Mr. Francois Boudreault
Ms. Ingrid Elliott
Mr. Todd Schneider
Ms. Saeeda Verrall
Mr. Matthew Cross

Counsel for Ante Gotovina
Mr. Gregory Kehoe
Mr. Luka Mišetić
Mr. Payam Akhavan
Mr. Guénaël Mettraux

Counsel for Mladen Markač
Mr. Goran Mikuličić
Mr. Tomislav Kuzmanović
Mr. John Jones
Mr. Kai Ambos

Konings and Rajčić indicated that BM-21s were less precise than 130-millimetre guns, but did not specify to what extent they were less accurate than BM-21s.[185]

60. The Trial Chamber also failed to justify its decision to apply the 200 Metre Standard uniformly to artillery shelling in all Four Towns. This approach is not consistent with the Trial Chamber's apparent acceptance of Witness Konings's testimony that factors such as wind speed would affect range of error,[186] or its failure to make findings on these factors with respect to each of the Four Towns.[187] In addition, where the Trial Chamber made findings as to the distance of artillery weaponry from individual towns being shelled, its conclusions suggest that these distances varied by as much as eight kilometres between different towns.[188] The Appeals Chamber notes that the Trial Chamber appears to have accepted Witness Konings's view that increased distance from a target would increase range of error;[189] however this view is not consistent with the Trial Chamber's reliance on a single margin of error for the artillery shelling of all Four Towns.[190]

61. The Trial Chamber's failure to make crucial findings and calculations may be partially explained by its observation that it did not receive detailed evidence on the factors identified by Witness Konings as affecting artillery shells' range of error.[191] However, the Prosecution's failure to proffer relevant evidence did not justify the Trial Chamber's insufficient analysis in this regard. The Appeals Chamber finds that there was a need for an evidentiary basis for the Trial Chamber's conclusions, particularly because these conclusions relate to a highly technical subject: the margin of error of artillery weapons in particular conditions. However, the Trial Chamber adopted a margin of error that was not linked to any evidence it received; this constituted an error on the part of the Trial Chamber. The Trial Chamber also provided no explanation as to the basis for the margin of error it adopted; this amounted to a failure to provide a reasoned opinion, another error. The impact, if any, of the Trial Chamber's errors will be considered later in this section.[192]

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[185] *See supra*, paras 53-54.
[186] *See* Trial Judgement, para. 1898.
[187] *See generally* Trial Judgement, paras 1899-1945.
[188] *See* Trial Judgement, paras 1898, 1916, 1928.
[189] *See* Trial Judgement, paras 1165, 1898.
[190] In addition, the Appeals Chamber recalls that Witnesses Konings and Rajčić testified that BM-21s were found to have a broader range of error than 130-millimetre guns. The Trial Chamber's single range of error did not account for this testimony. *See supra*, paras 53-54.
[191] Trial Judgement, para. 1898.
[192] The Appeals Chamber notes that the preceding discussion is limited to analysing the specifics of the Trial Chamber's reasoning, rather than taking a position on whether use of weapons with specific ranges of error would be lawful in particular contexts.

(b) Analysis

89. The Appeals Chamber recalls that in order to find an individual liable for commission of a crime through the first form of JCE:

> [a] trier of fact must find beyond reasonable doubt that a plurality of persons shared the common criminal purpose; that the accused made a contribution to this common criminal purpose; and that the commonly intended crime (or, for convictions under the third category of JCE, the foreseeable crime) did in fact take place. 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. In establishing these elements, the Chamber must, among other things: identify the plurality of persons belonging to the JCE (even if it is not necessary to identify by name each of the persons involved); 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); make a finding that this criminal purpose is not merely the same, but also common to all of the persons acting together within a joint criminal enterprise; and characterize the contribution of the accused in this common plan. On this last point, the Appeals Chamber observes that, although the contribution need not be necessary or substantial, it should at least be a significant contribution to the crimes for which the accused is to be found responsible.[267]

90. In addition, the Appeals Chamber recalls that convictions for deviatory crimes that are not part of the JCE's common purpose are possible pursuant to the third or extended form of JCE. Convictions for such crimes require that additional deviatory crimes were a "foreseeable" possible consequence of carrying out "the *actus reus* of the crimes forming part of the common purpose", and "the accused, with the awareness that such a crime was a *possible* consequence of the implementation of th[e] enterprise, decided to participate in that enterprise."[268]

91. The Appeals Chamber observes that the Trial Chamber's conclusion that a JCE existed was based on its overall assessment of several mutually-reinforcing findings, but that its findings on the JCE's core common purpose of forcibly removing Serb civilians from the Krajina rested primarily on the existence of unlawful artillery attacks against civilians and civilian objects in the Four Towns.[269] Having reversed the Trial Chamber's findings related to unlawful artillery attacks,[270] the Appeals Chamber, Judge Agius and Judge Pocar dissenting, cannot affirm the Trial Chamber's conclusion that the only reasonable interpretation of the circumstantial evidence on the record was that a JCE aiming to permanently remove the Serb civilian population from the Krajina by force or threat of force existed.

92. More specifically, the Appeals Chamber, Judge Pocar dissenting, recalls that, in the context of Operation Storm, unlawful artillery attacks were identified by the Trial Chamber as the primary

[267] *Brđanin* Appeal Judgement, para. 430 (internal citations omitted). *See also Krajišnik* Appeal Judgement, para. 662.
[268] *Karadžić* Foreseeability Decision, para. 15. *See also Karadžić* Foreseeability Decision, paras 16-18.
[269] *See* Trial Judgement, paras 2310-2315.
[270] *See supra*, para. 84.

VII. SEPARATE OPINION OF JUDGE THEODOR MERON

1. While I join the Majority's analysis as set out in the Appeal Judgement, I write separately primarily to explain my views on the Appeals Chamber's jurisprudence with respect to convictions pursuant to alternate modes of liability.

2. As an initial matter, I observe that the bench is unanimous in holding that the Trial Chamber erred in deriving the 200 Metre Standard. While not all my Colleagues join the Majority view on the consequences of this error, there is no dispute over its existence.[1]

3. I further observe that the Appeal Judgement makes two clear advances to the criminal procedure precedent of the Tribunal. For the first time, a panel considering entering convictions pursuant to an alternate mode of liability requested explicit briefing from parties on this issue. The Appeal Judgement also helps clarify our jurisprudence by setting out in more detail the judicial rationale underlying the Appeals Chamber's power to enter convictions pursuant to alternate modes of liability.

4. I join the Majority in holding that the Appeals Chamber possesses the power to enter convictions pursuant to alternate modes of liability. However, I would underscore that this authority does not constitute a panacea to address any and all errors by the Prosecution or a trial chamber. Instead, I believe that this power should only be exercised selectively, where: i) any additional inferences from findings set forth in a relevant trial judgement are restricted; and ii) any differences between the convictions that appellants initially appealed and convictions entered on appeal are limited. Otherwise, the Appeals Chamber risks undermining appellants' fair trial rights, or conducting a second trial rather than reviewing the trial chamber's alleged errors.[2]

5. Whether it is warranted to enter convictions pursuant to alternate modes of liability in a given appeal constitutes a fact-specific question best left to individual benches. But as a general matter, I do not believe that the Appeals Chamber's authority serves as a licence for wholesale reconstruction or revision of approaches adopted or decisions taken by a trial chamber. In this context, I recall that our jurisprudence has consistently indicated that sudden, significant alterations in the scope of a case may deny individuals their fair trial rights. Thus, for example, in the *Kupreškić et al.* Appeal Judgement, the Appeals Chamber found that two appellants had been unacceptably prejudiced by the "drastic change" in the Prosecution's case of which they had no

[1] *See* Appeal Judgement, para. 61.
[2] I would underscore that this discussion refers to convictions pursuant to alternate means of liability which are not requested in an appeal by the Prosecution.

effective notice.[3] Similarly, I note that in past cases where the Appeals Chamber entered convictions pursuant to alternate modes of liability, changes to the structure of the case faced by appellants were limited in nature. For example, the Appeals Chamber entered such convictions to address technical but effectively non-substantive errors in indictments,[4] or after finding that appellants aided a JCE but were not proved to share its common purpose.[5]

6. In the present Appeal Judgement, I am satisfied that the Majority acts prudently and fairly in not entering additional convictions. I also agree with the Majority's logic in addressing those findings with respect to each Appellant which were not reversed. However, were I solely responsible for the Appeal Judgement, I would not have undertaken this latter analysis. In this regard, I first recall that in the Appeal Judgement, the Majority reverses the fundamental conclusions of the Trial Chamber, including the finding that a JCE existed.[6] I also note that discussion of modes of liability other than JCE was almost entirely absent from core trial and appeal briefing.[7] In circumstances like these, while fully supporting the Appeal Judgement, I do not believe the Appeals Chamber should enter convictions pursuant to alternate modes of liability. Such convictions would, in my view, necessarily involve unfairness to the Appellants, who would be found guilty of crimes very different from those they defended against at trial or on appeal.[8] Accordingly, I consider that analysis of the Trial Chamber's "remaining findings",[9] like that

[3] *Kupreškić et al.* Appeal Judgement, para. 121. *See also Kupreškić et al.* Appeal Judgement, para. 122; *Ntagerura et al.* Appeal Judgement, paras 146-150, 164.
[4] *See, e.g., Rukundo* Appeal Judgement, paras 37, 115 (In which the Appeals Chamber replaced Rukundo's conviction for committing certain crimes with convictions for aiding and abetting these same crimes based on its finding that commission as a mode of liability was not pled in the indictment).
[5] *See, e.g., Krstić* Appeal Judgement, paras 135-144 (In which the Appeals Chamber found that Krstić did not possess the intent to commit genocide, but instead possessed knowledge of the exact same set of crimes, and did not reverse the finding that a JCE existed); *D. Milošević* Appeal Judgement, paras 275-282 (In which the Appeals Chamber found that the evidence did not establish that Dragomir Milošević ordered numerous shelling incidents but was responsible as a superior for those crimes). I note that in the *Simić* Appeal Judgement, in which the Appeal Chamber entered an alternate conviction for aiding and abetting after reversing a finding that a JCE existed, the Appeals Chamber underscored that aiding and abetting liability had been extensively discussed both at trial and on appeal. *See Simić* Appeal Judgement paras 74-191, 301.
[6] Appeal Judgement, paras 84, 98.
[7] The Prosecution's arguments at trial and on appeal focused on the existence of a JCE involving unlawful artillery attacks. While the Indictment charged the Appellants with, *inter alia*, aiding and abetting and superior responsibility, Indictment, paras 36-37, 45-46, post-Indictment proceedings provided only limited indications that the Prosecution was pursuing these alternate forms of liability. The Prosecution's Pre-Trial Brief and Final Trial Brief consistently focus on the existence of unlawful attacks and a JCE. *Compare* Prosecution Final Trial Brief, paras 1-123, 383-386, 477-660 (outlining the existence of a JCE and the centrality of the unlawful attacks), *with* Prosecution Final Trial Brief, paras 124-132, 387-399 (addressing alternate modes of liability). *See also* Prosecution Pre-Trial Brief, paras 127-132. Even the Prosecution's brief discussions of other modes of liability often include references to unlawful attacks. *See* Prosecution Final Trial Brief, paras 124-133, 387-400. On appeal, the Prosecution devoted only a single footnote to alternate modes of liability in each of its appeal response briefs, *see* Prosecution Response (Gotovina), para. 333 n. 1112; Prosecution Response (Markač) para. 273 n. 958, and referred to the matter only in passing during the Appeal Hearing, *see* AT. 14 May 2012 p. 102. *See also* Trial Judgement, paras 2375, 2587.
[8] In this regard I note that I join the Majority in finding that in the circumstances of this case, supplementary briefing would not cure such unfairness. *See* Appeal Judgement, para. 154.
[9] Appeal Judgement, para. 150.

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No. IT-01-48-A

Date: 16 October 2007

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Mehmet Güney, Presiding**
Judge Mohamed Shahabuddeen
Judge Andrésia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Judgement of: **16 October 2007**

PROSECUTOR

v.

SEFER HALILOVIĆ

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Mr. Peter Kremer
Mr. Arthur Buck
Ms. Laurel Baig
Mr. Xavier Tracol
Mr. Matteo Costi

Counsel for Sefer Halilović:

Mr. Peter Morrissey
Mr. Guénaël Mettraux

evidence concerning his high-ranking position in the ABiH and his position as Team Leader of the Inspection Team.[153]

59. As a preliminary matter, the Appeals Chamber notes that, in paragraph 56 of the Trial Judgement, the Trial Chamber correctly set out the elements that must be satisfied to hold a superior responsible under Article 7(3) of the Statute:

> i. The existence of a superior-subordinate relationship;
>
> ii. the superior knew or had reason to know that the criminal act was about to be or had been committed; and
>
> iii. the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.

Regarding the first of these elements, the Appeals Chamber recalls that the concept of effective control over a subordinate – in the sense of a material ability to prevent or punish criminal conduct, however that control is exercised – is the threshold to be reached in establishing a superior-subordinate relationship for the purpose of Article 7(3) of the Statute.[154] Against this backdrop, the Appeals Chamber recalls that the necessity of proving that the perpetrator was the "subordinate" of the accused (against whom charges have been brought under Article 7(3) of the Statute) does not require direct or formal subordination. Rather, the accused has to be, by virtue of his position, senior in some sort of formal or informal hierarchy to the perpetrator. The ability to exercise effective control in the sense of a material power to prevent or punish, which the Appeals Chamber considers to be a minimum requirement for the recognition of a superior-subordinate relationship for the purpose of superior responsibility, will almost invariably not be satisfied unless such a relationship of subordination exists.[155] The Appeals Chamber considers that a material ability to prevent and punish may also exist outside a superior-subordinate relationship relevant for Article 7(3) of the Statute. For example, a police officer may be able to "prevent and punish" crimes under his jurisdiction, but this would not as such make him a superior (in the sense of Article 7(3) of the Statute) vis-à-vis any perpetrator within that jurisdiction. The Trial Chamber's analysis of the law on the first element of superior responsibility is consistent with this approach.[156]

60. At paragraph 57 of the Trial Judgement, the Trial Chamber stated that "[i]t is the position of command over the perpetrator which forms the legal basis for the superior's duty to act, and for his

[153] Respondent's Brief, paras 51-52; *see* also Respondent's Brief, paras 57-58.
[154] *Čelebići* Appeal Judgement, para. 256.
[155] *Čelebići* Appeal Judgement, para. 303.
[156] *See* Trial Judgement, paras 57-63.

UNITED NATIONS	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-04-84-T
		Date:	3 April 2008
		Original:	English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Frank Höpfel
Judge Ole Bjørn Støle

Registrar: Mr Hans Holthuis

Judgement of: 3 April 2008

PROSECUTOR

v.

RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ

PUBLIC

JUDGEMENT

Office of the Prosecutor

Mr David Re
Mr Gramsci di Fazio
Mr Gilles Dutertre
Mr Philip Kearney

Counsel for Ramush Haradinaj

Mr Ben Emmerson, QC
Mr Rodney Dixon
Ms Susan L. Park

Counsel for Idriz Balaj

Mr Gregor Guy-Smith
Ms Colleen Rohan

Counsel for Lahi Brahimaj

Mr Richard Harvey
Mr Paul Troop

common objective, that forges a group out of a mere plurality.[543] In other words, the persons in a criminal enterprise must be shown to act together, or in concert with each other, in the implementation of a common objective, if they are to share responsibility for crimes committed through the JCE.[544]

5.2.2 Committing, planning, instigating, ordering, and aiding and abetting

140. The Indictment charges each of the Accused, alternatively to their participation in the joint criminal enterprise, with individual criminal responsibility under Article 7 (1) pursuant to the modes of liability of committing, planning, instigating, ordering, or aiding and abetting. Ramush Haradinaj is charged for committing under Counts 4, 16, and 24; for planning under Count 16; for instigating or ordering under Counts 2 and 34; and for aiding and abetting under Counts 2, 4, 16, 24, 32, and 34. Idriz Balaj is charged for committing under Counts 8, 14, 18, 20, 24, 32, 34, 36, and 37; for planning under Counts 14, 32, 34, 36, and 37; for instigating under Counts 14 and 32; and for aiding and abetting under Counts 8, 14, 18, 20, 24, 32, and 34. Lahi Brahimaj is charged for committing under Counts 28, 32, and 34; for planning under Counts 32 and 34; for instigating under Counts 24, 26, and 32; for ordering under Counts 24 and 26; and for aiding and abetting under Counts 24, 26, 28, 32, and 34.

141. Article 7 (1) covers first and foremost the physical perpetration of a crime or the culpable omission of an act that was mandated by law.[545] Article 7 (1) also reflects the principle that criminal responsibility for a crime in Articles 2 to 5 of the Statute does not attach solely to individuals who commit crimes, but may also extend to individuals who contribute to crimes in the other ways referred to above. For an accused to be found liable for a crime pursuant to one of these modes of responsibility, the crime in question must actually have been committed.[546] Furthermore, his or her actions must have contributed substantially to the commission of the crime.[547] Liability may also attach to omissions, where there is a duty to act.[548]

[543] *Krajišnik* Trial Judgement, para. 884.
[544] *Brđanin* Appeal Judgement, paras 410, 430.
[545] *Tadić* Appeal Judgement, para. 188.
[546] For planning, see *Kordić and Čerkez* Appeal Judgement, para. 26. For instigating, see *Kordić and Čerkez* Appeal Judgement, para. 27. For ordering, see *Kamuhanda* Appeal Judgement, para. 75. For aiding and abetting, see *Simić et al.* Appeal Judgement, para. 85.
[547] For planning, see *Kordić and Čerkez* Appeal Judgement, para. 26. For instigating, see *Kordić and Čerkez* Appeal Judgement, para. 27. For ordering, see *Kayishema and Ruzindana* Appeal Judgement, para. 186; *Kamuhanda* Appeal Judgement, para. 75. For aiding and abetting, see *Tadić* Appeal

142. *Planning*. Liability may be incurred by planning a crime that is later committed by the principal perpetrator.[549] The planner must intend that the crime be committed, or intend that the plan be executed in the awareness of the substantial likelihood that it would lead to the commission of the crime.[550]

143. *Instigating*. Liability may be incurred by instigating the principal perpetrator to commit a crime.[551] The instigator must intend that the crime be committed or be aware of the substantial likelihood that the crime would be committed as a consequence of his or her conduct.[552]

144. *Ordering*. Liability may be incurred by ordering the principal perpetrator to commit a crime or to engage in conduct that results in the commission of a crime.[553] The person giving the order must, at the time it is given, be in a position of formal or informal authority over the person who commits the crime.[554] The person giving the order must intend that the crime be committed or be aware of the substantial likelihood that the crime would be committed in the execution of the order.[555]

145. *Aiding and abetting*. Liability may be incurred by carrying out acts directed to assist, encourage or lend moral support to the commission of a crime.[556] Such encouragement may consist of tacit approval of an aider and abettor who is in a position of authority and physically present on the crime scene, even where he or she has no duty to act.[557] The aiding and abetting may occur before, during, or after the commission of the principal crime.[558] Aiding and abetting after the commission of a crime is possible if the perpetrator committed the crime in the knowledge that the aider and abettor was to

Judgement, para. 229; *Čelebići* Appeal Judgement, para. 352; *Vasiljević* Appeal Judgement, para. 102; *Blaškić* Appeal Judgement, paras 45-46, 48; *Kvočka et al.* Appeal Judgement, para. 89; *Simić et al.* Appeal Judgement, para. 85; *Blagojević and Jokić* Appeal Judgement, para. 127.

[548] *Blaškić* Appeal Judgement, para. 663; *Galić* Appeal Judgement, para. 175; *Brđanin* Appeal Judgement, para. 274.

[549] *Kordić and Čerkez* Appeal Judgement, para. 26.

[550] *Kordić and Čerkez* Appeal Judgement, paras 29, 31.

[551] *Kordić and Čerkez* Appeal Judgement, para. 27.

[552] *Kordić and Čerkez* Appeal Judgement, paras 29, 32.

[553] *Kordić and Čerkez* Appeal Judgement, para. 28; *Galić* Appeal Judgement, para. 176.

[554] *Kordić and Čerkez* Appeal Judgement, para. 28; *Galić* Appeal Judgement, para. 176.

[555] *Blaškić* Appeal Judgement, para. 42; *Kordić and Čerkez* Appeal Judgement, paras 29-30.

[556] *Tadić* Appeal Judgement, para. 229; *Čelebići* Appeal Judgement, para. 352; *Vasiljević* Appeal Judgement, para. 102; *Blaškić* Appeal Judgement, paras 45-46, 48; *Kvočka et al.* Appeal Judgement, para. 89; *Simić et al.* Appeal Judgement, para. 85; *Blagojević and Jokić* Appeal Judgement, para. 127.

[557] *Brđanin* Appeal Judgement, paras 273, 277.

[558] *Blaškić* Appeal Judgement, para. 48; *Simić et al.* Appeal Judgement, para. 85; *Blagojević and Jokić* Appeal Judgement, para. 127.

supply practical assistance.[559] The aider and abettor must have knowledge that his or her acts assist in the commission of the crime of the principal perpetrator.[560] The aider and abettor must also be aware of the principal perpetrator's criminal acts, although not their legal characterization, and his or her criminal state of mind.[561] The aider and abettor does not, however, need to know either the precise crime that was intended or the one that was actually committed; it is sufficient that he or she be aware that one of a number of crimes will probably be committed, if one of those crimes is in fact committed.[562]

[559] *Blagojević and Jokić* Trial Judgement, para. 731.
[560] *Vasiljević* Appeal Judgement, para. 102; *Blaškić* Appeal Judgement, paras 45-46; *Simić et al.* Appeal Judgement, para. 86; *Brđanin* Appeal Judgement, paras 484, 488; *Blagojević and Jokić* Appeal Judgement, para. 127.
[561] *Aleksovski* Appeal Judgement, para. 162; *Simić et al.* Appeal Judgement, para. 86; *Brđanin* Appeal Judgement, paras 484, 487-488.
[562] *Blaškić* Appeal Judgement, para. 50; *Simić et al.* Appeal Judgement, para. 86.

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No. IT-95-14/2-A

Date: 17 December 2004

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Wolfgang Schomburg, Presiding**
Judge Fausto Pocar
Judge Florence Ndepele Mwachande Mumba
Judge Mehmet Güney
Judge Inés Mónica Weinberg de Roca

Registrar: **Hans Holthuis**

Judgement of: **17 December 2004**

PROSECUTOR

v.

DARIO KORDIĆ
AND
MARIO ČERKEZ

JUDGEMENT

The Office of the Prosecutor:

Mr. Norman Farrell
Ms. Helen Brady
Ms. Marie-Ursula Kind and Ms. Michelle Jarvis

Counsel for Dario Kordić:

Mr. Mitko Naumovski, Mr. Turner T. Smith, Jr. and Mr. Stephen M. Sayers

Counsel for Mario Čerkez:

Mr. Božidar Kovačić and Mr. Goran Mikuličić

III. APPLICABLE LAW

A. Planning, instigating and ordering pursuant to Article 7(1) of the Statute

25. The Appeals Chamber notes that the Trial Chamber convicted Kordić for planning, instigating, and ordering crimes pursuant to Article 7(1) of the Statute.[18] The Trial Chamber's legal definitions of these modes of responsibility have not been appealed by any of the Parties. However, the Appeals Chamber deems it necessary to set out and clarify the applicable law in relation to these modes of responsibility insofar as it is necessary for its own decision.

26. The *actus reus* of "planning" requires that one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated.[19] It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.

27. The *actus reus* of "instigating" means to prompt another person to commit an offence.[20] While it is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused, it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.[21]

28. The *actus reus* of "ordering" means that a person in a position of authority instructs another person to commit an offence.[22] A formal superior-subordinate relationship between the accused and the perpetrator is not required.[23]

29. The *mens rea* for these modes of responsibility is established if the perpetrator acted with direct intent in relation to his own planning, instigating, or ordering.

30. In addition, the Appeals Chamber has held that a standard of *mens rea* that is lower than direct intent may apply in relation to ordering under Article 7(1) of the Statute. The Appeals Chamber held that a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing responsibility under Article 7(1) of the Statute pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime.[24]

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[18] Trial Judgement, paras 829, 834.
[19] See Trial Judgement, para. 386.
[20] See Trial Judgement, para. 387.
[21] *Cf.* Trial Judgement, para. 387.
[22] Trial Judgement, para. 388.
[23] Trial Judgement, para. 388.
[24] *Blaškić* Appeal Judgement, para. 42.

31. The Appeals Chamber similarly holds that in relation to "planning", a person who plans an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that plan, has the requisite *mens rea* for establishing responsibility under Article 7(1) of the Statute pursuant to planning. Planning with such awareness has to be regarded as accepting that crime.

32. With respect to "instigating", a person who instigates another person to commit an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that instigation, has the requisite *mens rea* for establishing responsibility under Article 7(1) of the Statute pursuant to instigating. Instigating with such awareness has to be regarded as accepting that crime.

B. The responsibility under Article 7(1) and Article 7(3) of the Statute

33. In the *Aleksovski* Appeal Judgement, the Appeals Chamber observed that the accused's "superior responsibility as a warden seriously aggravated [his] offences"[25] in relation to those offences of which he was convicted for his direct participation.[26] While the finding of superior responsibility in that case resulted in an aggravation of sentence, there was no entry of conviction under both heads of responsibility in relation to the count in question. In the *Čelebići* Appeal Judgement, the Appeals Chamber stated:

> Where criminal responsibility for an offence is alleged *under one count* pursuant to both Article 7(1) and Article 7(3), and where the Trial Chamber finds that both direct responsibility and responsibility as a superior are proved, even though only one conviction is entered, the Trial Chamber must take into account the fact that both types of responsibility were proved in its consideration of sentence. This may most appropriately be considered in terms of imposing punishment on the accused for two separate offences encompassed in the one count. Alternatively, it may be considered in terms of the direct participation aggravating the Article 7(3) responsibility (as discussed above) *or* the accused's seniority or position of authority aggravating his direct responsibility under Article 7(1).[27]

34. The provisions of Article 7(1) and Article 7(3) of the Statute connote distinct categories of criminal responsibility. However, the Appeals Chamber considers that, in relation to a particular count, it is not appropriate to convict under both Article 7(1) and Article 7(3) of the Statute.[28] Where both Article 7(1) and Article 7(3) responsibility are alleged under the same count, and where the legal requirements pertaining to both of these heads of responsibility are met, a Trial Chamber

[25] *Blaškić* Appeal Judgement, para. 90, referring to *Aleksovski* Appeal Judgement, para. 183.
[26] *Blaškić* Appeal Judgement, para. 90, referring to *Čelebići* Appeal Judgement, para. 745.
[27] *Blaškić* Appeal Judgement, para. 90, referring to *Čelebići* Appeal Judgement, para. 745 (emphasis added).
[28] *Blaškić* Appeal Judgement, para. 91, referring to the *Blaškić* Trial Judgement, para. 337.

Prosecution highlights the Trial Chamber's conclusion at paragraph 630 of the Trial Judgement that there was indeed "confirmation" of Witness AT's testimony[416] and that Kordić's submission implying that only direct evidence actually placing Kordić at the meetings can constitute corroboration of Witness AT's testimony is simply incorrect.[417]

273. As to Kordić's interpretation of the 18 September 2000 Decision, the Prosecution avers that corroborative evidence is not limited to that which mirrors the primary testimony specifically; rather, it is evidence which tends to convince the trier of fact that a witness is telling the truth.[418]

274. The Appeals Chamber has consistently held that the corroboration of evidence is not a legal requirement, but rather concerns the weight to be attached to evidence.[419] In *Kupreškić et al.*, the Appeals Chamber emphasized that a Trial Chamber is required to provide a fully reasoned opinion, and that where a finding of guilt was made in a case on the basis of identification evidence given by a single witness under difficult circumstances, the Trial Chamber must be especially rigorous in the discharge of that obligation.[420] A Trial Chamber may thus convict an accused on the basis of a single witness, although such evidence must be assessed with the appropriate caution, and care must be taken to guard against the exercise of an underlying motive on the part of the witness. Any appeal based on the absence of corroboration must therefore necessarily be against the weight attached by a Trial Chamber to the evidence in question.

275. As regards the decision of 18 September 2000, the Appeals Chamber recalls that in *Kupreškić et al.*, it held that "[i]t follows from the jurisprudence of the Appeals Chambers of both the ICTY and ICTR that the testimony of a single witness, even as to a material fact, may be accepted without the need for corroboration."[421]

276. It is incorrect to suggest that circumstantial evidence cannot be regarded as corroborative. In this case, the Trial Chamber specifically determined to what extent Witness AT's testimony was confirmed by other evidence.[422] The Appeals Chamber notes that Witness AT's testimony was given live and under solemn declaration, and was subject to cross-examination.

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[416] Prosecution Response, para. 3.8; Appeals Hearing, T. 360-361.
[417] Prosecution Response, paras 3.48-3.58.
[418] Appeals Hearing, T. 358.
[419] *Čelebići* Appeal Judgement, para. 506: "there is no legal requirement that the testimony of a single witness on a material fact be corroborated before it can be accepted as evidence. What matters is the reliability and credibility accorded to the testimony". See also *Kunarac* Appeal Judgement, para. 268; and *Aleksovski* Appeal Judgement, para. 62: "the testimony of a single witness on a material fact does not require, as a matter of law, any corroboration."
[420] *Kupreškić et al.* Appeal Judgement, para. 135.
[421] *Kupreškić et al.* Appeal Judgement, para. 33.
[422] Trial Judgement, para. 630.

was based on his role in a campaign and not on his involvement in the day-to-day operations of the attacks.[1399]

973. The Appeals Chamber notes that the Trial Chamber did not make an explicit finding that Kordić had the requisite *mens rea*. The Trial Chamber only found "that in those cases where Kordić participated in the HVO attacks, he intended to commit the crimes associated with them and did so. His role was a political leader and his responsibility under Article 7(1) was to plan, instigate and order the crimes."[1400]

974. The Appeals Chamber notes that the Trial Chamber held in relation to persecutions that

> there was a campaign of persecution throughout the Indictment period in Central Bosnia (and beyond) aimed at the Bosnian Muslims. This campaign was led by the HDZ-BiH and conducted through the instruments of the HZ H-B and the HVO and orchestrated from Zagreb.[1401]

The Appeals Chamber concluded that there was persecutions in Busovača in January 1993, in the Lašva Valley in April 1993, and in Kiseljak in June 1993, and deemed it not to be necessary to identify the main orchestrators of this campaign. Only the responsibility of Kordić is relevant for the Appeals Chamber. It considers that following the meeting on 15 April 1993, a general plan existed to expel the Muslim civilians and to destroy civilian houses, a plan which had no military justification, but was aimed at the civilian population.

975. At the meeting on 15 April 1993, the order to attack at 05:30 a.m. and the order that "all Muslim men of military age were to be killed while the civilians were not to be killed, but expelled and the houses set on fire" were discussed, and the Trial Chamber found at paragraph 631 of the Trial Judgement that Kordić was present at the meeting of politicians which authorised the 16 April 1993 attack; that he thus participated as the senior regional politician in the planning of the military operation and attack against Ahmići (and other Lašva Valley villages), an operation which was aimed at "cleansing" these areas of Muslims.

976. The Appeals Chamber considers that this general plan included the whole of the Lašva Valley and that the crimes explicitly discussed were to kill military aged men, expel civilians, and destroy houses. For these crimes Kordić had direct intent. Kordić approved the general plan knowing that these crimes would be committed, and with the awareness of the substantial likelihood that other crimes such as killings of civilians, unlawful detention of civilians, and plunder would be

[1399] Prosecution Response, paras 5.24-5.26.
[1400] Trial Judgement, para. 834.
[1401] Trial Judgement, para. 827.

committed in the execution of this general plan.[1402] Planning with such awareness has to be regarded as accepting these crimes.

5. Kiseljak municipality

(a) April 1993

977. Kordić argues that he was not convicted in relation to Stupni Do because the Trial Chamber concluded that he did not have control of Kiseljak, and since he did not have control in October 1993 over a specific limited operation, he could not have had control over the municipality during the April attack and the June offensives. He also relies on the testimony of Brigadier Wingfield-Heyes that Kiseljak was cut off from the Lašva Valley.

978. The Prosecution responds that there is a clear difference with the Stupni Do case: Kordić's conviction for the attacks on Kiseljak arose from his active participation in the common design to cleanse the Lašva Valley of Muslims.[1403]

979. The Appeals Chamber finds that the fact that Kordić was acquitted for Stupni Do does not affect his conviction for the attacks in Kiseljak municipality in April 1993 and dismisses Kordić's arguments in this part.

980. With regard to the April 1993 attacks in Kiseljak municipality, the Trial Chamber found that "Blaškić would not have launched the attacks without political approval which the Trial Chamber accepts meant the approval of the local leadership in the person of Dario Kordić. The clear inference is that the latter was thus associated with the giving of orders to attack the villages, including Rotilj."[1404]

981. The Appeals Chamber is of the view that the Trial Chamber's presumption that the reference to the fact that "we have informed the leadership of the HZ H-B of everything"[1405] leads to the conclusion that Kordić must have approved the order, is in itself insufficient for a reasonable trier of fact to find that Kordić is criminally responsible. Kordić's responsibility for the crimes committed in Kiseljak municipality in connection with the HVO military attack on 18 April 1993 emanates from the Trial Chamber finding that Kordić was at the meeting of politicians which authorised the 16 April 1993 attacks, and that he thus participated as the senior regional politician in

[1402] Trial Judgement, para. 377.
[1403] Prosecution Response, para. 5.35.
[1404] Trial Judgement, para. 669.
[1405] Trial Judgement, para. 668 (footnotes omitted).

3. Conclusion

1092. For the foregoing reasons, the Appeals Chamber sentences Čerkez to 6 years of imprisonment.

XI. DISPOSITION

For the foregoing reasons,

THE APPEALS CHAMBER

PURSUANT to Article 25 of the Statute and Rule 117 of the Rules;

NOTING the respective written submissions of the parties and the arguments they presented at the hearing of 17, 18, and 19 May 2004;

SITTING in open session;

WITH RESPECT TO THE PROSECUTION'S GROUNDS OF APPEAL:

NOTES that the Prosecution's first ground of appeal has become moot as it has been withdrawn;

REJECTS the Prosecution's remaining four grounds of appeal;

WITH RESPECT TO KORDIĆ'S GROUNDS OF APPEAL:

REJECTS Kordić's first, second, fifth and sixth grounds of appeal;

ALLOWS the ground of appeal concerning his responsibility for crimes committed in Novi Travnik in October 1992, **AND REVERSES** his convictions pursuant to Article 7(1) of the Statute under Counts 38 and 39;

ALLOWS, in part, the ground of appeal concerning his responsibility for crimes committed in Busovača in January 1993, **REVERSES** his convictions pursuant to Article 7(1) of the Statute under Counts 10 and 12, **AND AFFIRMS** his convictions pursuant to Article 7(1) of the Statute under Counts 1 (persecutions, a crime against humanity), 3 (unlawful attack on civilians, a violation of the laws or customs of war), 4 (unlawful attack on civilian objects, a violation of the laws or customs of war), 7 (murder, a crime against humanity), 8 (wilful killing, a grave breach of the Geneva Conventions of 1949), 38 (wanton destruction not justified by military necessity, a violation of the laws or customs of war) and 39 (plunder of public or private property, a violation of the laws or customs of war);

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No. IT-00-39-A

Date: 17 March 2009

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron

Acting Registrar: **Mr. John Hocking**

Judgement of: **17 March 2009**

PROSECUTOR

v.

MOMČILO KRAJIŠNIK

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Mr. Peter M. Kremer QC
Ms. Shelagh McCall
Ms. Barbara Goy
Ms. Katharina Margetts
Mr. Steffen Wirth
Ms. Anna Kotzeva
Mr. Matteo Costi
Ms. Julia Thibord

Momčilo Krajišnik *pro se*

Counsel for Momčilo Krajišnik on JCE:
Mr. Alan M. Dershowitz
Mr. Nathan Z. Dershowitz

***Amicus Curiae*:**
Mr. Colin Nicholls QC

of insider witnesses.[364] The Prosecution concludes that, in any event, Krajišnik was convicted "on the basis of a whole tapestry of evidence, including contemporaneous documents, intercepts, and important international witnesses", and that *Amicus Curiae* has failed to show that no reasonable trial chamber could have found Krajišnik guilty based on this evidence taken as a whole.[365]

138. *Amicus Curiae* replies that the Trial Chamber did adopt an illustrative approach and that the earlier parts of the Trial Judgement invoked by the Prosecution merely provide a background and context to the judgement, but that they are devoid of in-depth analysis of individual responsibility for crimes. In particular, he claims that the parts of the Trial Judgement addressing the commission of crimes and Krajišnik's responsibility are not sufficiently linked.[366] *Amicus Curiae* further submits that the individual witnesses referred to in his Appeal Brief are of "objectively adverse credibility", and that the Trial Chamber nevertheless extensively relied upon their evidence without adequately explaining why it was considered reliable.[367] *Amicus Curiae* also contends that there is no presumption that the Trial Chamber evaluated all the evidence.[368]

2. Analysis

(a) The requirement to provide a reasoned opinion

139. As recently recalled by the Appeals Chamber:

> The fair trial requirements of the Statute include the right of each accused to a reasoned opinion by the Trial Chamber under Article 23 of the Statute and Rule 98*ter*(C) of the Rules. A reasoned opinion ensures that the accused can exercise his or her right of appeal and that the Appeals Chamber can carry out its statutory duty under Article 25 to review these appeals. The reasoned opinion requirement, however, relates to a Trial Chamber's judgement rather than to each and every submission made at trial.[369]

As a general rule, a Trial Chamber "is required only to make findings on those facts which are essential to the determination of guilt on a particular count";[370] it "is not required to articulate every

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[364] Prosecution's Response to *Amicus Curiae*, para. 60. The Prosecution illustrates the "[Trial] Chamber's sound approach in assessing reliability of evidence" by referring to the Trial Chamber's assessment of the testimonies of Witnesses Đerić and Mandić as reflected in paragraphs 267 and 1085 of the Trial Judgement (Prosecution's Response to *Amicus Curiae*, para. 61). The Prosecution adds that, by simply listing impugned paragraphs and through the mere naming of "insider witnesses" without adequate reasoning, *Amicus Curiae* fails to explain why no reasonable trier of fact could have relied on the evidence in question (Prosecution's Response to *Amicus Curiae*, paras 62-63).
[365] Prosecution's Response to *Amicus Curiae*, para. 64.
[366] *Amicus Curiae*'s Reply, paras 35-36.
[367] *Amicus Curiae*'s Reply, paras 37-40. The *Amicus Curiae* avers that the Trial Judgement contains no reflection of the Trial Chamber's assurance that it would treat this evidence with caution (*Amicus Curiae*'s Reply, para. 38).
[368] *Amicus Curiae*'s Reply, para. 40.
[369] *Limaj et al.* Appeal Judgement, para. 81 (references omitted). *See* also *Hadžihasanović and Kubura* Appeal Judgement, para. 13; *Naletilić and Martinović* Appeal Judgement, para. 603; *Kvočka et al.* Appeal Judgement, paras 23 and 288.
[370] *Hadžihasanović and Kubura* Appeal Judgement, para. 13.

step of its reasoning for each particular finding it makes"[371] nor is it "required to set out in detail why it accepted or rejected a particular testimony."[372] However, the requirements to be met by the Trial Chamber may be higher in certain cases.[373] It will be "necessary for any appellant claiming an error of law because of the lack of a reasoned opinion to identify the specific issues, factual findings or arguments, which he submits the Trial Chamber omitted to address and to explain why this omission invalidated the decision."[374]

(b) Whether the Trial Chamber erred in using an "illustrative approach"

140. *Amicus Curiae* contends that the Trial Chamber used an "illustrative approach" with regard to the evidence it considered, and that it failed to provide adequate reasons for its findings. *Amicus Curiae* refers more specifically to paragraphs 292 and 889 of the Trial Judgement, which read as follows:

> 292. The Chamber notes that there is no practical way of presenting in detail all the evidence it has heard and received during the trial. The Chamber has been able to present only the most relevant parts of the evidence in detail, but generally has had to confine itself to presenting evidence in a summarized form.
>
> 889. Second, the Chamber cannot possibly discuss here all the evidence relevant to the Accused's responsibility which it received in the course of two-and-a-half years of trial and subsequently analysed. Having carefully deliberated on this vast amount of evidence, what the Chamber can (and must) do is to illustrate the types of fact that underlie its conclusions, so that these conclusions are sufficiently explained.

141. The Appeals Chamber is not convinced that these paragraphs demonstrate the Trial Chamber's failure to provide adequate reasons for its decision. The Trial Chamber does not have to refer to the testimony of every witness or every piece of evidence on the trial record; it is to be presumed that the Trial Chamber evaluated all the evidence before it.[375] In fact, the Trial Chamber specifically stated that it had "carefully deliberated" on the evidence presented to it. Both impugned passages merely stress the fact that the Trial Chamber could not *present and discuss* "all the evidence" in the judgement, a statement which cannot, by itself, be equated with a failure to *examine* the evidence in question, nor with a failure to provide sufficient reasons for the conclusions reached in the Trial Judgement. The Appeals Chamber considers that the approach taken by the Trial Chamber in the impugned paragraphs was not in error.

142. The Appeals Chamber also recalls that it is necessary for any appellant claiming an error of law based on the lack of a reasoned opinion to identify the specific issues, factual findings or

[371] *Musema* Appeal Judgement, para. 18. *See* also *Brđanin* Appeal Judgement, para. 39.
[372] *Musema* Appeal Judgement, para. 20.
[373] *Kvočka et al.* Appeal Judgement, para. 24.
[374] *Kvočka et al.* Appeal Judgement, para. 25 (reference omitted). *See* also *Halilović* Appeal Judgement, para. 7; *Brđanin* Appeal Judgement, para. 9.

failed to show that the Trial Chamber did not provide sufficient reasons for its findings in paragraph 987 of the Trial Judgement.

(c) Whether the Trial Chamber failed to give sufficient reasons in relation to witnesses with "adverse credibility issues"

145. *Amicus Curiae* submits that the Trial Chamber failed to give sufficient reasons for relying on evidence provided by witnesses whose credibility was allegedly in serious doubt, in order to find Krajišnik guilty. He also seems to argue that this alleged lack of reasons shows a failure of the Trial Chamber to scrutinise the evidence of these witnesses with the required caution.[384]

146. The Appeals Chamber recalls at the outset that it is well established in the jurisprudence of both *ad hoc* Tribunals that nothing prohibits a Trial Chamber from relying on evidence given by a convicted person, including evidence of a partner in crime of the person being tried before the Trial Chamber.[385] Indeed, accomplice evidence, and, more broadly, evidence of witnesses who might have motives or incentives to implicate the accused is not *per se* unreliable, especially where such a witness may be thoroughly cross-examined; therefore, reliance upon this evidence does not, as such, constitute a legal error.[386] However, "considering that accomplice witnesses may have motives or incentives to implicate the accused person before the Tribunal, a Chamber, when weighing the probative value of such evidence, is bound to carefully consider the totality of the circumstances in which it was tendered".[387] As a corollary, a Trial Chamber should at least briefly explain why it accepted the evidence of witnesses who may have had motives or incentives to implicate the accused; in this way, a Trial Chamber shows its cautious assessment of this evidence.

147. In the case at hand, the Trial Chamber stated its approach when examining the testimony of other accused or convicted persons:

> *Testimony of other accused or convicted persons.* Some of the witnesses in this case had pleaded guilty and were awaiting sentencing at the time of their testimony. The Chamber is aware of the problems associated with such testimonies – notably the witness's incentive to testify untruthfully for the purpose of improving his or her chances at the sentencing stage. The Chamber has used the testimonies of such witnesses with great caution. It is settled jurisprudence of the Tribunal that a

[384] *See Amicus Curiae*'s Notice of Appeal, para. 25 ("If the Chamber had properly scrutinised the evidence of witnesses in this category, as the exercise of giving reasons would have forced the Chamber to do, the Chamber would not have relied, or would not have relied to the same extent, on their evidence in convicting [Krajišnik]"); *Amicus Curiae*'s Appeal Brief, paras 134 *et seq.*

[385] *Nahimana et al.* Appeal Judgement, para. 439. *See* also *Blagojević and Jokić* Appeal Judgement, para. 82; *Ntagerura et al.* Appeal Judgement, paras 203-206; *Niyitegeka* Appeal Judgement, para. 98.

[386] *Niyitegeka* Appeal Judgement, para. 98. *See* also *Ntagerura et al.* Appeal Judgement, para. 204, and *Blagojević and Jokić* Appeal Judgement, para. 82.

[387] *Niyitegeka* Appeal Judgement, para. 98. *See* also *Nahimana et al.* Appeal Judgement, para. 439; *Ntagerura et al.* Appeal Judgement, paras 204 and 206, and *Blagojević and Jokić* Appeal Judgement, para. 82.

> Trial Chamber may find some parts of a witness's testimony credible, and rely on them, while rejecting other parts as not credible.[388]

The Appeals Chamber notes that the Trial Chamber did not identify the witnesses for whose testimonies it considered "great caution" to be required, nor did it expressly examine the reliability of each of these witnesses individually. Nevertheless, the Trial Chamber implicitly explained its acceptance of certain parts of the evidence in question: in referring to other evidence, it showed that it accepted the impugned testimony because it considered it to be in agreement with other evidence adduced.[389] The Appeals Chamber is thus of the view that the Trial Judgement provided sufficient reasons for its decision to allow Krajišnik to exercise his right of appeal.

148. As to the argument that the Trial Chamber did not assess the evidence in question with the required caution, the Appeals Chamber considers that the above statement of the Trial Chamber[390] cannot, of course, in itself establish an irrefutable presumption that the evidence given by each of these witnesses was indeed examined by the Trial Chamber with caution. However, it is a clear indication that the Trial Chamber, in its evaluation of the evidence in question, was well aware of the potential risks related to its use. Already during the trial, the Trial Chamber stressed its approach of special caution and emphasised an "extra degree of suspicion and scrutiny" with regard to a witness who might have an interest in testifying before the Trial Chamber.[391] While the Trial Judgement does not expressly reflect the Trial Chamber's evaluation of the evidence given by the impugned witnesses, its cautious approach towards this evidence is apparent from its assessment of the evidence as a whole and, in particular, from its reliance on numerous pieces of evidence for its findings.[392]

149. In particular, the Appeals Chamber considers that *Amicus Curiae* has failed to show any error by the Trial Chamber when examining the testimonies before it, nor has he demonstrated that the Trial Chamber erroneously relied on this evidence for findings essential to the determination of

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[388] Trial Judgement, para. 1203 (internal footnotes omitted).
[389] In this context, the Appeals Chamber also notes the Trial Chamber's general explanation of its approach in dealing with evidence it considered unreliable or irrelevant when it stated that it "has, on occasions, explicitly refuted some evidence. However, it has generally simply disregarded evidence when, after having considered the record as a whole, it deemed it unreliable or irrelevant for the purpose of reaching an informed decision." (Trial Judgement, para. 22).
[390] Trial Judgement, para. 1203.
[391] *See* Decision on the Defence's Motion to Preclude Miroslav Deronjić from Giving Testimony Prior to Being Sentenced, 16 February 2004 ("Decision on Deronjić's Testimony"), paras 9-10, where the Trial Chamber acknowledged that a person in Mr. Deronjić's position, who had pleaded guilty but had not yet been sentenced, "might be tempted to improve his chances before the sentencing panel by giving untruthful evidence to this Chamber that significantly assists the Prosecution's case", and thus stated that it would "exercise particular caution in scrutinizing, weighing up, and finding corroboration for the evidence that Deronjić places before it" and that it would "closely control the examination of the witness".
[392] *Cf. Ntagerura et al.* Appeal Judgement, para. 174, stating that "[i]ndividual items of the evidence, such as the testimony of different witnesses, or documents admitted into evidence, have to be analysed in the light of the entire body of evidence adduced. Thus, even if there are some doubts as to the reliability of the testimony of a certain witness,

Krajišnik's guilt. The Appeals Chamber stresses that the mere listing of witnesses of allegedly "doubtful credibility" by *Amicus Curiae* and the enumeration of paragraphs of the Trial Judgement which, according to him, rely erroneously on these witnesses, is insufficient in itself to substantiate an error of the Trial Chamber. In any event, the examples summarily provided by *Amicus Curiae*[393] do not contain any indication of an error by the Trial Chamber in its assessment of the evidence as a whole. In fact, in most of these examples, the testimony of the impugned witnesses is but one of several pieces of evidence relied upon by the Trial Chamber in reaching its findings.[394]

150. Moreover, the Trial Chamber's cautious approach in its assessment of the reliability of the challenged witness testimonies is further evidenced by the correct exercise of its discretion to rely on specific parts of these testimonies and to reject other parts as not credible.[395] Indeed, the assessment whether to rely on the evidence given by a person who might have certain interests while testifying before the Tribunal will vastly depend on the specific context of the provided information, as correctly reflected in the analysis of the Trial Chamber.[396]

151. In light of these considerations, the Appeals Chamber finds that *Amicus Curiae* has failed to show that the Trial Chamber erred when examining the evidence of witnesses of allegedly "doubtful credibility" and has failed to demonstrate that the Trial Chamber erroneously relied on their evidence in convicting Krajišnik. *Amicus Curiae* has not shown any error in the Trial Chamber's approach when assessing the evidence as a whole.

152. For the foregoing reasons, the Appeals Chamber dismisses this ground of appeal of *Amicus Curiae*.

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that testimony may be corroborated by other pieces of evidence leading the Trial Chamber to conclude that the witness is credible."

[393] *Amicus Curiae*'s Appeal Brief, fns 237 and 240.

[394] The Appeals Chamber also notes that, in some cases, the challenged evidence relied upon by the Trial Chamber (*see*, for example, Trial Judgement, paras 953, 958 and 1022) is based on evidence stemming from the Indictment period. The Trial Chamber's reliance on these specific, contemporaneous phone intercepts can therefore not reflect an intention of the witness to "implicate the accused person before the Tribunal" (*Ntagerura et al.* Appeal Judgement, para. 204) and is therefore unsuitable to show that the Trial Chamber did not apply the required caution when assessing the evidence of potentially interested witnesses testifying before it.

[395] *See, inter alia, Blagojević and Jokić* Appeal Judgement, para. 82.

[396] This is evidenced, *inter alia*, by the Trial Chamber's graded assessment of the testimony given by Momčilo Mandić, one of the witnesses claimed by *Amicus Curiae* to be of "objectively adverse credibility" (*Amicus Curiae*'s Reply, para. 37. *See* also *Amicus Curiae*'s Appeal Brief, para. 138 and fn. 237). While in paragraph 1085 of the Trial Judgement, the Trial Chamber chose to rely on Mr. Mandić's opinion, which it found to be equivalent to Witness Đerić's assessment, and concluded that Mr. Mandić's opinion was correct "in light of all the evidence"; in other parts of the Trial Judgement, the Trial Chamber, "in view of the evidence on the record", rejected the evidence provided by Mr. Mandić (Trial Judgement, para. 267).

175. In light of these scarce – or entirely absent – findings, the Appeals Chamber is not able to conclude with the necessary preciseness how and at which point in time the common objective of the JCE expanded to include other crimes that originally were not included in it, and, consequently, on what basis the Trial Chamber imputed those expanded crimes to Krajišnik.

176. Neither the Appeals Chamber nor the Parties can be required to engage in speculation on the meaning of the Trial Chamber's findings – or lack thereof – in relation to such a central element of Krajišnik's individual criminal responsibility as the scope of the common objective of the JCE. Aside from merely stating that the common objective was "fluid",[440] the Trial Chamber was required to precisely find how and when the scope of the common objective broadened in order to impute individual criminal responsibility to Krajišnik for those crimes that were not included in the original plan, *i.e* the expanded crimes.

177. In conclusion, the Appeals Chamber finds that the Trial Chamber committed a legal error[441] in failing to make the findings necessary for Krajišnik's conviction in relation to the following expanded crimes, which were not included in the original common objective of the JCE:

- persecution (count 3) with the underlying acts of the imposition and maintenance of restrictive and discriminatory measures; killings during and after attacks; cruel or inhumane treatment during and after attacks; unlawful detention; killings related to detention facilities; cruel or inhumane treatment in detention facilities; inhumane living conditions in detention facilities; forced labour at front lines; use of human shields; appropriation or plunder of property; and destruction of private property, cultural monuments, and sacred sites;
- extermination (count 4); and
- murder (count 5).[442]

178. Consequently, the Appeals Chamber grants sub-ground 3(B) submitted by *Amicus Curiae* to the extent that Krajišnik cannot be held liable for the above-mentioned expanded crimes that fell outside the original common objective of the JCE, which only encompassed the crimes of deportation and forcible transfer under Counts 7 and 8 of the Indictment as well as their incorporation as underlying acts of persecution under Count 3 of the Indictment. Thus, Krajišnik's

[440] Trial Judgement, para. 1098.
[441] As to the effect of this legal error. *see infra* III.C.11.
[442] Trial Judgement, paras 1095-1119. The "original" crimes of the JCE are: persecution (Count 3) with the underlying acts of deportation or forced transfer; deportation (Count 7); and inhumane acts (forced transfer, Count 8) (*ibid.*, para. 1097).

convictions for expanded crimes under Counts 3, 4 and 5 are quashed. The remainder of this part of sub-ground 3 (B) is dismissed.

3. Conclusion of the JCE (further sub-ground 3(B))

(a) Submissions

179. *Amicus Curiae* argues that the Trial Chamber erred in law "by failing to specify when the final crimes occurred which were committed pursuant to the JCE".[443] The Prosecution responds that the Trial Chamber did not have to make an explicit finding as to when the JCE ended because

> [w]hether members of the JCE (or others on their behalf) continued to act after the expiry of the indictment period is irrelevant. What matters is that the Chamber found that a JCE existed when the crimes were committed and that all of the crimes for which Krajišnik was convicted were committed pursuant to the common criminal objective.[444]

(b) Analysis

180. It is not entirely clear what *Amicus Curiae* seeks to argue here. To the extent that he asserts that the Trial Chamber had to specify when the JCE ended, this contention must be rejected. Indeed, all that the Trial Chamber had to find is that the crimes for which Krajišnik was convicted were committed pursuant to the JCE; this it did.[445] To the extent that *Amicus Curiae* avers that the Trial Judgement does not clearly state the crimes for which Krajišnik is being held liable because it does not explicitly identify the final crimes for which Krajišnik is being held responsible, this contention must also be rejected. Indeed, the Trial Chamber specified that Krajišnik was being held liable for the "crimes mentioned in part 5" of the Trial Judgement.[446] The Appeals Chamber notes that this part of the Trial Judgement details a number of crimes which occurred between April 1992 and 30 December 1992.[447] Therefore, the Appeals Chamber is satisfied that the Trial Chamber sufficiently specified the crimes for which Krajišnik was being held liable. Therefore, this part of sub-ground 3(B) is dismissed.

4. Type of JCE (sub-ground 3(C))

181. In sub-ground 3(C), *Amicus Curiae* contends that the Trial Chamber erred in law in convicting Krajišnik for the crimes referred to in Counts 3 (persecution as a crime against

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[443] *Amicus Curiae*'s Appeal Brief, para. 143.
[444] Prosecution's Response to *Amicus Curiae*, para. 71.
[445] *See* Trial Judgement, paras 1078 and following.
[446] Trial Judgement, para. 1078.
[447] This is in keeping with the Indictment, which charged crimes occurring between 1 July 1991 and 30 December 1992: Indictment, paras 15, 18, 24, 27, as well as the schedules.

the bases for its inference as to the intent of Krajišnik and other JCE members with respect to the expanded crimes. This does not constitute an error of law.

201. *Amicus Curiae* also submits that the Trial Chamber erred in law and fact by basing its conclusion on Krajišnik's *mens rea* directly on findings of knowledge and substantial assistance, and in concluding that Krajišnik possessed the requisite *mens rea* to commit the JCE crimes – both the *original* crimes and the *expanded* crimes.[502]

202. The Appeals Chamber notes that the Trial Chamber was cautious in drawing inferences on Krajišnik's intent. The Trial Chamber was plainly aware that, before entering a factual finding on the basis of circumstantial evidence, it had to determine whether other reasonable inferences were possible.[503] It stressed that "knowledge combined with continuing participation *can* be conclusive as to a person's intent" and stated that therefore the "information the Accused received during this period is an *important element* for the determination of his responsibility".[504]

203. As set out above,[505] the Trial Chamber did not make the necessary findings with respect to the JCE members' *mens rea* in relation to the *expanded* crimes. The Trial Chamber found that these crimes became encompassed by the common objective when leading members of the JCE were informed about them, took no effective measures to prevent their recurrence, and persisted in the implementation of the common objective of the JCE.[506] The Trial Chamber did not find, however, at *which point in time* the leading members of the JCE became aware of each of the various expanded crimes. Similarly, there are no findings as to when the members of the local component became aware of the expanded crimes. In the absence of such findings, the Appeals Chamber has found that the Trial Chamber committed a legal error by convicting Krajišnik for the expanded crimes.[507]

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[502] *Amicus Curiae*'s Appeal Brief, paras 162 (citing footnote 39 of the Separate Opinion of Judge David Hunt in *Ojdanić* Decision on Joint Criminal Enterprise), 163, 212-215. *Amicus Curiae*'s Reply, para. 53. With respect to *Amicus Curiae*'s submission that the Trial Chamber failed to make the necessary findings with respect to Krajišnik's intent for the first commissions of the expanded crimes *see supra* III.C.2.

[503] Trial Judgement, para. 1196:

> In making its findings, the Trial Chamber relied to some extent on inferences from circumstantial evidence. A finding must be more than reasonable inference from the circumstances. It must be the *only* reasonable inference. (Emphasis in original, references omitted).

See also Trial Judgement, para. 1201 ("An accused must be acquitted if there is any reasonable explanation of the evidence accepted by the Chamber other than the guilt of the accused").

[504] Trial Judgement, para. 890 (emphasis added). *See* also *ibid.*, paras 892-893.

[505] *See supra* III.C.2.

[506] Trial Judgement, para. 1098.

[507] *See supra* III.C.2.

> government bodies at the Republic, regional, municipal and local levels" was a contribution. Paragraph 1120 makes clear that Krajišnik's participation derived from the fact that he could exert control over these structures once the common criminal objective began to be implemented, not from his establishment of the SDS party itself.[528]

The Prosecution also avers that the fact that the SDS was not identified as an illegal organisation is irrelevant since the contribution of a member to a JCE need not itself be illegal.[529]

(b) Analysis

215. The Appeals Chamber recalls that the participation of an accused person in a JCE need not involve the commission of a crime, but that it may take the form of assistance in, or contribution to, the execution of the common objective or purpose.[530] The contribution need not be necessary or substantial, but it should at least be a significant contribution to the crimes for which the accused is found responsible.[531]

216. In the case at hand, the Trial Chamber found that Krajišnik had a central position in the JCE as he "not only participated in the implementation of the common objective but was one of the driving forces behind it". The Trial Chamber stated that Krajišnik's overall contribution to the JCE was to

> help establish and perpetuate the SDS party and state structures that were instrumental to the commission of the crimes. He also deployed his political skills both locally and internationally to facilitate the implementation of the JCE's common objective through the crimes envisaged by that objective.[532]

More specifically, the Trial Chamber found that the following alleged contributions[533] of Krajišnik to the JCE had been established:

(a) Formulating, initiating, promoting, participating in, and/or encouraging the development and implementation of SDS and Bosnian-Serb governmental policies intended to advance the objective of the joint criminal enterprise;

(b) Participating in the establishment, support or maintenance of SDS and Bosnian-Serb government bodies at the Republic, regional, municipal, and local levels, including Crisis Staffs, War Presidencies, War Commissions ("Bosnian-Serb Political and Governmental Organs") and the VRS, TO, and the MUP ("Bosnian-Serb Forces") through which [he] could implement the objective of the joint criminal enterprise;[534]

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[528] Prosecution's Response to *Amicus Curiae*, paras 103 and 105 (references omitted).
[529] Prosecution's Response to *Amicus Curiae*, para. 105.
[530] *Kvočka et al.* Appeal Judgement, para. 99; *Babić* Appeal Judgement, para. 38; *Ntakirutimana* Appeal Judgement, para. 466; *Vasiljević* Appeal Judgement, para. 100; *Krnojelac* Appeal Judgement, paras 31 and 81; *Tadić* Appeal Judgement, para. 227(iii).
[531] *Brđanin* Appeal Judgement, para. 430.
[532] Trial Judgement, paras 1119-1120.
[533] Indictment, para. 8.
[534] Except in relation to the establishment of the SDS party and the establishment of the TO.

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-00-39-PT

Date: 28th February 2003

Original: English

IN TRIAL CHAMBER I

Before: **Judge Liu Daqun, Presiding**
Judge El Mahdi
Judge Alphons Orie

Registrar: **Mr. Hans Holthuis**

Decision of: **28th February 2003**

PROSECUTOR

v.

MOMČILO KRAJIŠNIK

DECISION ON PROSECUTION MOTIONS FOR JUDICIAL NOTICE OF ADJUDICATED FACTS AND FOR ADMISSION OF WRITTEN STATEMENTS OF WITNESSES PURSUANT TO RULE 92*bis*

Office of the Prosecutor
Mr. Mark B. Harmon
Mr. Alan Tieger

Counsel for the Accused
Mr. Deyan R. Brashich
Mr. Goran Nešković

I. INTRODUCTION

1. **TRIAL CHAMBER I** ("the Chamber") of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("the Tribunal") is seized of a series of motions submitted by the Prosecutor relating to (a) the taking of judicial notice of adjudicated facts, and to (b) admission of evidence in the form of witness statements under Rule 92*bis* of the Tribunal's Rules of Procedure and Evidence ("the Rules").

2. In respect of taking *judicial notice* of facts adjudicated in other cases before this Tribunal, the Prosecution filed its first motion on 7th November 2002 (the "First Motion") for judicial notice of 1.029 adjudicated facts, 150 on which the parties to the trial had agreed to (filed as Annex A), and an additional 879 adjudicated facts on which the parties had *not* agreed to (filed as Annex B). Following the judgement in the *Vasiljević* case,[1] the Prosecution filed a second motion on 10th January 2003 for judicial notice of another 103 facts adjudicated in that case (the "Second Motion"), all of which have been objected to by the Defence. In total, the Prosecution has proposed 1.132 facts for judicial notice in this case against *Momčilo Krajišnik* ("the Accused").

3. As far as the *admission of witness statements* and *transcripts* under Rule 92*bis* is concerned, four Prosecution motions were referred to this Chamber from the Pre-Trial Chamber (Trial Chamber III), namely the Motion of 17th May 2002 for Admission of Statements and Transcripts Pursuant to Rule 92*bis* in Respect of Krajišnik, and the Motions of 2nd August, 9th September and 7th November 2002 for Admission of Evidence Pursuant to Rule 92*bis*. Altogether, the Prosecution sought admission of 188 statements pertaining to 178 witnesses under Rule 92*bis*, all of which have been objected to by the Defence on various grounds.

II. The Parties' Submissions and Arguments on Judicial Notice

4. In support of its First Motion of 7th November 2002, the Prosecution primarily pointed out that taking judicial notice of the proposed adjudicated facts would effectively reduce the number of Prosecution witnesses during trial and satisfy the public interest in judicial recognition of these facts. The Prosecution contended, furthermore, that consent of the Defence is not required under Rule 94(B) and that no unfair prejudice was being created against the Ac-

[1] The *Prosecutor vs. Mitar Vasiljević*, IT-98-32-T, rendered by Trial Chamber II on 29th November 2002.

cused. Finally, none of the adjudicated facts are legal findings or are based on plea agreements. The adjudicated facts of which the Prosecution had asked the Chamber to take judicial notice in the First Motion were gathered from six judgements in five cases, two of which are under appeal.[2]

5. The Defence objected on 20th November 2002 against the 879 facts included in Annex B of the Prosecution's First Motion, arguing that the taking of judicial notice was rarely used in the Common Law system and that, in any case, judicial economy should never outweigh the right of the Accused to a fair trial. The disputed facts, furthermore, attest to the criminal responsibility of the Accused and are therefore plainly inadmissible under Rule 94. The Defence also pointed out that the time frame in this case is different from the *Kunarać* and *Krnojelac* cases (from which parts of the adjudicated facts were collected) and asserted that the disputed facts were not "truly adjudicated" in the sense that they had been finally determined on appeal or had transpired as the result of "effective and aggressive litigation" between the Parties. In respect of facts from judgements on appeal, furthermore, the Defence submitted that even if the Trial Chamber *can* subsequently exclude the evidential value of adjudicated facts of which it has already decided to take judicial notice (should they be overturned by the appeal), the Prosecution's motions are premature. Finally, the Defence raised the question that if previous Trial Chambers did not find the facts sufficient to form a conviction on Article 7(3) of the Statute, then this Chamber would be unable to determine the strength of the facts as they pertain to the acquittals of the Accused and their interplay with convictions under Article 7(1) of the Statute. The Defence therefore requested that the first Motion be dismissed or deferred for a decision by the Trial Chamber assigned to try the matter.

6. By its Scheduling Order of 25th November 2002, Trial Chamber III requested the President of the Tribunal to assign the present case to another Trial Chamber[3] and allowed the Prosecution to call a maximum of 119 witnesses *viva voce* and to submit a maximum of 178 witness statements under Rule 92*bis*, setting specific limits on the number of live witnesses and 92*bis* statements to be admitted or called for each of the 37 municipalities covered in the indictment. Trial Chamber III also ordered the Prosecution to submit its final witness list by

[2] *Prosecutor v. Duško Tadić*, IT-94-1-T, dated 7th May 1997 and the Appeals Chamber judgement of 15th July 1999 in that same case; *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić, and Esad Landžo* IT-96-21-T (the "*Čelebići Judgement*") dated 16th November 1998; *Prosecutor v. Dragolub Kunarac et al.*, IT-96-23-T & 23/1-T, dated 22nd February 2000; *Prosecutor v. Miroslav Kvočka et al.*, IT-98-30/1-T, dated 2nd November 2001; and the *Prosecutor v. Krnojelac*, IT-97-25-T, dated 15th March 2002. The *Kvočka* judgement was appealed on 30 November 2001 and the *Krnojelac* judgement on 12th April 2002. Neither of these appeals is concluded as of today.

[3] The President of the Tribunal assigned the case to this Chamber by Order of 28th November 2002.

10th January 2003 but this was interrupted by the Prosecution's request of 8 January 2003 for more time to submit its revised witness list and for variation of the Scheduling Order's limitation of the number of witnesses for each municipality. In its decision of 10th January 2003 in response to the Prosecution's request, the Chamber suspended the time limit set out in the Scheduling Order and stayed the decision on the application for variation. This last matter is still pending and will be dealt with as well in the present decision.

7. In its response of 28th November 2002 to the Defence's objections against the First Motion, the Prosecution argued, in short, *that* the Common Law concept and use of judicial notice is irrelevant to the consideration of the nature of judicial notice under Rule 94(B), which is distinct from the concept of judicial notice contained in Rule 94(A); *that* the disputed adjudicated facts set out in Annex B do not relate directly to the Accused or to his immediately proximate subordinates and are thus appropriate for judicial notice, adding that even if they did relate to the Accused or his close subordinates, nothing in Rule 94 prevents the Chamber from taking judicial notice of such facts; *that* the adjudicated facts from the *Kunarac* and *Krnojelac* judgements are relevant to the period of time covered by the indictment against the Accused; and finally *that* an unsubstantiated assertion that the proposed facts were not truly adjudicated in the previous judgements because they were not properly challenged by the Defence is not a valid objection to the Prosecution's motion in the present case.

8. Following the judgement in the *Vasiljević* case,[4] the Prosecution filed its Second Motion for judicial notice of adjudicated facts on 10th January 2003 requesting the taking of judicial notice of an additional 103 adjudicated facts relating to the attack on and the persecution of the non-Serb population of Višegrad beginning in April 1992. The *Vasiljević* judgement was appealed on 30th December 2002.

9. In response to the Second Motion, the Defence filed its "Defence Response to Prosecutior's Second Motion for Judicial Notice of Adjudicated Facts" dated 29th January 2003, arguing that Mr. Vasiljević had been an ordinary waiter at a café in Višegrad and had never held any position in the military or Government structure of the Republika Srpska (RS), and that the judgement contains no evidence of any conspiracy between Mr. Vasiljević and the Accused or any RS military or Government official. The Defence, however, agreed that judicial notice could be taken of facts 1.030 to 1.033 and 1.040 to 1.047. Otherwise, the Second Motion should be dismissed.

[4] *Prosecutor v. Mitar Vasiljević*, IT-98-32-T, dated 29th November 2002.

10. To clarify the issue raised by the Defence in relation to the First Motion of whether judicial notice may be taken of facts derived from judgements currently *under appeal*, the Prosecution filed a Supplement, dated 29th January 2003 ("the Supplement") to indicate exactly which facts in the *Kvočka* and *Krnojelac* judgements were *not* being appealed. In line with the present Chamber's decision of 23rd January 2003 in *Ljubičić*,[5] the purpose of the Supplement was to identify those facts which would not be affected by the appeal, regardless of its outcome, and of which judicial notice could thus be taken without any prejudice to the Accused.

III. Discussion on Judicial Notice

11. Taking judicial notice of adjudicated facts is for the purpose of achieving judicial economy in the sense that it condenses the relevant proceedings to what is essential for the case of each party without rehearing supplementary allegations already proven in past proceedings and thereby shortens the duration of the trial. Judicial economy has been held up as one of the procedural legal principles of the International Tribunal in Articles 20(1) and 21(4)(c) of the Statute, *i.e.* the right of the accused to an *expeditious trial* and the right to be *tried without undue delay*. The Chamber emphasizes, however, that its first concern is always to ensure that the Accused is offered a *fair trial*. As long as this principle is accomplished, the Chamber is under a duty to avoid that unnecessary time and resources are wasted on unnecessary disputes.

12. Rule 94 on judicial notice reads:

> "(A). A Trial Chamber shall not require proof of facts of common knowlegde but shall take judicial notice thereof.
>
> (B). At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings."

13. While Sub-Rule (A) mirrors the concept of judicial notice as laid down in both Common Law and Civil Law, Sub-Rule (B) is a distinct production of this Tribunal reflecting the particularity of its jurisdiction *ratione materiae*. The wording of this Sub-Rule raises two obvious questions, namely: (1) which kind of facts can be taken judicial notice of; and (2) what are the legal consequences for the parties of the Trial Chamber's taking judicial notice of certain facts?

14. As far as the first question is concerned, the Tribunal has already offered a number of criteria in its previous decisions. In the *Simić* case, for instance, the Trial Chamber established

[5] The *Prosecutor vs. Paško Ljubičić*, IT-00-41-PT

that only facts *not subject to reasonable dispute* between the parties in the case at hand could be judicially noticed, and that Rule 94 only covers facts and *not legal consequences inferred from facts*, for which reason a Trial Chamber can only take judicial notice of factual findings but not of a legal characterization as such.[6] In *Sikirica*, the Trial Chamber confirmed this position and held, too, that it could only take judicial notice of facts which are not the subject of reasonable dispute between the parties in the case and which do not involve interpretation or legal characterizations of facts.[7] In *Kvočka*, then, the Trial Chamber found that even if the judgement from which the adjudicated facts are taken is *on appeal*, no provision in the Statute or the Rules prevents the Trial Chamber, having taken account of the rights of the Accused, from drawing legal conclusions based on facts established beyond a reasonable doubt.[8] In *Kupreškić*, the Appeals Chamber established, in respect of cases on appeal, that only facts from judgements *concluded* on appeal can be judicially noticed in subsequent cases under Rule 94(B) and that the facts would have to be specified individually, thereby excluding the taking of judicial notice of an entire judgement.[9] In *Milošević*, the Trial Chamber concluded that for a fact to be capable of admission under Rule 94(B) of the Rules, it should be "truly adjudicated and not based upon an agreement between the parties to previous proceedings, such as agreed facts underpinning a plea agreement". [10] Truly adjudicated facts, in particular, would be facts extracted from cases for which the Appeals Chamber has ruled on the merits or has not been called to do so.[11] In *Ljubičić*, finally, this Chamber sought to clarify the position expressed earlier by the Appeals Chamber in *Kupreškić* and most recently by the Trial Chamber in *Milošević* (*i.e.* that, as a main rule, only facts from *final* judgements are truly adjudicated) by finding that judicial notice of adjudicated facts should "generally not be taken of facts which are *themselves* being appealed." To the extent in which such facts have been "truly adjudicated" at trial but are not covered by the appeal, they will remain unaffected and may thus be judicially noticed even before the appeal is finally concluded. The *mere* fact that a judgement has been appealed, in other words, does not *in itself* provide sufficient grounds for excluding *all* facts adjudicated in that judgement.[12]

15. In view of these considerations, the Chamber finds that, for a fact to be capable of admission under Rule 94(B), it should be *truly adjudicated* in previous judgements in the sense that:

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[6] The *Prosecutor vs.Blagoje Simić et alt*, IT-95-9-PT; Decision of 25th March 1999, at page 3.
[7] *The Prosecutor vs. Duško Sikirica et. alt.*, IT-95-8-PT; Decision of 27th September 2000, at page 5.
[8] The *Prosecutor vs. Miroslav Kvočka et alt.*, IT-98-30/1-T; Decision of 8th June 2000, at page 5.
[9] The *Prosecutor vs. Zoran Kupreškić et alt.*, IT-95-16-A; Decision of 8th May 2001, at par. 12.
[10] The *Prosecutor vs. Slobodan Milošević*, IT-02-54-T; Decision of 5th June 2002, at page 3.
[11] The Trial Chamber referred to the ICTR Decision of 3rd November 2000 in *The Prosecutor vs. Semanza*, ICTR-97-20-PT
[12] The *Prosecutor vs. Paško Ljubičić*, IT-00-41-PT; Decision of 23rd January 2003, at page 6.

(i) it is *distinct, concrete and identifiable*;

(ii) it is restricted to *factual* findings and does not include *legal* characterizations;

(iii) it was *contested* at trial and forms part of a judgement which has either *not been appealed* or has been *finally settled* on appeal; or

(iv) it was *contested* at trial and now forms part of a judgement which is under appeal, but falls within issues which are *not in dispute* during the appeal;

(v) it does *not attest to criminal responsibility* of the Accused;

(vi) it is *not the subject of (reasonable) dispute* between the Parties in the present case;

(vii) it is *not based on plea agreements* in previous cases; and

(viii) it does not impact on the *right of the Accused to a fair trial.*

16. Turning then to the second question of the *legal consequences* of taking judicial notice of certain facts, the Chamber notes that Rule 94 does not itself establish the procedural legal implications of judicial notice of such facts. Judicial notice of "*facts of common knowledge*" under Rule 94(A) normally implies that such facts *cannot* be challenged during trial. Rule 94(B), however, allows for judicial notice of information based on sources which are substantially different in character from the facts contemplated in Rule 94(A). By taking judicial notice of an *adjudicated fact*, thus, the Chamber establishes a well-founded presumption for the accuracy of this fact, which therefore does not have to be proven again at trial – *unless* the other party brings out new evidence and successfully challenges and disproves the fact at trial.[13] In other words, the procedural legal impact of taking judicial notice of an adjudicated fact is *not* that the fact cannot be challenged or refuted at trial, but rather that the *burden of proof to disqualify the fact is shifted* to the disputing party. The general principle of criminal law that it is always for the Prosecutor to prove the criminal responsibility of the Accused is not, to be sure, affected by this particular Rule-based exception in relation to judicial notice of adjudicated facts; these facts *have* already been subject to judicial review, and both parties are still allowed – in order to safeguard the fairness of the trial – to challenge the fact during trial by submitting evidence that calls into question the veracity of the adjudicated facts.

17. If, during trial, a Party wishes to dispute an adjudicated fact of which the Trial Chamber has taken judicial notice, accordingly, that Party must then bring out the evidence in support of its contest and request the Chamber to entertain the challenge. If the Chamber admits the challenge, the other Party will be provided with an opportunity to respond within a short time frame set out by the Chamber and the Chamber will then decide on the matter.

[13] *Prosecutor v. Pasko Ljubičić*, "Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts", IT-00-41-PT, 23rd January 2003.

IV. Findings on Judicial Notice

18. Applying the principles discussed above to the circumstances of the present case, the Chamber will *not* take judicial notice of the following adjudicated facts proposed by the Prosecution in its First and Second Motions:[14]

(i) Facts number 214, 933, and 958 for the reason that the alleged adjudicated facts are not to be found in the paragraphs cited by the Prosecution;[15]

(ii) Facts number 243 and 257-258 for the reason that they do not correctly reflect the factual findings in the judgement;

(iii) Facts number 284-289, 309-310, 321-324, 333-334, 341-342, 344, 348-350, 352-358, 369-380, 385-388, 391, 393-396, 402-403, 407-408, 412-417, 420, 422-449, 961, 963-972, 974-977, and 979-1004 for the reason that they are currently under appeal in the *Kvočka* case;

(iv) Facts number 602, 605, 614-618, 620-621, and 647-918 for the reason that they are currently under appeal in the *Krnojelac* case;

(v) Facts number 1.034-1.039, 1.048-1.073, 1.075-1.076, 1.078, 1.080-1.132 for the reason that they are currently on appeal in the *Vasiljević* case.[16]

V. The Parties' Submissions and Arguments on Rule 92*bis*

19. The Chamber is also seized of four Prosecution motions for admission of evidence pursuant to Rule 92*bis* of the Rules filed on 17th May 2002 ("the first 92*bis* Motion"), 2nd August 2002 ("the second 92*bis* Motion"), 9th September 2002 ("the third 92*bis* Motion"), and 7th November 2002 ("the fourth 92*bis* Motion"), respectively, requesting the Trial Chamber to admit into evidence certified written witness statements or transcripts of witness testimonies given other proceedings before the Tribunal.

20. In the first 92*bis* Motion of 102 witnesses, the Prosecution requests admission of statements or transcripts of 102 witnesses. An annex to the motion summarizes the evidence of each witness and indicates, pursuant to Rule 92*bis*(A)(i), the particular factor in favour of its admission (for the most part the cumulative nature of the evidence). The Prosecution contends that the evidence in question goes to proof of matters other than the acts and conduct of the Accused as charged in the indictment. The Defence filed a response to the first 92*bis* Motion on 21 May 2002, in which it challenges what it sees as the Prosecution's "implicit con-

[14] In the consecutive listing of facts in this decision, the *first* as well as the *last* number are both *included*.
[15] Despite the (insignificantly) incorrect numerical references, the Chamber accepts that Fact number 180 should have referred to TJ 133 (in stead of 135), fact number 943 to KUJ 51 (in stead of 52); and fact number 1001 to KVJ 667 (in stead of 666). The references in facts number 806 and 964 are substantially incorrect but these two facts are not listed here as they are also excluded for the reason that they are under appeal in *Kvočka*.
[16] Fact number 1.030 is one of common knowledge and it makes no sense to dispute that Višegrad is located in South-Eastern Bosnia, etc. For facts 1.031, 1.074, 1.077 and 1.079, these were admitted by the parties as matters *not* in dispute. For facts number 1.032 and 1.033, finally, they also appear among the facts already agreed upon by the parties, see facts number 99 and 102. It makes no sense, therefore, to dispute them.

tention" that the 102 witnesses would not be subjected to cross-examination. The Defence goes on to emphasize the right of the Accused to confront the witnesses who made these statements, because the statements are, according to the Defence, "critical elements" of the Prosecution's case.

21. The second 92*bis* Motion is similar in terms to the first, requesting admission into evidence the statements of three witnesses. On 5th August 2002 the Defence filed a response to the second motion repeating in essence the submissions made in response to the first motion.

22. The third 92*bis* Motion is a request to admit material relating to 25 witnesses, five of whom were the subject of the earlier motions. The Defence's reply, filed on 11th September 2002, is virtually identical to those filed previously.

23. The fourth 92*bis* Motion seeks to have admitted evidence from 58 witnesses, whose statements are summarized at the end of the motion. The Defence's objections to admission, filed on 8th November 2002, do not raise new issues.

VI. Discussion and Findings on Rule 92*bis*

24. The Trial Chamber has reviewed the 92*bis* statements and concurs with the assessment of Trial Chamber III made in its Scheduling Order of 25th November 2002 that the statements are admissible under Rule 92*bis*.[17] The Chamber is not persuaded by the arguments of the Defence in respect of its denial of the admissibility of the statements into evidence: if the evidence sought to be admitted goes to proof of matters other than the acts or conduct of the accused, it passes the first test of admission. The Defence, however, did not identify any portion of a statement or transcript which could correctly be said to fail that test. It is a separate matter, for the Chamber to determine, whether cross-examination of a particular witness is warranted.

25. While finding that the material in question is admissible under the Rules, the Trial Chamber is not in a position to finally decide which material to admit into evidence pursuant to Rule 92*bis* before it has received the Prosecution's revised witness list. As for cross-examination, the Trial Chamber will hear any *specific* reasons the Defence may have for wanting to cross-examine a Rule 92*bis* witness after the Prosecution has submitted its witness list. Should the Defence make any submissions to this end, the Prosecution will have the right of reply.

26. The Scheduling Order of 25th November 2002 permitted the Prosecution to call a maximum of 119 *viva voce* witnesses and to present evidence of a maximum of 178 witnesses

by way of Rule 92*bis*. In light of the present Decision's grant of judicial notice of a large number of adjudicated facts and taking into consideration the variation of the Scheduling Order's limitation of the maximum numbers for individual categories set down in Annex A of the Order,[18] the Chamber resets the maximum permissible number of viva voce and Rule 92*bis* Prosecution witnesses to 101 and 168, respectively.

FOR THE FOREGOING REASONS,

PURSUANT TO RULES 54, 65*ter*, 73*bis*, 92*bis* and 94 OF THE RULES,

THE TRIAL CHAMBER:

ALLOWS the Prosecutions First and Second Motions in respect of the following adjudicated facts, of which it will take judicial notice: facts numbered:[19] 1-213, 215-242, 244-256, 259-283, 290-308, 311-320, 325-332, 335-340, 343, 345-347, 351, 360-368, 381-384, 389-390, 392, 397-401, 404-406, 409-411, 418-419, 421, 450-601, 603-604, 606-613, 619, 622-646, 919-932, 934-957, 959-960, 962, 973, 978, 1.005-1.033, 1.040-1.047, 1.074, 1.077, and 1.079;

AND OTHERWISE DENIES the First and the Second Motions;

DECIDES to modify the Scheduling Order issued by Trial Chamber III on 25th November 2002 to the effect that the Prosecution may call a maximum of 101 witnesses *viva voce* during trial and may present a maximum of 168 witnesses by way of statements and transcripts pursuant to Rule 92*bis*;

DECLARES ADMISSIBLE, under Rule 92bis, the statements and transcripts submitted by the Prosecution in the first, second, third, and fourth 92*bis* Motions;

VARIES the Scheduling Order issued by Trial Chamber III on 25th November 2002 to the effect that the Prosecution is not required to limit the number of viva voce witnesses and witness statements under Rule 92*bis* in respect of each municipality to any particular maximum or to have any maximum of expert, "international" or "general" witnesses;

ORDERS the Prosecution to submit a list of witnesses (maximum 101) to be called *viva voce* at trial and a list of witness statements and transcripts (pertaining to a maximum of 168 witnesses) to be admitted under Rule 92*bis* within 15 days of the date of this Decision, and to

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[17] *Prosecutor v. Momčilo Krajišnik and Biljana Plavšić*, "Scheduling Order", 25th November 2002.
[18] As requested in the "Prosecution's Request for Further Time to File Revised Witness List and for Variation of Scheduling Order", 8th January 2003.
[19] First and last fact number *both included.*

submit, along with these lists, a chart showing the distribution of witnesses and witness statements or transcripts per municipality;

RESERVES its decision as to which Rule 92*bis* statements and transcripts will be finally admitted and which Rule 92*bis* witnesses (if any) may be called for cross-examination until such time as the Prosecution has submitted its revised witness list and the Trial Chamber has heard the parties on any specific argument of the Defence against admission of a statement or transcript and in favour of cross-examination.

Done in English and French, the English text being authoritative.

Dated this twenty eighth day of February 2003,
At The Hague
The Netherlands

Liu Daqun
Presiding

[Seal of the Tribunal]

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-98-33-T

Date: 02 August 2001

Original: English

IN THE TRIAL CHAMBER

Before: **Judge Almiro Rodrigues, Presiding**
Judge Fouad Riad
Judge Patricia Wald

Registrar: **Mr. Hans Holthuis**

PROSECUTOR

v.

RADISLAV KRSTIC

JUDGEMENT

The Office of the Prosecutor:

Mr. Mark Harmon
Mr. Peter McCloskey
Mr. Andrew Cayley
Ms. Magda Karagiannakis

Counsel for the Accused:

Mr. Nenad Petrušic
Mr. Tomislav Višnji}

H. Criminal Responsibility of General Krsti}

1. Introduction

600. The Prosecution alleges that General Krsti} is criminally responsible for his participation in the crimes charged in the indictment, pursuant to Article 7(1) of the Statute,[1339] which states that:

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

601. The Trial Chambers of the ICTY and the ICTR and the Appeals Chamber of the ICTY have identified the elements of the various heads of individual criminal responsibility in Article 7(1) of the Statute.[1340] The essential findings in the jurisprudence may be briefly summarised as follows:

- "Planning" means that one or more persons design the commission of a crime at both the preparatory and execution phases;[1341]
- "Instigating" means prompting another to commit an offence;[1342]
- "Ordering" entails a person in a position of authority using that position to convince another to commit an offence;[1343]
- "Committing" covers physically perpetrating a crime or engendering a culpable omission in violation of criminal law;[1344]
- "Aiding and abetting" means rendering a substantial contribution to the commission of a crime;[1345] and
- "Joint criminal enterprise" liability is a form of criminal responsibility which the Appeals Chamber found to be implicitly included in Article 7(1) of the Statute. It entails individual responsibility for participation in a joint criminal enterprise to commit a crime;[1346]

[1339] Para. 18 of the Indictment. In its Final Trial Brief (para. 27), the Prosecution makes reference to each head - except "committing" - mentioned in Article 7(1) as well as the "common purpose doctrine" (discussed below) as a basis for General Krsti}'s guilt.
[1340] *Cf.* Article 6(1) of the Statute of the ICTR. In its Final Trial Brief (para. 3), the Prosecution incorporates by reference its submissions on Article 7 in its Pre-Trial Brief (paras 13-86). Likewise, the Defence's submissions on Article 7 in its Pre-Trial Brief (paras 13-29) are incorporated in its Final Trial Brief (para. 2).
[1341] *Akayesu* Judgement, para. 480; *Blaškic* Judgement, para. 279; *Kordic and Cerkez* Judgement, para. 386.
[1342] *Akayesu* Judgement, para. 482; *Blaškic* Judgement, para. 280; *Kordic and Cerkez* Judgement, para. 387.
[1343] *Akayesu* Judgement, para. 483; *Blaškic* Judgement, para. 281; *Kordic and Cerkez* Judgement, para. 388.
[1344] *Tadic* Appeal Judgement, para. 188; *Kunarac* et al. Judgement, para. 390.
[1345] *Aleksovski* Appeal Judgement, paras. 162-164.

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-95-16-A

Date: 23 October 2001

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Patricia Wald, Presiding**
Judge Lal Chand Vohrah
Judge Rafael Nieto-Navia
Judge Fausto Pocar
Judge Liu Daqun

Registrar: **Mr. Hans Holthuis**

Judgement of: **23 October 2001**

PROSECUTOR

v

ZORAN KUPRE[KI]
MIRJAN KUPRE[KI]
VLATKO KUPRE[KI]
DRAGO JOSIPOVI]
VLADIMIR ŠANTIC

APPEAL JUDGEMENT

The Office of the Prosecutor:

Mr. Upawansa Yapa
Mr. Anthony Carmona
Mr. Fabricio Guariglia
Ms. Sonja Boelaert-Suominen
Ms. Norul Rashid

Counsel for the Defendants:

Mr. Ranko Radovi}, Mr. Tomislav Pasari} for Zoran Kupre{ki}
Ms. Jadranka Slokovi}-Glumac, Ms. Desanka Vranjican for Mirjan Kupre{ki}
Mr. Anthony Abell, Mr. John Livingston for Vlatko Kupre{ki}
Mr. William Clegg Q.C., Ms. Valerie Charbit for Drago Josipovi}
Mr. Petar Pavkovi} for Vladimir [anti}

B. Reconsideration of factual findings made by the Trial Chamber

1. General principles

28. Under this heading, the Appeals Chamber will discuss the standard that applies with respect to the reconsideration of factual findings by the Trial Chamber. The vast majority of the grounds of appeal raised by the Defendants in this case concerns alleged errors of fact. Several of the parties to the present appeal have also raised questions of a more general nature relating to the Appeals Chamber's review of errors of fact under Article 25(1)(b) of the Statute.[36] In light thereof, the Appeals Chamber considers it appropriate to elaborate upon this matter.

29. In order for the Appeals Chamber to overturn a factual finding by the Trial Chamber, an appellant must demonstrate that the Trial Chamber committed a factual error and the error resulted in a miscarriage of justice.[37] The appellant must establish that the error of fact was critical to the verdict reached by the Trial Chamber, thereby resulting in a "grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime."[38] Consequently, it is not each and every error of fact that will cause the Appeals Chamber to overturn a decision of the Trial Chamber, but only one that has occasioned a miscarriage of justice.[39]

30. Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber. It must be borne in mind that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.[40]

31. As stated above, it is initially the Trial Chamber's task to assess and weigh the evidence presented at trial. In that exercise, it has the discretion to "admit any relevant evidence which it

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[36] *See, e.g.,* Josipovi} Appeal Brief, 8 and 20; Zoran Kupre{ki} Appeal Brief, para. 42 (questioning the probative value of a single identification witness); Zoran Kupre{ki} Appeal Brief, para. 83 (questioning acceptability of evidence in light of factors such as the passage of time between the events and the testimony, the possible influence of third persons, discrepancies, or the existence of stressful conditions at the time the events took place); Zoran Kupre{ki} Appeal Brief, para. 12 (arguing that the Trial Chamber is obliged to refer to all pieces of evidence relied upon or to refer to all pieces of possibly contradictory evidence); Zoran Kupre{ki} Appeal Brief, paras 23 and 50 (questioning reasoning as to why the evidence of one witness is preferred but not the evidence of another).
[37] *Furundžija* Appeal Judgement, para. 37 (citing *Serushago* Sentencing Appeal Judgement, para. 22).
[38] *Furund`ija* Appeal Judgement, para. 37 (quoting Black's Law Dictionary (7th ed., 1999)).
[39] *Furund`ija* Appeal Judgement, para. 37.
[40] *Tadi}* Appeal Judgement, para. 64; *Aleksovski* Appeal Judgement, para. 63; *^elebi}i* Appeal Judgement, paras 434 and 491; *Tadi}* Appeal Judgement, Separate Opinion of Judge Shahabuddeen, para. 30.

deems to have probative value", as well as to exclude evidence "if its probative value is substantially outweighed by the need to ensure a fair trial."[41] As the primary trier of fact, it is the Trial Chamber that has the main responsibility to resolve any inconsistencies that may arise within and/or amongst witnesses' testimonies. It is certainly within the discretion of the Trial Chamber to evaluate any inconsistencies, to consider whether the evidence taken as a whole is reliable and credible and to accept or reject the "fundamental features" of the evidence.[42] The presence of inconsistencies in the evidence does not, *per se*, require a reasonable Trial Chamber to reject it as being unreliable.[43] Similarly, factors such as the passage of time between the events and the testimony of the witness, the possible influence of third persons, discrepancies, or the existence of stressful conditions at the time the events took place do not automatically exclude the Trial Chamber from relying on the evidence. However, the Trial Chamber should consider such factors as it assesses and weighs the evidence.

32. The reason that the Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber is well known. The Trial Chamber has the advantage of observing witnesses in person and so is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence.[44] Accordingly, it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness' testimony to prefer, without necessarily articulating every step of the reasoning in reaching a decision on these points. This discretion is, however, tempered by the Trial Chamber's duty to provide a reasoned opinion, following from Article 23(2) of the Statute. In the *Furundžija* Appeal Judgement, the Appeals Chamber considered the right of an accused under Article 23 of the Statute to a reasoned opinion to be an aspect of the fair trial requirement embodied in Articles 20 and 21 of the Statute.[45]

33. It follows from the jurisprudence of the Appeals Chambers of both the ICTY and ICTR that the testimony of a single witness, even as to a material fact, may be accepted without the need for corroboration.[46] With the exception of the testimony of a child not given under solemn

[41] Rules 89(C) and (D).
[42] *^elebi}i* Appeal Judgement, paras 485 and 496-498.
[43] *^elebi}i* Appeal Judgement, paras 485 and 496-498.
[44] *Furund`ija* Appeal Judgement, para. 37.
[45] *Furundžija* Appeal Judgement, para. 69. This decision recalls principles drawn from the case-law of the European Court of Human Rights, which indicate that "the extent to which this duty...applies may vary according to the nature of the decision" and "can only be determined in the light of the circumstances of the case". *Ruiz Torija* v *Spain*, 303 Eur. Ct. H. R. (series A) at para. 29 (1994). However, a "tribunal" is not obliged to give a detailed argument in respect of every argument. *See Van de Hurk* v *The Netherlands*, 288 Eur. Ct. H. R. (series A) at para. 61 (1994).
[46] *Tadi}* Appeal Judgement, para. 65; *Aleksovski* Appeal Judgement, para. 62; *^elebi}i* Appeal Judgement, para. 492 and 506; *Kayishema* Appeal Judgement, para. 154.

IN THE TRIAL CHAMBER

Before: Judge Antonio Cassese, Presiding

Judge Richard May

Judge Florence Ndepele Mwachande Mumba

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 21 September 1998

PROSECUTOR

v.

Zoran KUPRESKIC, Mirjan KUPRESKIC, Vlatko KUPRESKIC, Drago JOSIPOVIC, Dragan PAPIC, Vladimir SANTIC, also known as "VLADO"

DECISION ON COMMUNICATIONS BETWEEN THE PARTIES AND THEIR WITNESSES

The Office of the Prosecutor:

Mr. Franck Terrier
Mr. Albert Moskowitz

Counsel for the Accused:

Mr. Ranko Radovic, for Zoran Kupreskic
Ms. Jadranka Glumac, for Mirjan Kupreskic
Mr. Borislav Krajina, for Vlatko Kupreskic
Mr. Luko Susak, for Drago Josipovic
Mr. Petar Puliselic, for Dragan Papic
Mr. Petar Pavkovic, for Vladimir Santic

TRIAL CHAMBER II of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal");

NOTING the objections raised by Defence Counsel at the hearings of 16 and 17 September 1998 to evidence being adduced in court as a result of out-of-court communications between the Prosecutor and its witnesses during breaks in the witnesses' testimony;

CONSIDERING that Defence Counsel has raised a genuine issue of importance since the aforementioned instances have posed a problem for Defence counsel in that it has led to their being confronted during the trial with evidence which had not previously been disclosed to them;

NOTING that this is not to imply in any way that the Prosecutor has on any occasion acted with impropriety or exerted any influence on the witnesses in question and that the Chamber fully accepts the Prosecutor's explanation that on each occasion the witness in question has volunteered the information,

during the break, which was later the subject of a tender of evidence,

CONSIDERING that the importance of the issue raised by the Defence transcends the specific question to which the Defence has drawn attention, and that it appears crucial to the proper administration of international criminal justice that the Chamber rule on the whole matter of contacts between witnesses and the Party which called him or her to testify,

HAVING HEARD the submissions of both the Prosecutor and Defence counsel on this subject;

CONSIDERING that:

(i) There is nothing in the Statute or Rules of Procedure and Evidence which expressly addresses this subject;

ii. However it should be noted that the Prosecutor of the Tribunal is not, or not only, a Party to adversarial proceedings but is an organ of the Tribunal and an organ of international criminal justice whose object is not simply to secure a conviction but to present the case for the Prosecution, which includes not only inculpatory, but also exculpatory evidence, in order to assist the Chamber to discover the truth in a judicial setting;

(iii) a witness, either for the Prosecution or Defence, once he or she has taken the Solemn Declaration pursuant to Rule 90(B) of the Rules of Procedure and Evidence, is a witness of truth before the Tribunal and, inasmuch as he or she is required to contribute to the establishment of the truth, not strictly a witness for either party;

(iv) permitting either Party to communicate with a witness after he or she has commenced his or her testimony may lead both witness and Party, albeit unwittingly, to discuss the content of the testimony already given and thereby to influence the witness's further testimony in ways which are not consonant with the spirit of the Statute and Rules of the Tribunal,

v. the Victims and Witnesses Unit, established pursuant to Article 22 of the Statute and Rule 34 of the Rules of Procedure and Evidence, is mandated to treat all witnesses equally and to assist and accompany all witnesses during their stay in The Hague, and to manage the practical aspects of their appearance before the Tribunal, and that this fact obviates the need for the Prosecution or the Defence to be in communication with a witness during his or her testimony in order, among other things, to provide him or her with psychological support.

CONSIDERING Rule 89(B) which provides, "In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law".

CONSIDERING Rule 90(G) which provides, "The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to (i) make the interrogation and presentation effective for the ascertainment of the truth; and (ii) avoid needless consumption of time".

CONSIDERING that, while undoubtedly it would be more coherent and judicious that any practice regarding communication between the Parties and their witnesses be consistently applied in all the cases brought before the various Chambers; nevertheless, pursuant to the aforementioned Rules, this Trial Chamber is warranted in ruling on this matter in the instant trial.

CONSIDERING, on the one hand, the need to avoid the above-mentioned problem while, on the other hand, the need to allow for the situation in which a witness wishes *proprio motu* to communicate certain information to the Prosecution – or Defence as the case may be – once the witness in question has begun testifying;

CONSDIERING, finally, that this Decision will take effect after the Prosecution has conducted the

examination-in-chief of several of its witnesses – and has been permitted with respect to those witnesses, there being no decision to the contrary in force until the present Decision, to communicate with them during breaks in their testimony – and that the Chamber will therefore apply this Decision with due regard and consideration for the rights of the Defence;

PURSUANT to Rules 54, 89(B) and 90(G) of the Rules of Procedure and Evidence;

HEREBY ORDERS that

(1) The Prosecution and Defence henceforth must not communicate with a witness, once he or she has made the Solemn Declaration provided for in Rule 90(B) and commenced testifying, on the subject of the content of the witness's testimony except with the leave of the Chamber.

(2) If a witness wishes to contact the Party which called him or her, he or she shall inform the competent staff of the Victims and Witnesses Unit who will then report the matter to the relevant Party. This Party may then decide whether or not to request, orally or in writing, the leave of the Chamber and will to this effect provide reasons for the request. The Chambers, when granting leave, may, whenever it deems it appropriate, decide that the contact between the requesting Party and the witness must take place in the presence of an official of the Victims and Witnesses Unit.

(3) The Chamber may further direct that a member of the Victims and Witnesses Unit be present in court during the testimony of a given witness to provide the necessary moral and psychological support to compensate the withdrawal of this support from the Prosecution or the Defence during the period that the witness testifies, as required by this Order.

Done in English and French, the English text being authoritative.

Antonio
Cassese

Presiding
Judge

Dated this twenty-first day of September 1998

At The Hague

The Netherlands

[Seal
of
the
Tribunal]

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No. IT-98-30/1-A

Date: 28 February 2005

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Mohamed Shahabuddeen, Presiding**
Judge Fausto Pocar
Judge Florence Ndepele Mwachande Mumba
Judge Mehmet Güney
Judge Inés Mónica Weinberg de Roca

Registrar: **Mr. Hans Holthuis**

PROSECUTOR

v.

MIROSLAV KVOČKA
MLAĐO RADIĆ
ZORAN ŽIGIĆ
DRAGOLJUB PRCAĆ

JUDGEMENT

The Office of the Prosecutor:

Mr. Anthony Carmona
Ms. Helen Brady
Ms. Norul Rashid
Mr. David Re
Ms. Kelly Howick

Counsel for the Accused:

Mr. Krstan Simić for Miroslav Kvočka
Mr. Toma Fila for Mlađo Radić
Mr. Slobodan Stojanović for Zoran Žigić
Mr. Goran Rodić for Dragoljub Prcać

opinion will not be defective as a result of a failure to refer to a witness, even one whose evidence contradicts the findings of the Trial Chamber.[72] In the Prosecution's view, the Trial Chamber is only required to make findings of those facts which are essential to a determination of guilt on a particular point, and is not required to make findings in relation to other facts which are not essential, even if they were expressly alleged in the indictment.[73]

23. The Appeals Chamber recalls that every accused has the right to a reasoned opinion under Article 23 of the Statute and Rule 98*ter*(C) of the Rules.[74] However, this requirement relates to the Trial Chamber's Judgement; the Trial Chamber is not under the obligation to justify its findings in relation to every submission made during the trial. The Appeals Chamber recalls that it is in the discretion of the Trial Chamber as to which legal arguments to address. With regard to the factual findings, the Trial Chamber is required only to make findings of those facts which are essential to the determination of guilt on a particular count. It is not necessary to refer to the testimony of every witness or every piece of evidence on the trial record.[75] It is to be presumed that the Trial Chamber evaluated all the evidence presented to it, as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence. There may be an indication of disregard when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning, but not every inconsistency which the Trial Chamber failed to discuss renders its opinion defective. Considering the fact that minor inconsistencies commonly occur in witness testimony without rendering it unreliable, it is within the discretion of the Trial Chamber to evaluate it and to consider whether the evidence as a whole is credible, without explaining its decision in every detail.[76] If the Trial Chamber did not refer to the evidence given by a witness, even if it is in contradiction to the Trial Chamber's finding, it is to be presumed that the Trial Chamber assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its actual findings. It is therefore not possible to draw any inferences about the quality of a judgement from the length of particular parts of a judgement in relation to other judgements or parts of the same judgement.

24. The Appeals Chamber notes that, in certain cases, the requirements to be met by the Trial Chamber are higher. As an example of a complex issue, the Appeals Chamber considered the appraisal of witness testimony with regard to the identity of the accused:

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[71] *Ibid.*, para. 2.17.
[72] *Ibid.*, para. 2.18.
[73] *Ibid.*, para. 2.19.
[74] *Furundžija* Appeal Judgement, para. 69; *Kunarac et al.* Appeal Judgement, para. 41.
[75] *Čelebići* Appeal Judgement, para. 498; *Kupreškić et al.* Appeal Judgement, para. 39; *Kordić and Čerkez* Appeal Judgement, para. 382. *See* also above, para. 23.
[76] *Čelebići* Appeal Judgement, paras 481, 498; *Kupreškić et al.* Appeal Judgement, para. 32.

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No. IT-03-66-A

Date: 27 September 2007

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Andrésia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Judgement of: **27 September 2007**

PROSECUTOR

v.

FATMIR LIMAJ
HARADIN BALA
ISAK MUSLIU

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Ms. Helen Brady
Ms. Shelagh McCall
Mr. Steffen Wirth
Ms. Kristina Carey
Ms. Katharina Margetts
Ms. Barbara Goy

Counsel for Fatmir Limaj:

Mr. Michael Mansfield Q.C.
Mr. Karim A.A. Khan

Counsel for Haradin Bala:

Mr. Gregor D. Guy-Smith
Mr. Richard Harvey

Counsel for Isak Musliu:

Mr. Michael Topolski Q.C.
Mr. Steven Powles

testimony interviews given to the Prosecution and their 1998 statements made to the Serbian authorities.[204] Specifically, he claims that both Witnesses L04 and L06 "blatantly lied" in the 9 January 2005 interviews when they stated that their 1998 interviews with the Serbian authorities had lasted not more than ten minutes, as records of the interviews show that each interview lasted three hours.[205] Haradin Bala argues that the Trial Chamber should have given their interviews no evidentiary value whatsoever or, at least, should have explained in the Trial Judgement why it considered Witnesses L04 and L06 credible despite their untenable and identical explanations to the Prosecution.[206] Last, Haradin Bala submits that the Appeals Chamber is in an equal position to assess this question of credibility as the relevant evidence for this appeal was disclosed after the witnesses had testified in court.[207] Haradin Bala claims that a miscarriage of justice has occurred since Witness L04's and L06's testimonies were relied upon to establish his guilt for cruel treatment by omission for the maintenance and enforcement of detention conditions, for aiding and abetting the cruel treatment of Witness L04, and for cruel treatment for forcing Witnesses L04, L10 and a third individual to bury three persons, including Agim Ademi.[208]

85. The Prosecution responds that these arguments were already made in Haradin Bala's Final Trial Brief, and that they do not demonstrate an error of fact.[209] It states that the Trial Chamber did consider exhibits P203 and P204, the relevant exhibits of Witness L04's and L06's 1998 interviews with the Serbian authorities.[210] It was reasonable for the Trial Chamber to have found Witnesses L04 and L06 credible despite evidence that they had each changed their story about the length of their previous interviews.[211] As the credibility of witnesses must be balanced against the trial record as a whole, the Trial Chamber is better placed than the Appeals Chamber to assess the credibility of these two witnesses.[212] The Trial Chamber did not fail to consider Witness L04's and L06's statements about the 1998 interviews,[213] and Haradin Bala has not shown how his convictions would be affected were Witness L04's and L06's testimonies found unreliable.[214]

86. The Appeals Chamber recalls that a Trial Chamber need not refer to the testimony of every witness or every piece of evidence on the trial record, "as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence."[215] Such disregard is

[204] Bala Appeal Brief, paras 247-248.
[205] Bala Appeal Brief, para. 248.
[206] Bala Appeal Brief, paras 259-260; Bala Reply Brief, paras 50-52.
[207] Bala Appeal Brief, para. 261; Bala Reply Brief, para. 48.
[208] Bala Appeal Brief, para. 262.
[209] Prosecution Response Brief, paras 5.6, 5.14.
[210] Prosecution Response Brief, para. 5.9.
[211] Prosecution Response Brief, paras 5.9, 5.23-5.29.
[212] Prosecution Response Brief, para. 5.11.
[213] Prosecution Response Brief, paras 5.15-5.22.
[214] Prosecution Response Brief, paras 5.30–5.31.
[215] *Kvočka et al.* Appeal Judgement, para. 23.

shown "when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning."[216]

87. The Appeals Chamber notes that Witness L04's and Witness L06's 1998 interviews with the Serbian authorities were disclosed to Haradin Bala on 29 December 2004, and the statements given to the Prosecution on 9 January 2005[217] were disclosed on 1 February 2005. Although the witnesses had already testified, the parties agreed to submit the 1998 interview with the Serbian authorities and the conflicting 2005 interview with the Prosecution as evidence, rather than re-calling the witnesses.[218] Both Witnesses L04 and L06 stated in their 2005 interviews to the Prosecution that their 1998 interviews had lasted about ten minutes, although the information summary of the 1998 interviews with the Serbian authorities shows that they each lasted three hours. The Trial Chamber discussed the credibility of both Witnesses L04 and L06, but did not directly address this clear and identical discrepancy in their respective stories about the extent of their 1998 interviews.[219]

88. Nevertheless, the Appeals Chamber will not disturb the Trial Chamber's findings on the credibility of Witnesses L04 and L06. The evidence on the length of the 1998 interviews, although not cited by the Trial Chamber, does not directly impact upon the Trial Chamber's reasoning regarding the crimes in question, but instead impacts upon the general question of the credibility of the two witnesses. The Trial Chamber found the witnesses' testimonies with regard to Haradin Bala to be honest and credible[220] after having carefully examined their testimonies and numerous factors touching upon their credibility. In particular, the Trial Chamber extensively and carefully discussed Witness L06's 1998 interview in relation to the identification of Haradin Bala, finding that "it will be approached with caution".[221] As to Witness L04, the Trial Chamber held that it "was impressed by the demeanour of L04 as he gave this evidence and accepts his account to be honest and reliable".[222] In this context, the Appeals Chamber recalls that "it is settled jurisprudence of the International Tribunal that it is the trier of fact who is best placed to assess the evidence in its entirety as well as the demeanour of a witness."[223] Taking into consideration the above findings on the credibility of Witnesses L04 and L06, the Appeals Chamber finds that the Trial Chamber reasonably accepted the honesty of their testimony, in particular in light of the evidence of Witnesses L07, L10, L12, L96 and Vojko and Ivan Bakrač, which corroborated much of it. Hence, the Appeals Chamber concludes that a reasonable trier of fact could have found Witnesses L04 and

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[216] *Ibid.*
[217] Ex. P203, "(2) ICTY statement of L04 of 9 January 2005"; ex. P204, "(2) ICTY statement of L06 of 9 January 2005".
[218] Prosecution Response Brief, paras 5.12-5.13.
[219] Trial Judgement, paras 606, 607, 614, 615.
[220] Witness L04: Trial Judgement, paras 398, 407, 627, 631; Witness L06: Trial Judgement, paras 615, 631.
[221] Trial Judgement, para. 615.
[222] Trial Judgement, para. 398.

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-03-66-T

Date: 30 November 2005

Original: English

IN TRIAL CHAMBER II

Before: **Judge Kevin Parker, Presiding**
Judge Krister Thelin
Judge Christine Van Den Wyngaert

Registrar: **Mr Hans Holthuis**

Judgement of: **30 November 2005**

PROSECUTOR

v.

FATMIR LIMAJ
HARADIN BALA
ISAK MUSLIU

JUDGEMENT

The Office of the Prosecutor:

Mr Alex Whiting
Mr Julian Nicholls
Mr Colin Black
Mr Milbert Shin

Counsel for the Accused:

Mr Michael Mansfield Q.C. and Mr Karim A.A. Khan for Fatmir Limaj
Mr Gregor D. Guy-Smith and Mr Richard Harvey for Haradin Bala
Mr Michael Topolski Q.C. and Mr Steven Powles for Isak Musliu

of the JCE were "a natural and foreseeable consequence thereof" must be assessed in relation to the knowledge of a particular accused.[1680]

(c) Planning

513. It has been said that "planning" implies that one or several persons plan or design the commission of a crime at both the preparatory and execution phases.[1681] The *actus reus* of "planning" requires that one or more persons plan or design the criminal conduct constituting one or more crimes provided for in the Statute, which are later perpetrated.[1682] It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.[1683] A person who plans an act or omission with an intent that the crime be committed, or with an awareness of the substantial likelihood that a crime will be committed in the execution of that plan, has the requisite *mens rea* for establishing responsibility under Article 7(1) of the Statute for planning.[1684]

(d) Instigating

514. In the jurisprudence of the Tribunal, the term "instigating" has been defined to mean "prompting another to commit an offence."[1685] Both acts and omissions may constitute instigating, which covers express and implied conduct.[1686] A *nexus* between the instigation and the perpetration must be demonstrated;[1687] but it need not be shown that the crime would not have occurred without the accused's involvement.[1688] The *actus reus* is satisfied if it is shown that the conduct of the accused was a factor substantially contributing to the perpetrator's conduct.[1689] The requisite *mens rea* for "instigating" is that the accused intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that a crime would be committed in the execution of that instigation.[1690]

1680 *Kvočka* Appeals Judgement, para 86.
1681 *Brđanin* Trial Judgement, para 268; *Krstić* Trial Judgement, para 601; *Stakić* Trial Judgement, para 443.
1682 *Kordić* Appeals Judgement, para 26, citing *Kordić* Trial Judgement, para 386.
1683 *Kordić* Appeals Judgement, para 26.
1684 *Kordić* Appeals Judgement, para 31.
1685 *Krstić* Trial Judgement, para 601; *Akayesu* Trial Judgement, para 482; *Blaškić* Trial Judgement, para 280; *Kordić* Appeals Judgement, para 27; *Kordić* Trial Judgement, para 387.
1686 *Brđanin* Trial Judgement, para 269; *Blaškić* Trial Judgement, para 280.
1687 *Brđanin* Trial Judgement, para 269; *Blaškić* Trial Judgement para 280.
1688 *Kordić* Appeals Judgement, para 27.
1689 *Kordić* Appeals Judgement, para 27.
1690 *Kordić* Appeals Judgement, para 32.

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No. IT-95-13/1-A

Date: 25 August 2008

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Andrésia Vaz

Registrar: **Mr. Hans Holthuis**

Decision of: **25 August 2008**

PROSECUTOR

v.

MILE MRKŠIĆ
VESELIN ŠLJIVANČANIN

PUBLIC

DECISION ON THE PROSECUTION'S MOTION TO ORDER VESELIN ŠLJIVANČANIN TO SEEK LEAVE TO FILE AN AMENDED NOTICE OF APPEAL AND TO STRIKE NEW GROUNDS CONTAINED IN HIS APPEAL BRIEF

The Office of the Prosecutor:

Ms. Helen Brady

Counsel for Veselin Šljivančanin:

Mr. Novak Lukić and Mr. Stéphane Bourgon

Counsel for Mile Mrkšić:

Mr. Miroslav Vasić and Mr. Vladimir Domazet

1 The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("Appeals Chamber" and "International Tribunal", respectively) is seized of the "Prosecution Motion to Order Šljivančanin to Seek Leave to File an Amended Notice of Appeal and to Strike New Grounds contained in his Appeal Brief" filed on 18 July 2008 ("Motion"). On 22 July 2008, Veselin Šljivančanin ("Šljivančanin") filed the "Response on Behalf of Veselin Šljivančanin to 'Prosecution Motion to Order Šljivančanin to Seek Leave to File an Amended Notice of Appeal and to Strike New Grounds contained in his Appeal Brief'" ("Response").[1]

A. Procedural background and submissions of the Parties

2 The Appeals Chamber is seized of three appeals in this case.[2] Šljivančanin's Appeal Brief was filed on 8 July 2008.[3] In his Appeal Brief, he abandons Ground 5, Ground 6, paragraphs 27, 28 and 29, and sub-error 1, (a), (b), (c), and (g) articulated in his Notice of Appeal, and explains that he has reorganised the remaining grounds and sub-grounds of appeal "with a view to facilitating adjudication of this Appeal".[4] On 23 July 2008, the Appeals Chamber ordered the Prosecution to file its consolidated Respondent's Brief by 28 August 2008, which shall not address Ground 2, sub-grounds A and C; Ground 5, sub-grounds A and B; Ground 1, sub-ground D; and Ground 6 sub-grounds A (I) and (II) of Šljivančanin's Appeal Brief, and informed the Prosecution that it may be allowed to supplement its Respondent Brief upon the Appeals Chamber's determination of the issues raised in the Motion.[5]

3 In its Motion, the Prosecution argues that while Šljivančanin contends that he simply reorganised and restructured the grounds of appeal contained in his Notice of Appeal,[6] he in fact introduces the equivalent of two new grounds and three new sub-grounds of appeal, which is a "substantial departure from his Notice of Appeal".[7] It does not object to the filing of an amended notice of appeal pursuant to Rule 108 of the Rules of Procedure and Evidence ("Rules") dropping or reorganising certain grounds of appeal.[8] However, it objects to the introduction of significant new grounds and sub-grounds of appeal at this stage of the appellate proceedings because it has

[1] On 23 July 2008, the Prosecution orally informed the Appeals Chamber that it would not file a reply to the Response.
[2] Prosecution's Notice of Appeal, filed on 29 October 2007 (amended 7 May 2008); Mr. Mrkšić's Defence Notice of Appeal and Request for Leave to Exceed the Word Limit, filed on 29 October 2007; Notice of Appeal from the Judgement of 27 September 2007 by the Defence of Šljivančanin ("Šljivančanin's Notice of Appeal"), filed on 29 October 2007.
[3] Appellant's Brief on Behalf of Veselin Šljivančanin, filed on 8 July 2008 ("Šljivančanin's Appeal Brief").
[4] Šljivančanin's Appeal Brief, para. 19.
[5] Order Concerning the Prosecution's Respondent's Brief, 23 July 2008, pp. 3-4.
[6] Šljivančanin's Appeal Brief, para. 19.
[7] Motion, para. 1.

operated for eight months on the basis of the grounds and sub-grounds set out in Šljivančanin's Notice of Appeal.[9]

4 The Prosecution further contends that even accepting Šljivančanin's explanation that the changes introduced in his Appeal Brief are due to his "review and analysis of the Judgement in [The Bosnian/Serbian/Croatian languages ("B/C/S")]"[10] – which he received on 29 May 2008[11] – he did not seek to amend his Notice of Appeal within 30 days of his receipt of the B/C/S Trial Judgement, and therefore the new grounds and sub-grounds of appeal raised in his Appeal Brief should accordingly be struck.[12]

5. The Prosecution requests as relief that the Appeals Chamber order Šljivančanin to seek leave to file an amended notice of appeal under Rule 108 of the Rules to reflect any dropping of grounds of appeal articulated in his Appeal Brief, and to strike new grounds of appeal contained therein.[13] Should the Appeals Chamber allow Šljivančanin's alleged new arguments set out in his Appeal Brief, the Prosecution argues that he should be ordered to include reference to these in an amended notice of appeal and requests an additional 21 days to file its Respondent's Brief to Šljivančanin's Appeal Brief.[14]

6. Šljivančanin opposes the Motion.[15] He argues that his Appeal Brief reflects a reorganisation of the alleged errors of law and fact comprised in his Notice of Appeal under six main grounds of appeal to facilitate the adjudication of the appeal, that there are no new grounds of appeal, that the Prosecution did not suffer any prejudice as his Notice of Appeal provided sufficient information and adequate notice concerning the errors alleged, and consequently that he does not need to submit an amended notice of appeal.[16] He further contends that, should the Appeals Chamber take the view that the filing of an amended notice of appeal is required, it is in the interest of justice that all the arguments raised in his Appeal Brief be adjudicated by the Appeals Chamber.[17] In his view, the adjudication of all the submissions in his Appeal Brief is necessary to avoid a miscarriage of justice.[18] Should the Appeals Chamber decide that he needs to submit an amended notice of appeal,

[8] Motion, paras 1 and 3.
[9] Motion, paras 1 and 4.
[10] Šljivančanin's Appeal Brief, para. 19.
[11] Šljivančanin's Appeal Brief, para. 17.
[12] Motion, para. 4.
[13] Motion, para. 5.
[14] Motion, para. 6.
[15] Response, para. 1.
[16] Response, paras 1, 11, 14, 47-48.
[17] Response, para. 7.
[18] Response, para. 54.

he requests the Appeals Chamber to consider the amended notice of appeal enclosed with his Response.[19]

B. Discussion

7. The question for the Appeals Chamber is, firstly, whether Šljivančanin's Appeal Brief departs substantially from his Notice of Appeal by setting forth new grounds or sub-grounds of appeal. If the Appeals Chamber finds that the grounds or sub-grounds of appeal set out in Šljivančanin's Appeal Brief are adequately covered by his Notice of Appeal, it need not pursue the matter further; the Motion may be denied forthwith. Should the Appeals Chamber find, however, that Šljivančanin's Appeal Brief contains new grounds or sub-grounds of appeal not covered by the grounds set out in his Notice of Appeal, it must then decide whether to strike these new grounds of appeal, or alternatively, to require Šljivančanin to submit an amended notice of appeal including these new grounds or sub-grounds of appeal.

8. The Appeals Chamber recalls that under Rule 108 of the Rules, a party seeking to appeal a judgement must set forth the grounds of appeal in a notice of appeal, indicating "the substance of the alleged errors and the relief sought". Under paragraph 1(c) (i) and (ii) of the Practice Direction on Formal Requirements for Appeals from Judgement of 7 March 2002,[20] a notice of appeal shall contain, *inter alia*, the grounds of appeal, clearly specifying in respect of each ground of appeal "any alleged error on a question of law invalidating the decision" and/or "any alleged error of fact which has occasioned a miscarriage of justice." The only formal requirement under the Rules is that the notice of appeal contains a list of the grounds of appeal; it does not need to detail the arguments that the parties intend to use in support of the grounds of appeal, the place for detailed arguments being the Appellant's brief.[21] The purpose of listing all the grounds of appeal in the notice of appeal is "to focus the mind of the Respondent, right from the day the notice of appeal is filed, on the arguments which will be developed subsequently in the Appeal brief".[22] The grounds of appeal and the arguments in an Appellant's brief must be set out and numbered in the same order as in the Appellant's notice of appeal, unless otherwise varied with leave of the Appeals Chamber.[23]

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[19] Response, paras 5, 56-57. *See* Amended Notice of Appeal on Behalf of Veselin Šljivančanin, 22 July 2008, attached to his Response as "Enclosure".
[20] Practice Direction on Formal Requirements for Appeals from Judgement (IT/201), 7 March 2002.
[21] *See Prosecutor v. Ignace Bagilishema*, No. ICTR-95-1A-A, Decision on Motion to Have the Prosecution's Notice of Appeal Declared Inadmissible, 26 October 2001 ("*Bagilishema* Decision of 26 October 2001"), p. 3; *Momir Nikolić v. Prosecutor*, Case No. IT-02-60/1-A, Decision on Motion to Strike Parts of Defence Appeal Brief and Evidence Not on Record, Motion to Enlarge Time, Motion for Leave to File a Rejoinder to the Prosecution's Reply, 1 September 2004, para. 22.
[22] *Bagilishema* Decision of 26 October 2001, p. 3.
[23] Practice Direction on Formal Requirements for Appeals from Judgement (IT/201), 7 March 2002, para. 4.

9. Any variation of the grounds of appeal must be done by motion in accordance with the Rules, setting out the specific Rule under which the variation is sought and the arguments in support of the request to vary the grounds of appeal as required by that Rule.[24] These rules are based on principles of fair trial and effectiveness, aimed at ensuring that both parties have adequate opportunity to be fully apprised of each others' submissions and to respond in good time to these.[25] They also clarify for the parties, and for the public, which arguments have been considered by the Appeals Chamber in reaching a particular decision.[26] Where new grounds of appeal have been presented for the first time in an Appellant's brief or in a brief in reply, the Appeals Chamber may strike them at the request of a party or disregard them.[27]

10. The Prosecution identifies four parts of Šljivančanin's Appeal Brief as new grounds or sub-grounds of appeal.[28] In each case, Šljivančanin argues that his Notice of Appeal sufficiently covers the ground or sub-ground of appeal in question.[29] The Appeals Chamber will address these grounds or sub-grounds of appeal in the order in which they are presented in Šljivančanin's Appeal Brief.

1. Preliminary issue

11. In view of the number of grounds and sub-grounds of appeal argued in his Appeal Brief which are challenged in the Motion, Šljivančanin requests leave to extend the word limit of 3000 words in his Response as established in the Practice Direction on the Length of Brief and Motions of 16 September 2005[30] to under 4000 words.[31] The Appeals Chamber reminds Šljivančanin that, in accordance with paragraph C (7) of the Practice Direction on the Length of Briefs and Motions, a party must seek authorisation in advance from the Appeals Chamber to exceed the word limit and

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[24] Practice Direction on Formal Requirements for Appeals from Judgement (IT/201), 7 March 2002, para. 2.
[25] *See Momir Nikolić v. Prosecutor*, Case No. IT-02-60/1-A, Decision of Prosecution's Motion to Strike, 20 January 2005 ("*Nikolić* Decision of 20 January 2005"), para. 25 (holding that the "benefit of striking out parts of a submission is [...] to guarantee the fairness of the proceedings [...]"); *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal and to Correct his Appellant's Brief, 17 August 2006 ("*Nahimana et al.* Decision of 17 August 2006"), para. 51(noting that "unjustified amendments [to notices of appeal] would result in appellants being free to change their appeal strategy after they have had the advantage of reviewing the arguments in a response brief, interfering with the expeditious administration of justice and prejudicing the other parties to the case, [...] which is unacceptable"; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Decision on Motion to Strike Ground One of Jokić Appeal Brief, 31 August 2006, para. 12 (denying a motion to strike because the Prosecution was not prejudiced by the inclusion of another ground at that stage of proceedings and because it had fair notice of the alleged errors).
[26] *Nikolić* Decision of 20 January 2005, para. 25.
[27] *Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-A, Judgment, 27 November 2007, paras 319, 325-326; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006, para. 78. *See* also *Prosecutor v. Naser Orić*, Case No. IT-03-68-A, Judgement, 3 July 2008, para. 65; *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-A, Judgement, 25 February 2004, para. 15; *Nikolić* Decision of 20 January 2005, para. 18.
[28] Motion, para. 2, namely: Ground 2, sub-grounds A and C; Ground 5, sub-grounds A and B; Ground 1, sub-ground D; and Ground 6, sub-ground A on sentence.
[29] Response, paras 2, 15-46.
[30] Practice Direction on the Length of Brief and Motions (IT/184/Rev. 2), 16 September 2005, para. 5.
[31] Response, para. 6.

provide an explanation of the exceptional circumstances that necessitate the oversized filing.[32] The Appeals Chamber considers that mere reference to the number of grounds challenged by the Prosecution does not amount to an explanation of "exceptional circumstances".[33] However, considering that the Prosecution, by not filing a Reply, does not appear to oppose Šljivančanin's request and that, in view of the significance of the Motion, it is in the interests of justice in this particular case to accept the Response as filed, the Appeals Chamber decides to recognise the oversized Response as validly filed.[34]

2. Ground 1, sub-ground D of Šljivančanin's Appeal Brief

12. Under Ground 1, sub-ground D of his Appeal Brief, Šljivančanin submits that the Trial Chamber's finding regarding his presence at Ovčara is inconsistent with evidence as to his character. Šljivančanin argues that this ground refers to Ground 1, sub-errors 1 and 2 and Ground 3 of his Notice of Appeal.[35] The Prosecution argues that Šljivančanin did not include in his Notice of Appeal any sub-ground of appeal as to the Trial Chamber's finding based on his "character" and that the grounds of appeal in question merely address the Trial Chamber's alleged errors as to its disregarding the testimonies of certain witnesses (sub-error 1), the time frame in which Šljivančanin was allegedly present at Ovčara (sub-error 2), and the finding regarding his presence at the Yugoslav Peoples' Army (JNA) Barracks (Ground 3).[36]

13. Šljivančanin contends that the Prosecution's argument is based on an "overly restrictive" view of Ground 1 of his Appeal Brief, in that the evidence concerning his character is "directly related to the testimony of witnesses whose evidence was found to be not credible by the Trial Chamber".[37] He argues that Ground 1 of his Notice of Appeal makes clear that he alleged errors of fact and law, which led to the Trial Chamber's finding that he was present at Ovčara on 20 November 1991, at about 14:30 or 15:00 hours.[38]

14. Ground 1, sub-ground D of Šljivančanin's Appeal Brief is at its core an argument to counter the Trial Chamber's finding that he was present at Ovčara on 20 November 1991, broadly covered by Ground 1 of his Notice of Appeal, which alleges that "the Trial Chamber committed an error in law and fact by finding that [he] was present at Ovčara on 20 November at about 14.30 or 15.00".[39]

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[32] Practice Direction on the Length of Brief and Motions (IT/184/Rev. 2), 16 September 2005, para. C (7).
[33] *Nikolić* Decision of 20 January 2005, para. 13 (finding that "mere reference to the Prosecution's arguments does not amount to a proper 'explanation'.")
[34] *See Nikolić* Decision of 20 January 2005, para. 13.
[35] Šljivančanin's Appeal Brief, paras 21, 166-174.
[36] Motion, para. 2 (c) (iii).
[37] Response, para. 16.
[38] Response, para. 17.
[39] Šljivančanin's Notice of Appeal, para. 7(i).

However, neither Ground 1 sub-error 1, sub-error 2, nor Ground 3 of Šljivančanin's Notice of Appeal raise any specific ground of appeal relating to his character. As previously noted, a notice of appeal need not detail the arguments to be presented in an Appellant's brief, but it must nonetheless list all of the grounds of appeal.[40] The Appeals Chamber fails to see any direct link between the Witnesses whose testimonies were found by the Trial Chamber not to be credible (sub-error 1 of Šljivančanin's Notice of Appeal)[41] and the evidence concerning Šljivančanin's character.

15. Accordingly, the Appeals Chamber finds that Ground 1, sub-ground D of Šljivančanin's Appeal Brief constitutes a new ground of appeal not covered by his Notice of Appeal.

3. Ground 2, sub-grounds A and C of Šljivančanin's Appeal Brief

16. Under Ground 2, sub-grounds A and C of his Appeal Brief, Šljivančanin argues respectively that aiding and abetting by omission is not a mode of liability included in the jurisdiction of the International Tribunal and that, if it exists, the Trial Chamber did not properly define it.[42] Ground 2 refers, according to his Appeal Brief, to Ground 1, sub-error 4 of his Notice of Appeal.[43] Ground 1, sub-error 4 raises an allegation of an error of law by the Trial Chamber in finding that he had notice that the Prosecution's case relied in part on aiding and abetting by omission.[44] As Ground 2, sub-grounds A and C, is a challenge to the finding of aiding and abetting by omission as a mode of liability, the Prosecution argues that this ground amounts to a wholly new ground of appeal.[45]

17. Šljivančanin submits that the Prosecution's argument is based on an "overly restrictive view" of Ground 2 of his Appeal Brief, as his challenge to the Trial Chamber's finding of aiding and abetting by omission as a mode of liability and the elements thereof as articulated by the Trial Chamber is "intrinsically implied" in his argument at paragraph 7 (iv) of his Notice of Appeal.[46] In support of his contention, Šljivančanin notes that the paragraph of the Trial Judgement referred to in paragraph 7 (iv) of his Notice of Appeal contains the specific finding that "a person may aid and abet by omission", and posits that there is a relationship between the lack of notice and the challenge to the finding of aiding and abetting by omission as a mode of liability.[47] In addition, he argues that "it is evident" that his ground of appeal relating to the lack of notice also challenges the finding on the mode of liability, as in adjudicating his ground of appeal related to the lack of notice,

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[40] *See supra* para. 8.
[41] *Prosecutor v. Mile Mrkšić et al*, Case No. IT-95-13/1-T, Judgement, 27 September 2007 ("Trial Judgement), paras 378-382.
[42] Šljivančanin's Appeal Brief, paras 22, 190-193, 198-199, 201-235, 253-266.
[43] Šljivančanin's Appeal Brief, para. 23.
[44] Motion, para. 2 (c) (i), referring to Šljivančanin's Notice of Appeal, para. 7 (iv).
[45] Motion, para. 2 (c) (i).
[46] Response, para. 22.
[47] Response, paras 23- 24.

the Appeals Chamber would necessarily have to pronounce itself on whether aiding and abetting by omission is a mode of liability under the jurisdiction of the International Tribunal and the elements thereof.[48] Šljivančanin also notes that, in his response to the Prosecution's appeal, he underscored his conviction that the basis of aiding and abetting by omission is a first before the International Tribunal, and, referring to his Notice of Appeal, reiterated that this mode of liability would be challenged as part of his appeal.[49] He notes in that respect that the Prosecution, in its reply to his response brief, acknowledged his challenge to aiding and abetting as a mode of liability and undertook to respond to this argument in its response brief.[50] He also contends that the Prosecution was provided with an outline of his submissions contained in his Appeal Brief on 18 June 2008.[51]

18. Sub-error 4 of Ground 1 of Šljivančanin's Notice of Appeal alleges that the Trial Chamber "made an error in law when it determined in para. 662 of the Judgment that the Defence had notice that the Prosecution case in part relied on aiding and abetting by omission".[52] Šljivančanin argues that the Prosecution only articulated its thesis regarding this mode of liability in its final trial brief, which resulted in a violation of his right under Article 24(1) (a) of the Statute to be informed promptly and in detail of the nature and cause of the charge against him.[53]

19. The Appeals Chamber finds that the plain wording of Šljivančanin's Notice of Appeal only mentions lack of notice and does not directly challenge aiding and abetting by omission as a mode of liability. Although a notice of appeal need not detail the arguments an appellant intends to use in support of his grounds of appeal, he must at least identify with sufficient clarity the errors of law and/or fact on which it intends to rely, so as to focus the mind of the respondent on the arguments which will be subsequently developed.[54] The practice of the Appeals Chamber indicates that implied errors of law have only been accepted as a basis for amending notices of appeal upon request in circumstances where the amendment corresponds to or clarifies an argument already advanced in the original notice of appeal.[55] This is not the case for the issue under consideration in this Motion. The issue of whether aiding and abetting by omission is a recognised mode of liability is one related to the jurisdiction of the International Tribunal, and is quite distinct from the question

[48] Response, para. 25.
[49] Response, para. 26, referring to Response Brief on Behalf of Veselin Šljivančanin (Confidential), filed on 18 June 2008, para. 161, footnote 173.
[50] Response, para. 27, referring to Prosecution's Consolidated Reply to Mile Mrkšić and Veselin Šljvančanin Response Briefs (Confidential), filed on 3 July 2008 (Public Redacted Version filed on 9 July 2008) ("Prosecution Reply Brief"), para. 45.
[51] Response, para. 50.
[52] Šljivančanin's Notice of Appeal, para. 7 (iv).
[53] Šljivančanin's Notice of Appeal, para. 7 (iv).
[54] *See supra* para. 8.
[55] *See Prosecutor v. Vidoje Blajojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Prosecution's Request for Leave to Amend Notice of Appeal in Relation to Vidoje Blagojević, 20 July 2005 ("*Blajojević and Jokić* Decision of 20 July 2005"), p. 3.

of notice, which is a matter related to the rights of the accused. If Šljivančanin had intended to allege an error of law with respect to the Trial Chamber's finding that a person may aid and abet a crime by omission, the proper avenue was to file a motion pursuant to Rule 108 of the Rules to amend his Notice of Appeal, which he failed to do.

20. Accordingly, the Appeals Chamber finds that sub-grounds A and C of Ground 2 of Šljivančanin's Appeal Brief are new grounds of appeal not covered by his Notice of Appeal.

4. Ground 5, sub-grounds A and B of Šljivančanin's Appeal Brief

21. Under Ground 5, sub-grounds A and B of his Appeal Brief, Šljivančanin argues that the Trial Chamber erred in finding, respectively, that his failure to act pursuant to his legal duty to ensure the security of the prisoners of war had a substantial effect on the commission of crimes at Ovčara, and that he must have been aware that by his omission he facilitated the commission of crimes.[56] In his Appeal Brief, Šljivančanin states that this ground of appeal refers to Ground 4 (paragraphs 18, 19, and 20) of his Notice of Appeal.[57] The Prosecution argues that these paragraphs "address completely different matters", which are unrelated to the challenge in Šljivančanin's Appeal Brief of the Trial Chamber's finding that his omission substantially contributed to the crimes, and that his awareness that his failure to act assisted their commission.[58]

22. Šljivančanin submits that the Prosecution's assertion is "without foundation".[59] He argues that paragraphs 18 and 19 of his Notice of Appeal allege "errors of fact and law concerning the findings of the Trial Chamber related to the *mens rea* required for Count 7", thereby providing adequate notice about the aim and purpose of Ground 5 of his Appeal Brief, which concerns errors relating to his *mens rea*.[60] He further points out that paragraph 19 of his Notice of Appeal refers specifically to alleged errors in paragraph 670 of the Trial Judgement, in which the Trial Chamber found that his omission substantially contributed to the crimes, and that he must have been aware that his failure to act assisted their commission.[61] In addition, he argues, both paragraphs 19 and 20 of his Notice of Appeal reference paragraphs of the Trial Judgment in which findings are made concerning his prior knowledge.[62]

23. Under his fourth ground of appeal as set out in his Notice of Appeal, Šljivančanin alleges that the Trial Chamber erred in fact and law "in determining factors relevant for establishing [his]

[56] Šljivančanin's Appeal Brief, paras 28-29, 424-430, 435-454.
[57] Šljivančanin's Appeal Brief, para. 29.
[58] Motion, para. 2 (c) (ii).
[59] Response, para. 31.
[60] Response, para. 32.
[61] Response, para. 33.

mens rea".[63] Under Ground 5 of his Appeal Brief, Šljivančanin contends that the Trial Chamber erred by finding that his omission had a substantial effect on the commission of crimes at Ovčara in the afternoon of 20 November 1991 *and* that he must have been aware that through his omission, he facilitated the commission of those crimes.[64]

24. With regard to sub-ground A of Ground 5, the Appeals Chamber finds that the fourth ground of appeal as set out in Šljivančanin's Notice of Appeal does not touch upon the finding of the Trial Chamber that his failure to act pursuant to his legal duty to ensure the security of the prisoners of war had a substantial effect on the commission of crimes at Ovčara, except by an oblique reference to paragraph 670 of the Trial Judgement, in which the Trial Chamber found that his failure to act had a substantial effect on the commission of crimes at Ovčara. It is not sufficient for a notice of appeal to merely refer to a paragraph of the Trial Judgement in the expectation that the opposing party will understand which ground of appeal is being presented. Paragraph 19 of Šljivančanin's Notice of Appeal, which refers, *inter alia,* to paragraph 670 of the Trial Judgement, clearly states that his ground of appeal relates to the Trial Chamber's alleged misapplication of the law in relation to the *mens rea* requirement; there is no mention of any other ground of appeal raised against other findings of the Trial Chamber in the paragraphs of the Trial Judgement cited.

25. As sub-ground A concerns the *actus reus* of aiding and abetting, namely, whether an accused by his conduct directly and substantially contributed to the commission by another person of the *actus reus* of a crime, the Appeals Chamber accordingly finds that sub-ground A of Ground 5 of Šljivančanin's Appeal Brief is a new ground of appeal that goes beyond the scope of Šljivančanin's Notice of Appeal.

26. The Appeals Chamber finds that Šljivančanin's fourth ground of appeal in his Notice of Appeal is comprised in sub-ground B of Ground 5 of Šljivančanin's Appeal Brief, since the latter clearly addresses the *mens rea* aspect of his responsibility, which is the core of the submission under the fourth ground of his Notice of Appeal.[65]

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[62] Response, para. 33.

[63] Paragraph 18 of the Šljivančanin's Notice of Appeal submits that the Trial Chamber "erred in fact/law with respect to the conclusions on the Appellant's knowledge of prior crimes and antagonism which affected the degree of *mens rea* necessary for the responsibility established by the Judgment", while paragraph 19 alleges that the Trial Chamber "misapplied the law in relation to *mens rea* requisite for the crime [he] was found guilty of", citing paragraphs 658, 664, 666, and 670 of the Trial Judgement.

[64] Šljivančanin's Appeal Brief, para. 28.

[65] *See* Trial Judgement, para. 556, in which the Trial Chamber set out the *mens rea* for aiding and abetting by omission, as "knowledge that, by his or her conduct, the aider and abettor is assisting or facilitating the commission of the offence, a knowledge which need not have been explicitly expressed and may be inferred from all the relevant circumstances" (footnotes omitted).

27. The Appeals Chamber accordingly finds that Ground 5, sub-ground B is covered by Šljivančanin's Notice of Appeal.

5. Ground 6, sub-ground A of Šljivančanin's Appeal Brief

28. Under Ground 6, sub-ground A of his Appeal Brief, Šljivančanin argues that the Trial Chamber erred in imposing the sentence against him based upon its finding that the prisoners of war ("POWs") at Ovčara were under his immediate responsibility and its failure to consider the presence of other officers at Ovčara who were in a better position than him to act.[66] He states that this ground of appeal refers to Ground 7 of his Notice of Appeal.[67] The Prosecution argues that given that Ground 7 of Šljivančanin's Notice of Appeal, relates to the Trial Chamber's consideration of aggravating and mitigating circumstances, Ground 6, sub-grounds A (I) and (II) of his Appeal Brief thereby constitute two new grounds of appeal.[68]

29. Šljivančanin responds that Ground 7 of his Notice of Appeal makes clear that he alleges errors of fact and law, which led to the imposition of the five year sentence, which he submits was excessive.[69] He contends that the Prosecution was well aware of the aim, nature, and relief sought in his appeal against sentence.[70] He points out that paragraphs 31 and 32 of his Notice of Appeal, which relate to Ground 7, refer to paragraphs of the Trial Judgement in which the Trial Chamber found, as an aggravating circumstance, that the POWs at Ovčara were under his immediate responsibility,[71] and which show that the Trial Chamber failed to consider the presence, superior position, capacity and authority of other officers present as a mitigating factor,[72] thereby constituting an error in sentencing.[73] In addition, he argues that paragraphs 31 and 32 of his Notice of Appeal make it clear that the alleged "sentencing errors" of the Trial Chamber in relation to the relevant aggravating and mitigating circumstances are to be considered on the basis of all other grounds of appeal and in relation to the offence itself.[74] As these findings of the Trial Chamber are directly related to the issue of aggravating and mitigating circumstances, he submits that they are properly comprised in Ground 7 of his Notice of Appeal.[75]

30. Šljivančanin's Notice of Appeal, under Ground 7, very broadly sets out his arguments concerning his sentence, paragraph 31 dealing with the Trial Chamber's consideration of

[66] Šljivančanin's Appeal Brief, paras 30-31, 496-506.
[67] Šljivančanin's Appeal Brief, para. 31.
[68] Motion, para. 2 (c) (iv) (citing Šljivančanin's Notice of Appeal, paras 31-33).
[69] Response, para. 39.
[70] Response, para. 39.
[71] Response, para. 40.
[72] Response, paras 42-43.
[73] Response, para. 43.
[74] Response, para. 44.

aggravating circumstances with specific reference to paragraphs 690 and 704 of the Trial Judgement, paragraph 32 dealing with the Trial Chamber's consideration of mitigating circumstances, with specific reference to paragraphs 704 and 716 of the Trial Judgement.

31. The Appeals Chamber considers that Ground 6, sub-ground A (I) of Šljivančanin's Appeal Brief, which submits that the Trial Chamber erred in finding that the POWs at Ovčara were under his immediate responsibility, is covered by Ground 7, paragraph 31 of his Notice of Appeal, which refers to the Trial Chamber's establishment of aggravating circumstances and, in particular, to paragraph 704 of the Trial Judgement, where the Trial Chamber found that the circumstances of the his conduct "reveal a failure to act to protect from severe criminal abuse the prisoners of war who were his immediate responsibility".[76]

32. Ground 6, sub-ground A (II) of Šljivančanin's Appeal Brief, which submits that the Trial Chamber failed to consider as a mitigating factor the presence of other officers at Ovčara who were in a better position than Šljivančanin to act is not specifically pleaded in his Notice of Appeal. It could be argued that this ground of appeal is covered by paragraph 32 of Ground 7 as set out in Šljivančanin's Notice of Appeal, which alleges that the Trial Chamber erred in fact and law by not sufficiently evaluating mitigating circumstances in relation to the offence. The Appeals Chamber recalls, however, that the purpose for setting forth the grounds of appeal in a notice of appeal is to focus the mind of the respondent, right from the day the notice of appeal is filed, on the arguments which will be developed subsequently in the appeal brief.[77] Therefore the Appeals Chamber considers that the argument that there were other officers at Ovčara who were in a better position to act than Šljivančanin was not raised in his Notice of Appeal.

33. Hence, Ground 6, sub-ground A (II) of Šljivančanin's Appeal Brief is a new ground of appeal not covered by his Notice of Appeal.

6. Conclusions

34. The Appeals Chamber found that the following grounds or sub-grounds of Šljivančanin's Appeal Brief are covered by his Notice of Appeal: sub-ground B of Ground 5 and sub-ground A (I) of Ground 6. The following grounds or sub-grounds of Šljivančanin's Appeal Brief are new grounds of appeal that go beyond the scope of his Notice of Appeal: sub-ground D of Ground 1; sub-grounds A and C of Ground 2; sub-ground A of Ground 5; and sub-ground A (II) of Ground 6.

[75] Response, para. 45.
[76] Trial Judgement, para. 704.
[77] *See supra* para. 8.

35. As set out in paragraph 17 of the Practice Direction on Formal Requirements for Appeals from Judgment, where a party fails to comply with the requirements laid down in the Practice Direction – in this case, by not clearly specifying each ground of appeal in its notice of appeal as required under Paragraph 1 (c) – the Appeals Chamber may, within its discretion, decide upon an appropriate sanction, which can include an order for clarification or re-filing, or reject a filing or dismiss submissions therein.[78] The question of whether to strike new grounds of appeal or alternatively, to order an appellant to file an amended notice of appeal reflecting these grounds, is premised on two competing considerations, both of which have elements of validity. The first is the consideration of whether or to what extent the respondent has been prejudiced by not having had adequate and timely notice about these grounds of appeal. Related to this is also a procedural consideration that "[a]ppellants should not be permitted to side-step procedures fixed within the Statute and the Rules. Nor should they be given the opportunity to continue to point out errors as and when they believe they have been identified."[79] The second consideration is whether the adjudication of these grounds or sub-grounds of appeal in an appellant's case is of substantial importance to the appeal such that without their inclusion there is a risk of a miscarriage of justice.[80] The Appeals Chamber will review each of these new sub-grounds of appeal in light of these considerations.

36. Sub-ground D of Ground 1 of Šljivančanin's Appeal Brief contains the submission that the Trial Chamber erred by failing to consider that its finding – that Šljivančanin was present at Ovčara on 20 November 1991 – is inconsistent with the evidence concerning his character. The purpose of Šljivančanin's sub-ground of appeal, as for all the sub-grounds under Ground 1, is to contest the finding of his presence at Ovčara on the relevant day. Given that four other sub-grounds are presented in his Appeal Brief with this same purpose, the Appeals Chamber does not consider that this sub-ground of appeal is of such substantial importance to the success of his appeal such as to lead to a miscarriage of justice if it is excluded. In view of this, the interest in the inclusion of this sub-ground of appeal is outweighed by the claim of prejudice of the Prosecution for not having been included in Šljivančanin's Notice of Appeal. The Appeals Chamber therefore strikes this sub-ground of appeal.

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[78] Practice Direction on Formal Requirements for Appeals from Judgement (IT/201), 7 March 2002, para. 17.
[79] *Prosecutor v. Zoran Kupreškić*, Case No. IT-95-16-T, Judgement, 23 October 2001, para. 470.
[80] The Appeals Chamber held in the *Kordić and Čerkez* case that "inadvertence or negligence by an appellant's counsel to plead a ground of appeal with sufficient clarity should not restrict an appellant's right to raise that ground of appeal where that ground could be of substantial importance to the success of an appeal such as to lead to a miscarriage of justice if it is excluded" (*Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Decision Granting Leave to Dario Kordić to Amend his Grounds of Appeal, 9 June 2002 ("*Kordić and Čerkez* Decision of 9 June 2002"), paras 5 and 8). The Appeals Chamber also upheld motions to amend a notice of appeal where the amendment was "of substantial importance to the success" of the appeal "such that denying it would lead to a miscarriage of justice" (*Blagojević and Jokić* Decision of 20 July 2005, p. 4). *See* also *Nahimana et al.* Decision of 17 August 2006, para. 12.

37. Sub-grounds A and C of Ground 2 of Šljivančanin's Appeal Brief allege, respectively, that aiding and abetting by omission is not a mode of liability included in the jurisdiction of the International Tribunal and that, if it exists, the Trial Chamber did not properly define it.[81] As Šljivančanin's conviction for torture under Article 7(1) of the Statute was based upon the mode of liability of aiding and abetting by omission,[82] the Appeals Chamber finds that these sub-grounds of appeal could be of substantial importance to the success of Šljivančanin's appeal such as to lead to a miscarriage of justice if they are excluded. In these circumstances, any inadvertence or negligence by Šljivančanin's Counsel to plead these sub-grounds of appeal with sufficient clarity in his Notice of Appeal should not restrict his right to raise these sub-grounds of appeal.[83] The Appeals Chamber notes that the prejudice that the Prosecution may have suffered as a result of not having had notice of these sub-grounds of appeal is minimal given that, as pointed out by Šljivančanin, the Prosecution indicated its awareness of these sub-grounds of appeal at least by the time of filing of the Prosecution's Reply Brief.[84] Any prejudice that may have arisen will in any case be cured by allocating additional time to the Prosecution to file supplemental submissions to its Respondent's Brief on these sub-grounds of appeal.

38. Sub-ground A of Ground 5 of Šljivančanin's Appeal Brief argues that the Trial Chamber erred by finding that Šljivančanin's omission had a substantial effect on the commission of crimes at Ovčara in the afternoon of 20 November 1991. Given that the test of "substantial effect" is central to the elements of the mode of liability of aiding and abetting a crime by omission,[85] this sub-ground of appeal is clearly of substantial importance to Šljivančanin's appeal. Indeed, if this finding of the Trial Chamber was overturned by the Appeals Chamber, there would be no need to proceed to the question of whether Šljivančanin had the required *mens rea* for this offence, as pleaded in his Notice of Appeal. Therefore, although the Prosecution may have suffered some prejudice by not having had adequate notice about this sub-ground of appeal from Šljivančanin's Notice of Appeal, the Appeals Chamber is of the view that this consideration is outweighed by the potential miscarriage of justice that might result from this sub-ground of appeal not being adjudicated by the Appeals Chamber. Furthermore, the prejudice that may have arisen will be cured by allocating additional time to the Prosecution to file supplemental submissions to its Respondent's Brief on this sub-ground of appeal.

39 Sub-ground A (II) of Ground 6 of Šljivančanin's Appeal Brief presents the argument that the Trial Chamber erred in failing to consider the presence at Ovčara of officers who had reason to

[81] Šljivančanin's Appeal Brief, paras 22, 190-193, 198-199, 201-235, 253-266.
[82] Trial Judgement, paras 662-670, 715.
[83] *Kordić and Čerkez* Decision of 9 June 2002, paras 5 and 8.
[84] Response, para. 27, referring to Prosecution Reply Brief, para. 45.

take measures, the material ability to act and who were in a better position than him to do so.[86] Šljivančanin identifies this as a "discernible error" in the Trial Chamber's appreciation of his role and responsibility in the torture of the prisoners of war at Ovčara.[87] However, the Appeals Chamber is not convinced that the exclusion of this argument would result in a miscarriage of justice or that the Prosecution has not been prejudiced by its inclusion.[88] The Appeals Chamber therefore strikes this sub-ground of appeal.

40. The Appeals Chamber is mindful that the proper procedure under which a notice of appeal may be amended is by its authorising a variation of the grounds of appeal upon good cause being shown by motion under Rule 108 of the Rules. Nonetheless, the Appeals Chamber retains its discretion to deal with the issues that are raised in this Motion, which requires similar considerations in deciding whether or not to strike these new sub-grounds of appeal from Šljivančanin's Appeal Brief. Therefore, in view of the interests of judicial economy, the Appeals Chamber finds it expedient and appropriate to order Šljivančanin to file an amended notice of appeal reflecting the additional sub-grounds of appeal as identified in this decision that have not been struck, rather than to order him to request leave to submit an amended notice of appeal including these sub-grounds of appeal, as the issues have already been adjudicated.

41. In reaching its decision to allow Šljivančanin to submit an amended notice of appeal rather than to strike all of the new sub-grounds of appeal in his Appeal Brief, the Appeals Chamber also takes into account the practice of the International Tribunal to interpret the "good cause" rule more restrictively at later stages in the appeal proceedings when variations to the grounds of appeal may have a deleterious effect upon the efficient administration of justice.[89] In the present case, the inclusion of these sub-grounds of appeal in an amended notice of appeal does not unduly interfere with the expeditious administration of justice as these arguments do not reflect a change to an

[85] *See* Trial Judgement, paras 552 and 670.
[86] Šljivančanin's Appeal Brief, paras 502-506.
[87] Šljivančanin explains this ground of appeal more fully at paragraph 506 of his Appeal Brief: "Had the Trial Chamber properly considered the presence and involvement of other officers at Ovčara, it could only have concluded that [his] role and responsibility [...] in the tortures committed at Ovčara was by no means substantial, and in fact, minimal."
[88] *See Nahimana et al.* Decision of 17 August 2006, para. 14 (holding that it is the appellant's burden to demonstrate that each amendment should be permitted under the standards).
[89] *Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-A, Decision on Miroslav Bralo's Motion for Leave to Supplement Appeal Brief in Light of New Information Concerning Ex Parte Portion of the Trial Record, 9 January 2007 ("*Bralo* Decision of 9 January 2007"), para. 11 (finding that "the jurisprudence of the Tribunal establishes that the 'good cause' requirement *must be interpreted restrictively at late stages in appeal proceedings* when amendments would necessitate a substantial slowdown in the progress of the appeal – for instance, *when they would require briefs already filed to be revised and resubmitted*. To hold otherwise would leave appellants free to change their appeal strategy and essentially restart the appeal process at will (including after they have had the advantage of reviewing the arguments in a response brief), thus interfering with the expeditious administration of justice and prejudicing the other parties to the case" (citations omitted, emphases added).

appeal strategy by Šljivančanin subsequent to reading the Prosecution's Respondent's brief, which has not yet been filed.[90]

C. Disposition

For the foregoing reasons, the Appeals Chamber

GRANTS the Motion to strike sub-ground D of Ground 1 and sub-ground A (II) of Ground 6 of Šljivančanin's Appeal Brief;

ORDERS Šljivančanin to file, within three days of the present decision, an amended Notice of Appeal, dropping the grounds that he has decided not to pursue, including sub-grounds A and C of Ground 2 and sub-ground A of Ground 5, and presenting his arguments in the same order as they appear in his Appeal Brief, pursuant to paragraph 4 of the Practice Direction on Formal Requirements for Appeals from Judgement (IT/201), and an amended and public version of his Appeal Brief, dropping sub-ground D of Ground 1 and sub-ground A (II) of Ground 6 of his Appeal Brief;

ALLOWS the Prosecution to file supplemental submissions to its Respondent's Brief on sub-grounds A and C of Ground 2, sub-grounds A and B of Ground 5, and sub-ground A (I) of Ground 6 of Šljivančanin's Appeal Brief, within 15 days of the issuing of the present decision;

ORDERS Šljivančanin to file his reply to the Prosecution's supplemental submissions within 7 days of their filing, and

DISMISSES the remaining parts of the Motion.

Done in English and French, the English version being authoritative.

Done this twenty fifth day of August 2008,

At The Hague,
The Netherlands.

Judge Theodor Meron
Presiding Judge

[Seal of the International Tribunal]

[90] The Appeals Chamber has held previously that "unjustified amendments [to notices of appeal] would result in appellants being free to change their appeal strategy after they have had the advantage of reviewing the arguments in a response brief, interfering with the expeditious administration of justice and prejudicing the other parties to the case, [...] which is unacceptable" (*Nahimana et al.* Decision of 17 August 2006, para. 51). *See* also *Bralo* Decision of 9 January 2007, para. 11.

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No. IT-98-34-A

Date: 3 May 2006

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Judgement of: **3 May 2006**

PROSECUTOR

v.

MLADEN NALETILIĆ, *a.k.a.* "TUTA"
VINKO MARTINOVIĆ, *a.k.a.* "ŠTELA"

JUDGEMENT

Counsel for the Prosecutor:

Mr. Norman Farrell
Mr. Peter M. Kremer
Ms. Marie-Ursula Kind
Mr. Xavier Tracol
Mr. Steffen Wirth

Counsel for Naletilić and Martinović:

Mr. Matthew Hennessy and Mr. Christopher Meek for Mladen Naletilić
Mr. Želimir Par and Mr. Kurt Kerns for Vinko Martinović

[customary international] law, Article 2 of the Statute only applies to offences committed within the context of international armed conflicts".[255]

113. *Tadić* did not directly address the further question posed by this case: whether the mental state element of Article 2 crimes encompasses knowledge of the international character of the armed conflict. In *Kordić and Čerkez*, the Appeals Chamber provided an affirmative answer to that question, stating that although the accused need not "make a correct legal evaluation as to the international character of the armed conflict", he must be "aware of the *factual* circumstances, *e.g.*, that a foreign state was involved in the armed conflict".[256] The Appeals Chamber considers it necessary to elucidate the matter further. In the Appeals Chamber's view, the conclusion of *Kordić and Čerkez* was correct, and follows logically from the principles established in *Tadić*.

114. The principle of individual guilt requires that an accused can only be convicted for a crime if his *mens rea* comprises the *actus reus* of the crime. To convict him without proving that he knew of the facts that were necessary to make his conduct a crime is to deny him his entitlement to the presumption of innocence. The specific required mental state will vary, of course, depending on the crime and the mode of liability. But the core principle is the same: for a conduct to entail criminal liability, it must be possible for an individual to determine *ex ante*, based on the facts available to him, that the conduct is criminal. At a minimum, then, to convict an accused of a crime, he must have had knowledge of the facts that made his or her conduct criminal.[257]

115. The critical question before the Appeals Chamber is therefore this: what conduct constitutes a crime amounting to a "grave breach" of the Geneva Conventions? Is it the mere commission of acts listed in Article 2(a) to (h) of the Statute, such as "wilful killing"? Or is it the commission of such acts on the basis that they were committed in the course of an international armed conflict?

116. The Appeals Chamber concludes that the existence and international character of an armed conflict are both jurisdictional prerequisites (as established in *Tadić*) and substantive elements of crimes pursuant to Article 2 of the Statute. The fact that something is a jurisdictional prerequisite does not mean that it does not at the same time constitute an element of a crime. If certain conduct becomes a crime under the Statute only if it occurs in the context of an international armed conflict, the existence of such a conflict is not merely a jurisdictional prerequisite: it is a substantive element of the crime charged. Thus, the Prosecution's obligation to prove intent also encompasses the accused's knowledge of the facts pertinent to the internationality of an armed conflict.

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[255] *Tadić* Appeal Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, paras 83-84.
[256] *Kordić and Čerkez* Appeal Judgement, para. 311.
[257] In some contexts, particularly with respect to a commander's knowledge of his subordinates' crimes, it suffices that an accused had "reason to know" of the facts in question: *see* Article 7(3) of the Statute.

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-03-68-A

Date: 3 July 2008

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Wolfgang Schomburg, Presiding**
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: **Hans Holthuis**

Judgement of: **3 July 2008**

PROSECUTOR

v.

NASER ORIĆ

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Ms. Michelle Jarvis
Ms. Christine Dahl
Mr. Paul Rogers
Ms. Laurel Baig
Ms. Nicole Lewis
Ms. Najwa Nabti

Counsel for Naser Orić:

Ms. Vasvija Vidović
Mr. John Jones

47. Having considered the Trial Judgement as a whole, the Appeals Chamber is left with only a small number of general findings – for instance, that Atif Krdžić might have been "wilfully blind" to the crimes and that he was "conspicuously absent" from the detention facilities – without any indication of whether and how they relate to any form of criminal liability under the International Tribunal's Statute. These scattered fragments do not allow the Appeals Chamber to conclude on what basis the Trial Chamber found Orić's only identified culpable subordinate criminally responsible. Such finding would have been required to determine Orić's guilt. For these reasons, the Appeals Chamber finds that the Trial Chamber erred in failing to resolve the issue of whether Orić's subordinate incurred criminal responsibility.

48. In the absence of a finding on the basis on which Orić's only identified culpable subordinate was found criminally responsible, Orić's convictions under Article 7(3) of the Statute cannot stand. The Trial Chamber's error therefore invalidates the decision.

49. Having granted Orić's appeal in this part, the Appeals Chamber would not necessarily need to address Orić's arguments pertaining to his knowledge or reason to know of his subordinate's alleged criminal conduct. However, the Appeals Chamber deems it necessary to give full consideration of the issue of Orić's *mens rea* raised under his sub-ground of appeal 1(F)(2).

5. Orić's knowledge or reason to know of his subordinate's alleged criminal conduct (Orić's Ground 1(F)(2))

50. Under his ground of appeal 1(F)(2), Orić submits that there was no evidence that he knew that the Military Police was criminally responsible for the commission of the crimes committed in the detention facilities.[111] Before it can turn to Orić's submissions, the Appeals Chamber must first consider whether the Trial Chamber actually made the challenged finding.

51. The Appeals Chamber recalls that to hold a superior criminally liable under Article 7(3) of the Statute it must be found that he knew or had reason to know of his subordinate's criminal conduct:

> The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[112]

[111] Orić Appeal Brief, paras. 129(e), 130-137. *See also* Prosecution Response Brief, paras. 50 and 53.
[112] Article 7(3) of the Statute.

52. The Appeals Chamber notes that the Trial Chamber made no explicit finding as to whether Orić knew or had reason to know of his subordinate's alleged criminal responsibility for the mistreatment of Serb detainees.[113] As such a pivotal finding was required, the Appeals Chamber will examine whether a holistic reading of the Trial Judgement reveals that the Trial Chamber was satisfied that Orić had the required *mens rea* under Article 7(3) of the Statute.

53. In its analysis of Orić's "imputed knowledge", the Trial Chamber found that Orić "appears to have had no doubt that the killing of a detainee was a matter that concerned him as he discussed it with Hamed Salihović and Ramiz Bećirović with a view to prevent reoccurrence."[114] The Trial Chamber further found that Orić was "instrumental in promoting an investigation of this incident, which ultimately resulted in the removal of Mirzet Halilović, a decision in which the Accused took an active part."[115] The Appeals Chamber considers that these findings imply that the Trial Chamber was satisfied that Orić had knowledge of Mirzet Halilović's criminal conduct, but notes that the latter was not found to be Orić's subordinate.[116]

54. Regarding Orić's only identified culpable subordinate, Atif Krdžić, the Trial Chamber held that Orić "was aware that, responding to problems with the Srebrenica military police, Mirzet Halilović had been replaced by Atif Krdžić as its commander."[117] It also found that Orić knew that his deputy, Zulfo Tursunović, was visiting the Serb detainees at the detention facilities.[118] The Trial Chamber continued: "The reality of the situation is that more Serb detainees were killed and cruelly treated after Atif Krdžić was appointed commander of the Srebrenica military police than before. In addition, this occurred at a time when the Srebrenica military police was assigned a new commander, and was undergoing structural changes, supposedly to resolve previous problems."[119] The Trial Chamber concluded by holding that "[a]gainst the backdrop of the Accused's prior notice, it appears that the Accused did not deem it necessary to verify if further Serb detainees were killed or cruelly treated and acted on that assumption."[120]

55. Read in isolation, these findings might be understood to mean that the Trial Chamber was satisfied that Orić had "prior notice" – in other words, reason to know – that Atif Krdžić would continue his predecessor's failure to ensure that the Serb detainees were not subjected to murder and cruel treatment. However, the Appeals Chamber considers that, read in context, the finding on

[113] *See* Trial Judgement, paras. 533-560.
[114] Trial Judgement, para. 550.
[115] Trial Judgement, para. 550.
[116] Trial Judgement, paras. 492, 532. *See infra*, para. 166.
[117] Trial Judgement, para. 552.
[118] Trial Judgement, para. 552.
[119] Trial Judgement, para. 558. *See also ibid.*, paras. 495, 505-506.
[120] Trial Judgement, para. 558.

Orić's "prior notice" relates to his knowledge that "Serb detainees kept at the Srebrenica Police Station were cruelly treated, and that one of them had been killed."[121] Thus, the finding did not concern Orić's reason to know of his subordinate's conduct, but, instead, his notice of the crimes committed by others at the Srebrenica Police Station.

56. On such a crucial element of the accused's criminal responsibility under Article 7(3) of the Statute as his knowledge or reason to know of his subordinate's criminal conduct, the Appeals Chamber emphasises that neither the Parties nor the Appeals Chamber can be required to engage in this sort of speculative exercise to discern findings from vague statements by the Trial Chamber.

57. The difficulty 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,[122] which were not physically committed by Atif Krdžić, his only identified culpable subordinate:[123]

> Having established that subsequent to 27 November 1992, a superior-subordinate relationship existed between the Accused and *the head of the Srebrenica military police* ultimately responsible for the murder and cruel treatment, the Trial Chamber must now examine to what extent, if any, the Accused had knowledge or should have been aware of *the occurrence of murder and cruel treatment at the Srebrenica Police Station and the Building* between December 1992 and March 1993.[124]

This approach was ultimately reflected in the Trial Chamber's conclusion as to Orić's *mens rea*, which was squarely limited to the question of whether he knew or had reason to know of the actual crimes committed at the two detention facilities, to the exclusion of any finding on his knowledge of the alleged criminal conduct of his subordinate, Atif Krdžić.[125]

58. The Prosecution submits that, in the context of crimes such as those at issue which occur in a prison setting, knowledge of the crimes and knowledge of the subordinates' criminal conduct "are one and the same."[126] It argues that "[a]s soon as Orić knew or had reason to know that prisoners were being mistreated and killed, he must also be considered to have known that his subordinates in charge of the prisoners were criminally responsible for that mistreatment."[127]

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[121] Trial Judgement, para. 557. *See also ibid.*, para. 550: "His knowledge about this killing incident, as well as of the cruel treatment of the other detainees, put him on notice that the security and the well-being of all Serbs detained henceforth in Srebrenica was at risk".
[122] Trial Judgement, paras. 533-560. *See also ibid.*, paras. 574, 576, 577.
[123] *See supra*, paras. 24, 25, 33-35.
[124] Trial Judgement, para. 533 (emphasis added; footnote omitted).
[125] Trial Judgement, para. 560.
[126] AT. 1 April 2008, p. 22.
[127] Prosecution Written Submissions of 25 March 2008, para. 19. *See also ibid.*, para. 18; AT. 1 April 2008, pp. 23-24; AT. 2 April 2008, pp. 192-193.

59. The Appeals Chamber stresses that knowledge of a crime and knowledge of a person's criminal conduct are, in law and in fact, distinct matters. Although the latter may, depending on the circumstances, be inferred from the former, the Appeals Chamber notes that such an inference was not made by the Trial Chamber.[128] Its enquiry was limited to Orić's knowledge or reason to know of the crimes committed in the detention facilities, and so was its conclusion. Therefore, the Appeals Chamber need not consider the Prosecution's assertion that Orić knew or had reason to know of the crimes themselves.[129]

60. In conclusion, the Appeals Chamber finds that, in order to establish Orić's responsibility under Article 7(3) of the Statute, the Trial Chamber was under the obligation to make a finding on whether he knew or had reason to know that Atif Krdžić, the only identified culpable subordinate, was about to or had engaged in criminal activity. The Trial Chamber's failure to do so constitutes an error of law.

6. Conclusion

61. The Appeals Chamber grants Orić's grounds 1(E)(1) and 5 insofar as he alleges therein that the Trial Chamber failed to resolve the issue of his subordinate's criminal responsibility. In relation to Orić's sub-ground of appeal 1(F)(2), the Appeals Chamber finds that the Trial Chamber also failed to resolve the issue of whether Orić knew or had reason to know that his subordinate was about to or had committed crimes. These errors invalidate the Trial Chamber's decision to find Orić criminally responsible for failing to prevent the crimes of murder and cruel treatment committed against Serb detainees between 27 December 1992 and 20 March 1993.

[128] Regarding the possibility of making such an inference in the circumstances of the case, the Appeals Chamber refers to its analysis of the Prosecution's appeal, *infra* paras. 172-174.
[129] *See* AT. 1 April 2008, pp. 19-22, 24-25.

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UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No. IT-04-81-A

Date: 15 October 2012

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Carmel Agius
Judge Liu Daqun
Judge Arlette Ramaroson
Judge Andrésia Vaz

Registrar: **Mr. John Hocking**

Order of: **15 October 2012**

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

ADDENDUM TO THE SCHEDULING ORDER FOR APPEAL HEARING

The Office of the Prosecutor:

Ms. Helen Brady

Counsel for Momčilo Perišić:

Mr. Novak Lukić
Mr. Gregor Guy-Smith

THE APPEALS CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("Appeals Chamber" and "Tribunal", respectively);

NOTING the appeal lodged by Momčilo Perišić ("Perišić") against the Judgement rendered by Trial Chamber I ("Trial Chamber") on 6 September 2011 in the case of *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T ("Appeal");[1]

NOTING the "Scheduling Order for Appeal Hearing", filed on 24 September 2012 ("Scheduling Order"), which orders that the Appeal be heard on Tuesday, 30 October 2012 ("Appeal Hearing"), and informs the parties of the timetable of the Appeal Hearing;[2]

CONSIDERING the need to ensure that the time allotted for the Appeal Hearing is used as efficiently as possible;

RECALLING that the parties are expected to focus their oral arguments on the grounds of appeal raised in their briefs and that an appeal hearing is not the occasion for presenting new arguments on the merits of the case;[3]

EMPHASIZING that the present *Addendum* in no way expresses the Appeals Chamber's views on the merits of the Appeal;

HEREBY INFORMS the parties that the Appeal Hearing will take place in Courtroom I; and

INVITES the parties, without prejudice to any other matter which they or the Appeals Chamber may wish to address, to discuss, with references to the record:

1. How the Appeals Chamber should address the issue of "specific direction" in the context of aiding and abetting liability;
2. Whether aid that is not "specifically directed" towards a particular crime can have the substantial effect required to enter a conviction for aiding and abetting;
3. Whether the aid facilitated by Perišić met the requirements of "specific direction", if any, in the context of aiding and abetting liability;
4. Whether the Trial Chamber erred in finding that the assistance facilitated by Perišić had a substantial effect on the commission of the Army of Republika Srpksa crimes; and

[1] Notice of Appeal of Momčilo Perišić, 8 November 2011; Appeal Brief of Momčilo Perišić, 6 February 2012 (confidential) ("Appeal Brief"). A final public redacted version of the Appeal Brief was filed on 10 April 2012. *See also* Corrigendum to Mr. Perišić's Notice of Appeal, 7 February 2012.
[2] Scheduling Order, p. 1.
[3] *Prosecutor v. Rasim Delić*, Case No. IT-04-83-A, *Addendum* to the Order Scheduling the Appeal Hearing, 15 December 2009, p. 2.

5. Whether the Trial Chamber erred in finding that Perišić had the *de jure* and *de facto* authority to discipline and issue command orders to 40th Personnel Centre members.

Done in English and French, the English version being authoritative.

Done this 15th day of October 2012,
At The Hague,
The Netherlands.

Judge Theodor Meron
Presiding

[Seal of the Tribunal]

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No. IT-05-88-T

Date: 10 June 2010

Original: English

IN TRIAL CHAMBER II

Before: **Judge Carmel Agius, Presiding**
Judge O-Gon Kwon
Judge Kimberly Prost
Judge Ole Bjørn Støle – Reserve Judge

Registrar: **Mr. John Hocking**

Judgement of: **10 June 2010**

PROSECUTOR
v.
VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVČANIN
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ

PUBLIC REDACTED

JUDGEMENT
Volume I

Office of the Prosecutor
Mr. Peter McCloskey

Counsel for the Accused
Mr. Zoran Živanović and Ms. Mira Tapušković for Vujadin Popović
Mr. John Ostojić and Mr. Predrag Nikolić for Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić
Mr. Christopher Gosnell and Ms. Tatjana Čmerić for Ljubomir Borovčanin
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Radivoje Miletić
Mr. Dragan Krgović and Mr. David Josse for Milan Gvero
Mr. Peter Haynes and Mr. Simon Davis for Vinko Pandurević

logical implication of this pronouncement is that there cannot be liability for ordering, if the crime, which the accused is charged with ordering, was not actually committed.[3332]

(d) Aiding and Abetting

1014. Aiding and abetting is a form of accomplice liability.[3333] In *Blagojević and Jokić*, the Appeals Chamber reiterated that:

> an aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime, which have a substantial effect on the perpetration of the crime. [...] The requisite mental element of aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator.[3334]

The Appeals Chamber however observed that "specific direction" was not always included as an element of the *actus reus* of aiding and abetting.[3335] It referred to the contextual nature of the statement and confirmed that "specific direction" is not an essential ingredient of the *actus reus* of aiding and abetting.[3336]

1015. An aider and abettor contributes "to the perpetration" of a crime, whether he assists a crime committed by a physical perpetrator or a participant in a joint criminal enterprise who might not be a physical perpetrator.[3337] There cannot be liability for aiding and abetting, if the crime, which the accused is charged with aiding and abetting, was not actually committed.[3338]

1016. An accused needs to know that his or her acts assist the commission of the crime that he or she is charged with aiding and abetting, though the accused does not need to have the intent to commit the crime.[3339] The aider and abetter does not need to know who is committing the crime.[3340] The person or persons committing the crime need not have been tried or identified, even in respect

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[3332] *Martić* Trial Judgement, para. 441; *Brđanin* Trial Judgement, para. 267; *Kajelijeli* Trial Judgement, para. 758; *Semanza* Trial Judgement, para. 378.

[3333] *Tadić* Appeal Judgement, para. 229.

[3334] *Blagojević and Jokić* Appeal Judgement, para. 127. *See also*; *Simić* Appeal Judgement, paras. 85–86; *Vasiljević* Appeal Judgement, para. 102; *Blaškić* Appeal Judgement, para. 45; *Tadić* Appeal Judgement, para. 229. *See also Ntagerura et al.* Appeal Judgement, para. 370.

[3335] *Blagojević and Jokić* Appeal Judgement, para. 189, referring to *Krnojelac* Appeal Judgement, para. 37, citing *Tadić* Appeal Judgment, para. 229; *Čelebići* Appeal Judgement, para. 345, citing *Tadić* Trial Judgement, para 688.

[3336] *Blagojević and Jokić* Appeal Judgement, paras. 185–186, 188–189. *See also Mrkšić and Šljivančanin* Appeal Judgement, para. 159.

[3337] *Blagojević and Jokić* Appeal Judgement, para. 127; *Brđanin* Appeal Judgement, para. 484; *Simić* Appeal Judgement, para. 86; *Blaškić* Appeal Judgement, para. 49; *Vasiljević* Appeal Judgement, para. 102.

[3338] *Aleksovski* Appeal Judgement, para. 165.

[3339] *Brđanin* Appeal Judgement, para. 484; *Blaškić* Appeal Judgement, para. 49; *Vasiljević* Appeal Judgement, paras. 102, 142–143; *Aleksovski* Appeal Judgement, para. 162; *Tadić* Appeal Judgement, para. 229.

[3340] *Krstić* Appeal Judgement, para. 143. *See also Brđanin* Appeal Judgement, para. 355. The Appeals Chamber held Krstić responsible for aiding and abetting genocide, irrespective of the fact that the individuals committing the genocide were not identified.

of a crime that requires specific intent.[3341] Neither does the person or persons committing the crime need to be aware of the involvement of the aider and abetter.[3342] Accordingly, the Prosecution generally need not provide evidence that a plan or an agreement existed between the aider and abettor and the person or persons committing the crimes.[3343]

1017. While an accused may know of a number of crimes that might be committed with his contribution, he must be aware, at a minimum, of the essential elements of the crime for which he is charged with aiding and abetting.[3344] The accused needs to know that the person or persons in the joint criminal enterprise intended the crime he or she is charged with aiding and abetting.[3345] With respect to specific-intent crimes such as genocide and persecution, the accused needs to know that the person or persons in the joint criminal enterprise possessed the genocidal or discriminatory intent.[3346]

1018. The assistance, encouragement, or moral support provided by an aider and abettor must have had a substantial effect on the commission of the crime.[3347] The Prosecution need not, however, prove that the crime would not have been committed absent contribution of the aider and abettor.[3348]

1019. The Appeals Chamber has held that omission proper may lead to individual criminal responsibility under Article 7(1) of the Statute where there is a legal duty to act.[3349] Moreover, the Appeals Chamber has consistently found that, in the circumstances of a given case, the *actus reus*

[3341] *Krstić* Appeal Judgement, para. 143. *See also Brđanin* Appeal Judgement, para. 355.
[3342] *Tadić* Appeal Judgement, para. 229.
[3343] *Krnojelac* Appeal Judgement, para. 33; *Tadić* Appeal Judgement, para. 229.
[3344] *Brđanin* Appeal Judgement, para. 484; *Simić* Appeal Judgement, para. 86; *Aleksovski* Appeal Judgement, para. 162.
[3345] *Brđanin* Appeal Judgement, paras. 487-488.
[3346] *Krstić* Appeal Judgement, para. 143; *Vasiljević* Appeal Judgement, paras. 142–143. *See Blagojević and Jokić* Appeal Judgement, para. 127; *Simić* Appeal Judgement, para. 86; *Krstić* Appeal Judgement, para. 140 (genocide); *Krnojelac* Appeal Judgement, para. 52 (persecution). *See also Semanza* Appeal Judgement, para. 316 (genocide); *Ntakirutimana and Ntakirutimana* Appeal Judgement, para. 501 (genocide).
[3347] *Brđanin* Appeal Judgement, para. 348; *Simić* Appeal Judgement, para. 85; *Blaškić* Appeal Judgement, para. 46; *Vasiljević* Appeal Judgement, para. 102; *Čelebići* Appeal Judgement, para. 352; *Aleksovski* Appeal Judgement, para. 162; *Tadić* Appeal Judgement, para. 229. *See also Gacumbitsi* Appeal Judgement, para. 140; *Furundžija* Trial Judgement, para. 234.
[3348] *Mrkšić and Šljivančanin* Appeal Judgement, para. 81 (holding "[t]here is no requirement of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime or that such conduct served as the precedent to the commission of the crime"); *Brđanin* Appeal Judgement, para. 348; *Simić* Appeal Judgement, para. 85; *Blaškić* Appeal Judgement, para. 48. The Appeals Chamber in *Brđanin* held that "[i]n cases where tacit approval or encouragement has been found to be the basis for criminal responsibility, it has been the authority of the accused combined with his presence on (or very near to) the crime scene, especially if considered together with his prior conduct, which all together allow the conclusion that the accused's conduct amounts to official sanction of the crime and thus substantially contributes to it." *Brđanin* Appeal Judgement, para. 277, referring to *Kayishema and Ruzindana* Appeal Judgement, para. 201; *Akayesu* Trial Judgement, paras. 706-707; *Furundžija* Trial Judgement, paras 207-209; *Aleksovski* Trial Judgement, para. 88; *Bagilishema* Trial Judgement, para. 36; *Ndindabahizi* Trial Judgement, para. 457.
[3349] *Mrkšić and Šljivančanin* Appeal Judgement, para. 49, citing *Orić* Appeal Judgement, para. 43, *Brđanin* Appeal Judgement, para. 274; *Galić* Appeal Judgement, para. 175; *Blaškić* Appeal Judgement, para. 663; *Ntagerura et al.* Appeal Judgement, paras. 334, 370. *See also Tadić* Appeal Judgement, para. 188.

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No. IT-98-32/1-R77.2-A

Date: 16 November 2012

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Khalida Rachid Khan, Presiding**
Judge Mehmet Güney
Judge Fausto Pocar
Judge Arlette Ramaroson
Judge Andrésia Vaz

Registrar: **Mr. John Hocking**

Judgement of: **16 November 2012**

PROSECUTOR

v.

JELENA RAŠIĆ

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Mr. Paul Rogers
Mr. Kyle Wood
Mr. Aditya Menon

Counsel for Jelena Rašić:

Ms. Mira Tapušković

II. STANDARD OF APPELLATE REVIEW IN SENTENCING

8. The Appeals Chamber recalls the applicable standard of appellate review pursuant to Article 25 of the Statute of the Tribunal ("Statute"). The Appeals Chamber reviews only errors of law which have the potential to invalidate the decision of the trial chamber and errors of fact which have occasioned a miscarriage of justice.[26]

9. Appeals against sentence, as in the case of appeals from a trial judgement, are appeals *stricto sensu*, which means that they are of a corrective nature and not trials *de novo*.[27] Trial chambers are vested with broad discretion in determining an appropriate sentence, including the determination of the weight given to mitigating or aggravating circumstances, due to their obligation to individualise penalties to fit the circumstances of the convicted person and the gravity of the crime.[28] As a general rule, the Appeals Chamber will not substitute its own sentence for that imposed by the trial chamber unless the appealing party demonstrates that the trial chamber committed a "discernible error" in exercising its discretion or failed to follow the applicable law.[29]

10. To demonstrate that the trial chamber committed a discernible error in exercising its discretion, an appellant is required to show that the trial chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the trial chamber's decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the trial chamber must have failed to properly exercise its discretion.[30]

[26] *Haradinaj et al.* Appeal Judgement, para. 9 and references cited therein. *See also Ntabakuze* Appeal Judgement, para. 10.
[27] *Haradinaj et al.* Appeal Judgement, para. 321 and references cited therein.
[28] *Milošević* Appeal Judgement, para. 297; *Ntabakuze* Appeal Judgement, para. 264.
[29] *Haradinaj et al.* Appeal Judgement, para. 321 and references cited therein; *Ntabakuze* Appeal Judgement, para. 264.
[30] *Haradinaj et al.* Appeal Judgement, para. 322 and references cited therein.

63. The Prosecution responds that Rašić fails to demonstrate that the Trial Chamber erred in finding that she abused a position of trust as a case manager.[172] It argues that Rašić's submissions are largely semantic because she was acting as an "officer of justice" by virtue of her role as a case manager which placed her in a significant position of trust despite her youth and inexperience.[173] Moreover, it submits that she fails to explain how the Trial Chamber was unreasonable in describing a case manager as an "officer of justice" or how this description had a negative impact on her sentence.[174]

64. The Prosecution further responds that Rašić's knowledge of the falsity of the Tabaković Statement is irrelevant to whether she bribed him and incited him to bribe others.[175] It submits that Rašić fails to show that the Trial Chamber erroneously considered the fact that her criminal conduct was "persistent and repetitive" as an aggravating factor just because the *Tabaković* trial chamber did not explicitly mention this as an aggravating factor.[176] Finally, the Prosecution also submits that she fails to explain how her sentence should be shorter merely because others might be more culpable than she.[177]

2. Discussion

65. The Appeals Chamber finds that Rašić has failed to show that the Trial Chamber erroneously relied on her position as an "officer of justice" as an aggravating circumstance. The Appeals Chamber notes that neither party explicitly argued that Rašić was an "officer of justice". However, the Appeals Chamber observes that the Trial Chamber used this term to describe Rašić's position of trust as a member of the defence team.[178] This position of trust was mentioned by the Prosecution when it submitted that "Ms. Ra[š]i[ć] occupied a position of trust, as [...] Case Manager, whose activities were at a level above those of Mr. Tabaković, whilst he was a level himself above Mr. X and [Mr.] Y."[179] Thus, Rašić's argument effectively turns on semantics and she has failed to show that the Trial Chamber abused its discretion when it relied on an aggravating circumstance that was not mentioned by the parties.

66. Similarly, the Appeals Chamber finds that Rašić has failed to show that the Trial Chamber's finding that she was an "officer of justice" is not supported by the evidence. Again, the Appeals

[172] Prosecution Response Brief, para. 17. The Prosecution does not explicitly respond to Rašić's submission that the aggravating circumstance of "officer of justice" was outside the scope of arguments put forth by the parties.
[173] Prosecution Response Brief, para. 17.
[174] Prosecution Response Brief, para. 17.
[175] Prosecution Response Brief, para. 18.
[176] Prosecution Response Brief, para. 14.
[177] Prosecution Response Brief, para. 19.
[178] Sentencing Judgement, para. 18.
[179] T. 57 (31 January 2012).

UNITED
NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-01-42-A
		Date:	17 July 2008
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Andrésia Vaz, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Theodor Meron
Judge O-Gon Kwon

Registrar: **Mr. Hans Holthuis**

Judgement of: **17 July 2008**

PROSECUTOR

v.

PAVLE STRUGAR

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Ms. Helen Brady
Ms. Michelle Jarvis
Mr. Xavier Tracol
Ms. Laurel Baig

Counsel for the Accused:

Mr. Goran Rodić
Mr. Vladimir Petrović

testimony of a witness is uncorroborated.[57] Where the Appeals Chamber considers that an appellant makes such assertions without substantiating them, it will summarily dismiss that alleged error or argument ("category 5").

6. Mere Assertions that the Trial Chamber Must Have Failed to Consider Relevant Evidence

24. A Trial Chamber does not necessarily have to refer to the testimony of every witness and to every piece of evidence on the record[58] and failure to do so does not necessarily indicate lack of consideration.[59] This holds true "as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence".[60] Such disregard is shown "when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning".[61] Where the Appeals Chamber finds that an appellant merely asserts that the Trial Chamber failed to consider relevant evidence, without showing that an alleged error of fact occasioned a miscarriage of justice, it will summarily dismiss that alleged error or argument[62] ("category 6").

[57] The Appeals Chamber recalls that there is no legal requirement that the testimony of a single witness on a material fact be corroborated before it can be accepted as evidence: *Limaj et al.* Appeal Judgement, para. 203; *Kordić and Čerkez* Appeal Judgement, para. 274; *Čelebići* Appeal Judgement, para. 506.
[58] *Kvočka et al.* Appeal Judgement, para. 23.
[59] *Čelebići* Appeal Judgement, para. 481; *Kupreškić et al.* Appeal Judgement, para. 458.
[60] *Limaj et al.* Appeal Judgement, para. 86.
[61] *Ibid.*
[62] *Brdanin* Appeal Judgement, para. 24.

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-94-1-A

Date: 15 July 1999

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Mohamed Shahabuddeen, Presiding**
Judge Antonio Cassese
Judge Wang Tieya
Judge Rafael Nieto-Navia
Judge Florence Ndepele Mwachande Mumba

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Judgement of: **15 July 1999**

PROSECUTOR

v.

DU[KO TADI]

JUDGEMENT

The Office of the Prosecutor:

Mr. Upawansa Yapa
Ms. Brenda J. Hollis
Mr. William Fenrick
Mr. Michael Keegan
Ms. Ann Sutherland

Counsel for the Appellant:

Mr. William Clegg
Mr. John Livingston

quintessentially genocidal frame of mind, the accused would have to be acquitted of crimes against humanity because he acted for "purely personal" reasons. Similarly, if the same man said that he participated in the genocide only for the "purely personal" reason that he feared losing his job, he would also be entitled to an acquittal. Thus, individuals at both ends of the spectrum would be acquitted. In the final analysis, any accused that played a role in mass murder purely out of self-interest would be acquitted. This shows the meaninglessness of any analysis requiring proof of "non-personal" motives. The Appeals Chamber does not believe, however, that the Trial Chamber meant to reach such a conclusion. Rather, the requirement that the accused's acts be part of a context of large-scale crimes, and that the accused knew of this context, was misstated by the Trial Chamber as a negative requirement that the accused not be acting for personal reasons. The Trial Chamber did not, the Appeals Chamber believes, wish to import a "motive" requirement; it simply duplicated the context and *mens rea* requirement, and confused it with the need for a link with an armed conflict, and thereby seemed to have unjustifiably and inadvertently added a new requirement.

270. The conclusion is therefore warranted that the relevant case-law and the spirit of international rules concerning crimes against humanity make it clear that under customary law, "purely personal motives" do not acquire any relevance for establishing whether or not a crime against humanity has been perpetrated.

C. Conclusion

271. The Trial Chamber correctly recognised that crimes which are unrelated to widespread or systematic attacks on a civilian population should not be prosecuted as crimes against humanity. Crimes against humanity are crimes of a special nature to which a greater degree of moral turpitude attaches than to an ordinary crime. Thus to convict an accused of crimes against humanity, it must be proved that the crimes were *related* to the attack on a civilian population (occurring during an armed conflict) and that the accused *knew* that his crimes were so related.

272. For the above reasons, however, the Appeals Chamber does not consider it necessary to further require, as a substantive element of *mens rea,* a nexus between the specific acts allegedly committed by the accused and the armed conflict, or to require proof

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-94-1-A and IT-94-1-A *bis*

Date: 26 January 2000

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Mohamed Shahabuddeen, Presiding**
Vice-President Florence Ndepele Mwachande Mumba
Judge Antonio Cassese
Judge Wang Tieya
Judge Rafael Nieto-Navia

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Judgement of: **26 January 2000**

PROSECUTOR

v.

DU[KO TADI]

JUDGEMENT IN SENTENCING APPEALS

The Office of the Prosecutor:

Mr. Upawansa Yapa

Counsel for the Appellant:

Mr. William Clegg
Mr. John Livingston

II. APPEAL AGAINST SENTENCING JUDGMENT OF 14 JULY 1997

A. First Ground of Appeal: That the Sentence Imposed by the Trial Chamber is Unfair

1. Submissions of the Parties

(a) The Appellant

18. In the first ground of the appeal against the Sentencing Judgment of 14 July 1997, the Appellant alleges that the 20-year sentence imposed by Trial Chamber II is unfair.[34]

(i) The Appellant avers that the sentence was longer than the facts of the case required. Specifically, the Appellant contends that the Trial Chamber erred in failing to have regard to any "hierarchy of relative criminal culpability". The Appellant notes that, as a general sentencing principle, heavier penalties should be imposed on those who commit the gravest crimes and whose responsibility for those crimes is highest, and submits that it was incumbent upon the Trial Chamber in determining sentence to have in mind the development of an appropriate tariff reflecting the varying culpability of different accused. The Appellant submits that his rank, activities and position in the hierarchy ought to have placed him at the very bottom of such a list of culpability, and that this fact was not reflected in the Trial Chamber's decision to impose a sentence of 20 years' imprisonment.[35]

(ii) As a second aspect of this ground of appeal, the Appellant avers that the Trial Chamber, in imposing sentence, failed to take sufficient account of the sentencing practice of the courts of the former Yugoslavia, as required by Article 24(1) of the Statute. While acknowledging that the Statute does not make this sentencing practice binding on the Trial Chambers, the Appellant notes in this respect that, in the absence of the death penalty, the most severe punishment that could be imposed under the law of the former Yugoslav was a prison term of 20 years.[36]

(iii) The Appellant further argues that the Trial Chamber gave insufficient weight to his personal circumstances. He submits that at the time of the offences he was the subject of a

[34] Appellant's Brief Against Sentencing Judgement of 14 July 1997, pp. 1-4; T. 303 (21 April 1999).
[35] *Ibid.*, pp. 3-4, paras. 5((a)-(d)); T. 303 (21 April 1999).
[36] *Ibid.*, pp. 4-6; T. 304, 311 (21 April 1999).

campaign of deliberate propaganda encouraging participation in ethnic cleansing. The Appellant also notes that he is currently imprisoned and will serve his sentence in a foreign country away from his spouse and family, and isolated from persons of his own nationality. The Appellant further contends that upon his release he will suffer from the notoriety of being the first war criminal convicted by the International Tribunal and that this, combined with other factors, will render return to his native region impossible.[37]

(b) The Respondent

19. The Prosecutor ("Respondent") submits that the Appellant in relation to the first ground of appeal has failed to meet the burden which is to be placed upon him, namely, to show that the Trial Chamber incorrectly stated the law relating to its sentencing options or abused its discretion in arriving at its sentence.[38] The Respondent maintains that the sentence imposed was both in accordance with the law and appropriate in respect of the crimes committed and the circumstances of the offender. The Respondent further submits that the Trial Chamber, in determining its sentence, considered all the relevant factors as required by the Statute and the Rules. It is, accordingly, the Respondent's position that the 20-year sentence imposed by Trial Chamber II on the Appellant should not be disturbed on appeal.[39]

(i) The Respondent submits that the Trial Chamber, in determining its sentence, considered the notion of relative criminal culpability and applied it to the Appellant's position as compared to others at the time of the commission of the offences. The Respondent notes that the Trial Chamber in its Sentencing Judgment of 14 July 1997 expressly referred to the "relative unimportance" of the Appellant as a mitigating factor.[40] Moreover, the Respondent notes that under the Statute, the Trial Chamber had the option of imposing on the Appellant a sentence of life imprisonment, as well as that of imposing consecutive sentences upon him. Instead, the Trial Chamber chose, as the most severe punishment imposed on the Appellant, to sentence him to imprisonment for 20 years and ordered that his sentences run concurrently. The Respondent submits that this indicates that

[37] *Ibid.*, pp. 9-10; T. 305 (21 April 1999).
[38] "Response to Appellant's Brief on Appeal Against Sentencing Judgement Filed on 12 January 1998", 16 November 1998 ("Response to Appellant's Brief Against Sentencing Judgement of 14 July 1997"), pp. 4-6; T. 314 (21 April 1999).
[39] *Ibid.*, pp. 11-13, paras. 5.4, 5.8; T. 312 (21 April 1999).
[40] *Ibid.*, p. 7.

the Trial Chamber did consider the Appellant's individual situation and culpability, and contends that the sentence arrived at by the Trial Chamber was not inappropriate. The Respondent accordingly submits that the Appellant has failed to discharge his burden in relation to this point.[41]

(ii) The Respondent observes that, although Article 24 of the Statute provides that Trial Chambers, in passing sentences, shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia, a Trial Chamber in sentencing must ultimately exercise its own discretion. The Respondent notes that the Trial Chamber expressly stated that it had had recourse to the sentencing practice of the former Yugoslavia, and submits that the Appellant has not satisfied his burden of demonstrating that the Trial Chamber abused its discretion by not giving this factor even greater weight in the determination of the Appellant's sentence.[42]

(iii) As regards the personal circumstances of the Appellant, the Respondent asserts that the Trial Chamber noted not only the existence of the propaganda campaign and its impact on people in the region, but also considered the role of the Appellant in the campaign. The Respondent contends that, in assessing the circumstances relevant to the Appellant, the Trial Chamber also considered the brutality of the acts in which he personally engaged and his willingness to take part in the ethnic cleansing which occurred in the area. Thus, the Respondent submits that, given the Appellant's willing participation in the entire scope of the ethnic cleansing campaign in the area, the 20-year sentence is not excessive, and does not amount to an abuse of discretion by the Trial Chamber.[43]

2. Discussion

20. Insofar as the Appellant argues that the sentence of 20 years was unfair because it was longer than the facts underlying the charges required, the Appeals Chamber can find no error in the exercise of the Trial Chamber's discretion in this regard. The sentence of 20 years is within the discretionary framework provided to the Trial Chambers by the Statute

[41] *Ibid.*, p. 14 para. 5.12; T. 313-314 (21 April 1999).
[42] *Ibid.*, p. 9 para. 4.7; T. 314-315 (21 April 1999).
[43] T. 315-316 (21 April 1999).

and the Appeals Chamber will not, therefore, quash the sentence and substitute its own sentence instead.

21. The Appeals Chamber finds no merit in the Appellant's contention that the Trial Chamber failed to sufficiently consider the sentencing practice and in particular the maximum sentences in the former Yugoslavia. The jurisprudence of this Tribunal has consistently held that, while the law and practice of the former Yugoslavia shall be taken into account by the Trial Chambers for the purposes of sentencing, the wording of Sub-rule 101(A) of the Rules, which grants the power to imprison for the remainder of a convicted person's life, itself shows that a Trial Chamber's discretion in imposing sentence is not bound by any maximum term of imprisonment applied in a national system. The Appeals Chamber is not satisfied that the Trial Chamber, in imposing a sentence of 20 years, erred in the exercise of its discretion. Accordingly, the reliance by the Appellant on the law of the former Yugoslavia which prescribed a maximum sentence of 20 years as an alternative to the death penalty is misplaced, and more especially having regard to the fact that, at the time when the offences were committed, a death penalty could have been imposed under that law for similar offences.

22. With respect to the Appellant's final challenge to his sentence, namely, that the Trial Chamber failed to adequately consider his personal circumstances, the Appeals Chamber is unable to find support for this contention. The Trial Chamber's decision addressed the issue of public indoctrination, and there is no discernible error in the exercise of discretion with regard to the remainder of the Trial Chamber's analysis that would permit the Appeals Chamber to substitute its own decision for that of the Trial Chamber.

3. Conclusion

23. For the reasons set out above, the first ground of appeal fails and is accordingly dismissed.

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-98-32-A

Date: 25 February 2004

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Wolfgang Schomburg
Judge Inés Mónica Weinberg de Roca

Registrar: **Mr. Hans Holthuis**

Date: **25 February 2004**

PROSECUTOR

v.

MITAR VASILJEVIĆ

JUDGEMENT

The Office of the Prosecutor:

Ms. Helen Brady
Ms. Michelle Jarvis
Mr. Steffen Wirth

Counsel for the Accused:

Mr. Vladimir Domazet
Mr. Geert-Jan Knoops

stopped in Sase that the seven Muslim men were to be killed; vi) the behaviour of the soldiers changed drastically from the moment Milan Lukić ordered them to leave the car;[219] vii) that throughout the entire incident the impression of the two survivors was that no one around Milan Lukić could have influenced him or his decisions;[220] and viii) that the Appellant willingly accompanied Milan Lukić and his group with the seven Muslim men to the Drina River.[221]

131. The Appeals Chamber recalls that the question before it is whether no reasonable tribunal could find that the only reasonable inference available on the evidence cited above was that the Appellant shared the intent to commit murder. The Appeals Chamber considers that when a Chamber is confronted with the task of determining whether it can infer from the acts of an accused that he or she shared the intent to commit a crime, special attention must be paid to whether these acts are ambiguous, allowing for several reasonable inferences. The Appeals Chamber is satisfied that no reasonable tribunal could have found that the only reasonable inference available on the evidence, as cited above, is that the Appellant had the intent to kill the seven Muslim men. The Trial Chamber found that the Appellant assisted Milan Lukić and his men by preventing the seven Muslim men from fleeing.[222] It did not find, however, that the Appellant shot at the Muslim men himself, nor that he exercised control over the firing. Compared to the involvement of Milan Lukić and potentially one or both of the other men, the participation of the Appellant in the overall course of the killings did not reach the same level. The above-mentioned acts of the Appellant were ambiguous as to whether or not the Appellant intended that the seven Muslim men be killed. This conclusion is further supported by the relatively short period of time between the change of attitude of Milan Lukić and the shooting, the strong personality of Milan Lukić compared to the Appellant, as well as the factors mentioned in paragraph 130. The Appeals Chamber, therefore, concludes that the Trial Chamber erred by finding that the only reasonable inference from the evidence was that the Appellant shared the intent to kill the seven Muslim men.

132. The error made by the Trial Chamber led to a miscarriage of justice since, without the proof the Appellant's intent, the Appellant would not be responsible as a co-perpetrator in the joint criminal enterprise. The Appeals Chamber will now consider whether the Appellant is, nevertheless, responsible as an aider and abettor.

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[219] T. 274-275, testimony of witness VG-32.
[220] Judgement, para. 107. Testimony of witnesses VG-14 and VG-32.
[221] *Ibid*, para. 107.
[222] *Cf.* for a comparable situation in a national jurisdiction *Prosecutor v. Novislav Djajić*, 3St 20/96, Supreme Court of Bavaria, 23 May 1997. In this case, the accused was found guilty of, *inter alia*, aiding and abetting 14 murders by standing with a gun in the middle of a semi-circle that Serbs had formed around a group of Muslims who were then shot.

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Rome Statute of the International Criminal Court

PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW

Article 22
Nullum crimen sine lege

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

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

Article 23
Nulla poena sine lege

A person convicted by the Court may be punished only in accordance with this Statute.

Article 24
Non-retroactivity *ratione personae*

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.

2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

Article 25[8]
Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

   (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

   (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

   (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

   (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

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8 As amended by resolution RC/Res.6 of 11 June 2010 (adding paragraph 3 *bis*).

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

3 *bis*. In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Article 26
Exclusion of jurisdiction over persons under eighteen

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

Article 27
Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 28
Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

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Criminal
Court

Original: **English**

No.: **ICC-01/04-01/06**
Date: **14 March 2012**

TRIAL CHAMBER I

Before: **Judge Adrian Fulford, Presiding Judge**
Judge Elizabeth Odio Benito
Judge René Blattmann

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF THE PROSECUTOR v .THOMAS LUBANGA DYILO

Public

Judgment pursuant to Article 74 of the Statute

the predominance of principal over secondary liability, which, in turn, supports a notion of principal liability that requires a greater contribution than accessory liability.

999. The Majority is of the view that the contribution of the co-perpetrator must be **essential**, as has been consistently and invariably established in this Court's jurisprudence.[2705] The Statute differentiates between the responsibility and liability of those persons who commit a crime (at Article 25(3)(a)) and those who are accessories to it (at Articles 25(3)(b) to (d)). It would be possible to expand the concept of principal liability (or "commission" or "perpetration"), to make it more widely applicable, by lowering the threshold that the accused's contribution be essential. However, lowering that threshold would deprive the notion of principal liability of its capacity to express the blameworthiness of those persons who are the most responsible for the most serious crimes of international concern. Instead, a notion of co-perpetration that requires an essential contribution allows for the

[2705] ICC-01/04-01/06-803-tEN, paras 346-348; *The Prosecutor v. Katanga and Ngudjolo*, Decision on the confirmation of the charges, 30 September 2008, ICC-01/04-01/07-717, paras 524 to 526; *The Prosecutor v. Bemba*, Decision pursuant to Article 61 (7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, 15 June 2009, ICC-01/05-01/08-424, para 350; *The Prosecutor v. Banda and Jerbo*, Corrigendum of the "Decision on the Confirmation of Charges", ICC-02/05-03/09-121-Corr-Red, 7 March 2011, paras 136-138; *The Prosecutor v. Abu Garda*, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red, para. 153; *The Prosecutor v. Callixte Mbarushimana*, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, 28 September 2010, ICC-01/04-01/10-1, para. 30, and Decision on the Confirmation of Charges, 16 December 2011, ICC-01/04-01/10-465-Red, paras 273 and 279; *The Prosecutor v. Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3, para. 212; *The Prosecutor v. Ruto, Kosgey and Sang*, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011, ICC-01/09-01/11-01, para. 40, and Decision on the Confirmation of Charges against William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 23 January 2012, ICC-01/09-01/11-373, para. 40; *The Prosecutor v. Muthaura, Kenyatta and Ali*, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, ICC-01/09-02/11-01, para. 36, and Decision on the Confirmation of Charges against Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 23 January 2012, ICC-01/09-02/11-382-Red, paras 297, 401-404 and 419; *The Prosecutor v. Gbagbo*, Warrant of Arrest for Laurent Koudou Gbagbo, 23 November 2011, ICC-02/11-01/11-1, para. 10; the Chamber established that "by implementing the plan, the **co-perpetrators** exercised joint control over the crimes. Given the position of each member and their role as regards the plan, they made a **coordinated and essential contribution** to its realisation" [emphasis added].

different degrees of responsibility to be properly expressed and addressed.

1000. The determination as to whether the particular contribution of the accused results in liability as a co-perpetrator is to be based on an analysis of the common plan and the role that was assigned to, or was assumed by the co-perpetrator, according to the division of tasks.[2706] In the view of the Majority what is decisive is whether the co-perpetrator performs an essential role in accordance with the common plan, and it is in this sense that his contribution, as it relates to the exercise of the role and functions assigned to him, must be essential.

1001. Furthermore, the co-perpetrator's role is to be assessed on a case-by-case basis. This assessment involves a flexible approach, undertaken in the context of a broad inquiry into the overall circumstances of a case.

1002. The defence submits that co-perpetration requires "personal and direct participation in the crime itself",[2707] and that the responsibility of those who do not participate directly in the execution of a crime is reflected in Article 25(3)(b) rather than Article 25(3)(a).[2708] It contends that Article 25(3)(a) requires direct participation in the crime.[2709]

[2706] Thomas Weigend, "Intent, Mistake of Law, and Co-perpetration in the *Lubanga* Decision on Confirmation of Charges", Journal of International Criminal Justice 6 (2008), page 480; Stratenwerth/Kuhlen Allgemeiner Teil I, Die Straftat (2011), 12/83. See also Gerhard Werle, "Individual Criminal Responsibility in Article 25 ICC Statute", Journal of International Criminal Justice 5 (2007), page 962; Gerhard Werle, Principles of International Criminal Law (2009), paras 466 to 468 and 472; Roger S. Clark, "Drafting a general part to a penal code: some thoughts inspired by the negotiations on the Rome Statute of the International Criminal Court and by the Court's first substantive law discussion in the *Lubanga Dyilo* confirmation proceedings", Criminal law forum (2008), pages 545 *et seq*; William A. Schabas, The International Criminal Court - A Commentary on the Rome Statute (2010), page 429; Kai Ambos, La parte general del derecho penal internacional (2005), page 189.
[2707] ICC-01/04-01/06-2773-Red-tENG, para. 66.
[2708] ICC-01/04-01/06-2773-Red-tENG, para. 67.
[2709] ICC-01/04-01/06-2773-Red-tENG, para. 73.

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA

(NICARAGUA *v.* UNITED STATES OF AMERICA)

MERITS

JUDGMENT OF 27 JUNE 1986

1986

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DES ACTIVITÉS MILITAIRES ET PARAMILITAIRES AU NICARAGUA ET CONTRE CELUI-CI

(NICARAGUA c. ÉTATS-UNIS D'AMÉRIQUE)

FOND

ARRÊT DU 27 JUIN 1986

international custom "as evidence of a general practice accepted as law", the Court may not disregard the essential role played by general practice. Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them ; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice.

185. In the present dispute, the Court, while exercising its jurisdiction only in respect of the application of the customary rules of non-use of force and non-intervention, cannot disregard the fact that the Parties are bound by these rules as a matter of treaty law and of customary international law. Furthermore, in the present case, apart from the treaty commitments binding the Parties to the rules in question, there are various instances of their having expressed recognition of the validity thereof as customary international law in other ways. It is therefore in the light of this "subjective element" – the expression used by the Court in its 1969 Judgment in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, p. 44) – that the Court has to appraise the relevant practice.

186. It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.

* *

187. The Court must therefore determine, first, the substance of the customary rules relating to the use of force in international relations, applicable to the dispute submitted to it. The United States has argued that, on this crucial question of the lawfulness of the use of force in inter-State relations, the rules of general and customary international law, and those of the United Nations Charter, are in fact identical. In its view this identity is so complete that, as explained above (paragraph 173), it constitutes an argument to prevent the Court from applying this customary law, because it is indistinguishable from the multilateral treaty law which it may not apply. In its Counter-Memorial on jurisdiction and

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING OIL PLATFORMS

(ISLAMIC REPUBLIC OF IRAN *v.* UNITED STATES OF AMERICA)

JUDGMENT OF 6 NOVEMBER 2003

2003

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DES PLATES-FORMES PÉTROLIÈRES

(RÉPUBLIQUE ISLAMIQUE D'IRAN c. ÉTATS-UNIS D'AMÉRIQUE)

ARRÊT DU 6 NOVEMBRE 2003

SEPARATE OPINION OF JUDGE SIMMA

Matters relating to United States use of force are at the heart of the case, therefore the approach of dealing with Article XX before turning to Article X of the 1955 Treaty is acceptable — The Court's position regarding the United States attacks on the oil platforms, although correct as such, is marked throughout by inappropriate self-restraint — While hostile military action not reaching the threshold of an "armed attack" within the meaning of Article 51 of the United Nations Charter may be countered by proportionate and immediate defensive measures equally of a military character, the United States actions did not qualify as such proportionate counter-measures — The Court's treatment of Article X on "freedom of commerce" between the territories of the Parties follows a step-by-step approach which is correct up to a certain point but then takes turns in two wrong directions: first, the platforms attacked in October 1987 did not lose protection under Article X through being temporarily inoperative because the freedom under the Treaty embraces also the possibility of commerce in the future; secondly, the indirect commerce in Iranian oil going on during the time of the United States embargo is also protected by the Treaty — The Court's finding on the United States counter-claim is profoundly inadequate particularly with regard to the so-called "generic" counter-claim which should have been upheld — The problems of attribution and causality posed by the existence of several tortfeasors in the case could have been solved by recourse to a general principle of joint-and-several responsibility recognized by major domestic legal systems — Neither would the "indispensable-third-party" doctrine have stood in the way of declaring Iran responsible for breaches of Article X.

I have voted in favour of the first part of the *dispositif* of the present Judgment with great hesitation. In fact, I see myself in a position to concur — in principle — with the Court's treatment of only one of the two issues dealt with there, namely that of the alleged security interests of the United States measured against the international law on self-defence. As to the remaining parts of the *dispositif*, neither can I agree with the Court's decision that the United States attacks on the Iranian oil platforms ultimately did not infringe upon Iran's treaty right to respect for its freedom of commerce with the United States; nor do I consider that the way in which the Court disposed of the so-called "generic" counter-claim of the United States is correct. In my view, this counter-claim ought to have been upheld. Regarding the part of the *dispositif* devoted to this counter-claim, I thus had no choice but to dissent.

The reason why I have not done so also with regard to the first part of

that I consider it of utmost importance, and a matter of principle, for the Court to pronounce itself on questions of the threat or use of force in international relations whenever it is given the opportunity to do so. In this regard, the desirable standard of vigour and clarity was set already in the *Corfu Channel* case where the Court condemned a right to self-help by armed force claimed by the United Kingdom

> "as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law"[9].

Unfortunately, in the sombre light of developments over the 50 years that have passed since the *Corfu Channel* case, but more particularly in the recent past, this statement of the Court shows traits of a prophecy.

6. My agreement with the present position of the Court in principle does not however keep me from criticizing the Judgment for what I consider the half-heartedness of the manner in which it deals with the question of the use of force.

I recognize of course that there are valid legal reasons for the Court to keep what has to be said on the legality of United States military actions against the oil platforms within the confines of the text of Article XX, paragraph 1 *(d)*, of the Treaty. In fact, my criticism of the Court's treatment of the issues arising under that provision does not stem from any disagreement with what the text of the Judgment is saying. Rather, what concerns me is what the Court has decided not to say. I find it regrettable that the Court has not mustered the courage of restating, and thus reconfirming, more fully fundamental principles of the law of the United Nations as well as customary international law (principles that in my view are of the nature of *jus cogens*) on the use of force, or rather the prohibition on armed force, in a context and at a time when such a reconfirmation is called for with the greatest urgency. I accept of course that, since its jurisdiction is limited to the bases furnished by the 1955 Treaty, it would not have been possible for the Court to go as far as stating in the *dispositif* of its Judgment that, since the United States attacks on the oil platforms involved a use of armed force that cannot be justified as self-defence, these attacks must not only, for reasons of their own, be found not to have been necessary to protect the essential security interests of the United States within the meaning of Article XX of the Treaty; they must also be found in breach of Article 2 (4) of the United Nations Charter. What the Court could have done, without neglecting any jurisdictional bounds as I see them, is to restate the backbone of the Charter law on use of force by way of strong, unequivocal *obiter dicta*. Everybody will be

[9] *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 35.

il est de la plus haute importance, et c'est une question de principe, que la Cour se prononce sur des questions touchant à la menace ou à l'emploi de la force dans les relations internationales chaque fois qu'elle a l'occasion de le faire. A cet égard, elle a déjà fait preuve de la vigueur et de la clarté souhaitables dans l'affaire du *Détroit de Corfou*, lorsqu'elle a condamné le droit d'autoprotection par la force armée que revendiquait le Royaume-Uni

> «comme la manifestation d'une politique de force, politique qui, dans le passé, a donné lieu aux abus les plus graves et qui ne saurait, quelles que soient les déficiences présentes de l'organisation internationale, trouver aucune place dans le droit international»[9].

Malheureusement, au vu des sombres événements survenus au cours des cinquante années qui se sont écoulées depuis l'affaire du *Détroit de Corfou*, mais plus particulièrement dans le passé récent, cette déclaration de la Cour revêt un caractère prophétique.

6. Mon accord de principe avec la position actuelle de la Cour ne m'empêche cependant pas de critiquer l'arrêt pour ce que je considère comme un manque de conviction dans la manière dont il traite de l'emploi de la force.

Je reconnais bien sûr que la Cour a des raisons juridiques valables de contenir dans les limites de l'alinéa *d)* du paragraphe 1 de l'article XX du traité ce qui doit être dit de la licéité des actions militaires des Etats-Unis contre les plates-formes pétrolières. En fait, si je critique la manière dont la Cour a traité les questions que soulève cette disposition, ce n'est pas parce que je n'approuve pas ce qu'en dit le texte de l'arrêt. Ce qui me préoccupe, c'est plutôt ce que la Cour a décidé de ne pas dire. Je trouve regrettable que la Cour n'ait pas trouvé le courage de réaffirmer, et donc de reconfirmer, de façon plus explicite les principes fondamentaux du droit des Nations Unies et du droit international coutumier (principes qui, à mon avis, relèvent du *jus cogens*) sur l'emploi de la force, ou plutôt sur l'interdiction de la force armée, dans un contexte et à un moment où il serait on ne peut plus urgent de le faire. J'admets bien entendu que, sa compétence étant limitée aux bases fournies par le traité de 1955, la Cour ne pouvait pas aller jusqu'à dire dans le dispositif de son arrêt que, puisque les attaques menées par les Etats-Unis contre les plates-formes pétrolières comportaient un emploi de la force armée qui ne pourrait être justifié en tant qu'acte de légitime défense, il fallait juger non seulement que ces attaques, en elles-mêmes, n'étaient pas nécessaires pour protéger les intérêts vitaux des Etats-Unis sur le plan de la sécurité au sens de l'article XX du traité, mais aussi qu'elles violaient le paragraphe 4 de l'article 2 de la Charte des Nations Unies. Ce que la Cour aurait pu faire toutefois, sans outrepasser à mon sens sa compétence, c'est réaffirmer le caractère fondamental des dispositions de la Charte sur l'emploi de la

[9] *Détroit de Corfou, fond, arrêt, C.I.J. Recueil 1949*, p. 35.

aware of the current crisis of the United Nations system of maintenance of peace and security, of which Articles 2 (4) and 51 are cornerstones. We currently find ourselves at the outset of an extremely controversial debate on the further viability of the limits on unilateral military force established by the United Nations Charter[10]. In this debate, "supplied" with a case allowing it to do so, the Court ought to take every opportunity to secure that the voice of the law of the Charter rise above the current cacophony. After all, the International Court of Justice is not an isolated arbitral tribunal or some regional institution but the principal judicial organ of the United Nations. What we cannot but see outside the courtroom is that, more and more, legal justification of use of force within the system of the United Nations Charter is discarded even as a fig leaf, while an increasing number of writers appear to prepare for the outright funeral of international legal limitations on the use of force. If such voices are an indication of the direction in which legal-political discourse on use of force not authorized by the Charter might move, do we need more to realize that for the Court to speak up as clearly and comprehensively as possible on that issue is never more urgent than today? In effect, what the Court has decided to say — or, rather, not to say — in the present Judgment is an exercise in inappropriate self-restraint.

7. Paragraph 78 of the Judgment concludes that the United States attacks against the oil platforms cannot be justified, under Article XX, paragraph 1 *(d)*, of the Treaty of 1955, as being measures necessary to protect the essential security interests of the United States, since those actions constituted recourse to armed force not qualifying as acts of self-defence under "international law on the question" (see *infra*), and thus did not fall within the category of measures that could be contemplated, "upon its correct interpretation", by the said provision of the Treaty. I admit of course that this passage can be read — indeed, it must be read — as stating by way of implication that the United States actions, constituting unilateral use of "armed force not qualifying, under international law . . . as acts of self-defence", were therefore in breach of Article 2 (4) of the United Nations Charter. *Tertium non datur*. It is a great pity however that the reasoning of the Court does not draw this necessary conclusion, and thus strengthen the Charter prohibition on the threat or use of armed force, in straightforward, terms. To repeat, I cannot see how in doing so the Court would have gone beyond the bounds

[10] Cf. Secretary-General Kofi Annan's Address to the General Assembly of 23 September 2003, General Assembly, 7th Plenary Meeting, 23 September 2003, A/58/PV.7, at p. 3.

force par des *obiter dicta* fermes et sans équivoque. Tout le monde est conscient de la crise que traverse actuellement le système de maintien de la paix et de la sécurité des Nations Unies, système dont le paragraphe 4 de l'article 2 et l'article 51 de la Charte sont les pierres angulaires. Nous nous trouvons actuellement au seuil d'un débat extrêmement polémique sur la question de savoir si les limites fixées par la Charte des Nations Unies à l'emploi unilatéral de la force armée resteront valables pour l'avenir[10]. Dans ce débat, ayant à juger une affaire qui s'y prête, la Cour devrait saisir toutes les occasions pour que la voix du droit de la Charte s'élève au-dessus de la cacophonie ambiante. Après tout, la Cour internationale de Justice n'est pas un tribunal arbitral ou une institution régionale quelconque: elle est l'organe judiciaire principal des Nations Unies. Ce que nous sommes bien obligés de constater en dehors de la Cour, c'est que, de plus en plus, on rejette ne serait-ce que l'apparence d'une justification juridique de l'emploi de la force à l'intérieur du système établi par la Charte des Nations Unies, en même temps qu'un nombre croissant d'auteurs semblent se préparer à voir enterrer purement et simplement les restrictions qu'impose le droit international à cet égard. S'il y a là une indication de la direction dans laquelle pourrait s'orienter le discours juridico-politique sur l'emploi de la force non autorisé par la Charte, que nous faut-il de plus pour comprendre qu'il n'y a jamais eu autant d'urgence à ce que la Cour s'exprime aussi clairement et de manière aussi explicite que possible sur cette question? En fait, ce que la Cour a décidé de dire — ou plutôt de ne pas dire — dans le présent arrêt est le résultat de la retenue excessive dont elle a inopportunément fait preuve.

7. Le paragraphe 78 de l'arrêt conclut que les attaques menées par les Etats-Unis contre les plates-formes pétrolières ne sauraient être justifiées, en vertu de l'alinéa *d)* du paragraphe 1 de l'article XX du traité de 1955, en tant que mesures nécessaires à la protection des intérêts vitaux des Etats-Unis sur le plan de la sécurité, dès lors qu'elles constituaient un recours à la force armée et ne pouvaient être considérées, au regard du «droit international relatif à cette question» (voir ci-dessous), comme des actes de légitime défense, et ne relevaient donc pas de la catégorie des mesures pouvant être prévues par cette disposition du traité «telle qu'elle doit être interprétée». J'admets évidemment que ce passage peut — et même doit — être interprété comme indiquant implicitement que les actions des Etats-Unis, constituant un recours unilatéral à la force armée qui ne pouvait être considéré «au regard du droit international ... comme des actes de légitime défense», violaient le paragraphe 4 de l'article 2 de la Charte des Nations Unies. *Tertium non datur*. Il est très regrettable cependant que le raisonnement de la Cour ne l'amène pas à tirer cette nécessaire conclusion en renforçant du même coup sans équivoque l'inter-

[10] Voir l'allocution faite par M. Kofi Annan, Secrétaire général des Nations Unies, devant l'Assemblée générale le 23 septembre 2003: Assemblée générale, 7e séance plénière, A/58/PV.7, p. 3.

Germany (Territory under Allied occupation, 1945- U.S. Zone) Military Tribunals

TRIALS

OF

WAR CRIMINALS

BEFORE THE

NUERNBERG MILITARY TRIBUNALS

UNDER

CONTROL COUNCIL LAW No. 10

VOLUME I

NUERNBERG

OCTOBER 1946–APRIL 1949

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CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL

I. CONSTITUTION OF THE INTERNATIONAL MILITARY TRIBUNAL

Article 1. In pursuance of the Agreement signed on the 8th day of August 1945 by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics, there shall be established an International Military Tribunal (hereinafter called "the Tribunal") for the just and prompt trial and punishment of the major war criminals of the European Axis.

Article 2. The Tribunal shall consist of four members, each with an alternate. One member and one alternate shall be appointed by each of the Signatories. The alternates shall, so far as they are able, be present at all sessions of the Tribunal. In case of illness of any member of the Tribunal or his incapacity for some other reason to fulfill his functions, his alternate shall take his place.

Article 3. Neither the Tribunal, its members nor their alternates can be challenged by the prosecution, or by the Defendants or their Counsel. Each Signatory may replace its member of the Tribunal or his alternate for reasons of health or for other good reasons, except that no replacement may take place during a Trial, other than by an alternate.

Article 4.

(*a*) The presence of all four members of the Tribunal or the alternate for any absent member shall be necessary to constitute the quorum.

(*b*) The members of the Tribunal shall, before any trial begins, agree among themselves upon the selection from their number of a President, and the President shall hold office during that trial, or as may otherwise be agreed by a vote of not less than three members. The principle of rotation of presidency for successive trials is agreed. If, however, a session of the Tribunal takes place on the territory of one of the four Signatories, the representative of that Signatory on the Tribunal shall preside.

(*c*) Save as aforesaid the Tribunal shall take decisions by a majority vote and in case the votes are evenly divided, the vote of the President shall be decisive: provided always that convictions and sentences shall only be imposed by affirmative votes of at least three members of the Tribunal.

Article 5. In case of need and depending on the number of the matters to be tried, other Tribunals may be set up; and the establishment, functions, and procedure of each Tribunal shall be identical, and shall be governed by this Charter.

II. JURISDICTION AND GENERAL PRINCIPLES

Article 6. The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(*a*) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(*b*) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or de-

portation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[1]

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Article 7. The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Article 8. The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Article 9. At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.

After receipt of the Indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organization will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organization. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard.

Article 10. In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.

Article 11. Any person convicted by the Tribunal may be charged before a national, military or occupation court, referred to in Article 10 of this Charter, with a crime other than of membership in a criminal group or organization and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organization.

Article 12. The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.

Article 13. The Tribunal shall draw up rules for its procedure. These rules shall not be inconsistent with the provisions of this Charter.

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[1] See proctocol p. XV for correction of this paragraph.

III. COMMITTEE FOR THE INVESTIGATION AND PROSECUTION OF MAJOR WAR CRIMINALS

Article 14. Each Signatory shall appoint a Chief Prosecutor for the investigation of the charges against and the prosecution of major war criminals.

The Chief Prosecutors shall act as a committee for the following purposes:

(*a*) to agree upon a plan of the individual work of each of the Chief Prosecutors and his staff,

(*b*) to settle the final designation of major war criminals to be tried by the Tribunal,

(*c*) to improve the Indictment and the documents to be submitted therewith,

(*d*) to lodge the Indictment and the accompanying documents with the Tribunal,

(*e*) to draw up and recommend to the Tribunal for its approval draft rules of procedure, contemplated by Article 13 of this Charter. The Tribunal shall have power to accept, with or without amendments, or to reject, the rules so recommended.

The Committee shall act in all the above matters by a majority vote and shall appoint a Chairman as may be convenient and in accordance with the principle of rotation: provided that if there is an equal division of vote concerning the designation of a Defendant to be tried by the Tribunal, or the crimes with which he shall be charged, that proposal will be adopted which was made by the party which proposed that the particular Defendant be tried, or the particular charges be preferred against him.

Article 15. The Chief Prosecutors shall individually, and acting in collaboration with one another, also undertake the following duties:

(*a*) investigation, collection, and production before or at the Trial of all necessary evidence,

(*b*) the preparation of the Indictment for approval by the Committee in accordance with paragraph (*c*) of Article 14 hereof,

(*c*) the preliminary examination of all necessary witnesses and of the Defendants,

(*d*) to act as prosecutor at the Trial,

(*e*) to appoint representatives to carry out such duties as may be assigned to them,

(*f*) to undertake such other matters as may appear necessary to them for the purposes of the preparation for and conduct of the Trial.

It is understood that no witness or Defendant detained by any Signatory shall be taken out of the possession of that Signatory without its assent.

IV. FAIR TRIAL FOR DEFENDANTS

Article 16. In order to ensure fair trial for the Defendants, the following procedure shall be followed:

(*a*) The Indictment shall include full particulars specifying in detail the charges against the Defendants. A copy of the Indictment and of all the documents lodged with the Indictment, translated into a language which he understands, shall be furnished to the Defendant at a reasonable time before the Trial.

(*b*) During any preliminary examination or trial of a Defendant he shall have the right to give any explanation relevant to the charges made against him.

(*c*) A preliminary examination of a Defendant and his Trial shall be conducted in, or translated into, a language which the Defendant understands.

(*d*) A defendant shall have the right to conduct his own defense before the Tribunal or to have the assistance of Counsel.

(e) A defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defense, and to cross-examine any witness called by the Prosecution.

V. POWERS OF THE TRIBUNAL AND CONDUCT OF THE TRIAL

Article 17. The Tribunal shall have the power
(a) to summon witnesses to the Trial and to require their attendance and testimony and to put questions to them,
(b) to interrogate any Defendant,
(c) to require the production of documents and other evidentiary material,
(d) to administer oaths to witnesses,
(e) to appoint officers for the carrying out of any task designated by the Tribunal including the power to have evidence taken on commission.

Article 18. The Tribunal shall
(a) confine the Trial strictly to an expeditious hearing of the issues raised by the charges,
(b) take strict measures to prevent any action which will cause unreasonable delay, and rule out irrelevant issues and statements of any kind whatsoever,
(c) deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any Defendant or his Counsel from some or all further proceedings, but without prejudice to the determination of the charges.

Article 19. The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value.

Article 20. The Tribunal may require to be informed of the nature of any evidence before it is offered so that it may rule upon the relevance thereof.

Article 21. The Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof. It shall also take judicial notice of official governmental documents and reports of the United Nations, including the acts and documents of the committees set up in the various allied countries for the investigation of war crimes, and the records and findings of military or other Tribunals of any of the United Nations.

Article 22. The permanent seat of the Tribunal shall be in Berlin. The first meetings of the members of the Tribunal and of the Chief Prosecutors shall be held at Berlin in a place to be designated by the Control Council for Germany. The first trial shall be held at Nuremberg, and any subsequent trials shall be held at such places as the Tribunal may decide.

Article 23. One or more of the Chief Prosecutors may take part in the prosecution at each Trial. The function of any Chief Prosecutor may be discharged by him personally, or by any person or persons authorized by him.

The function of Counsel for a Defendant may be discharged at the Defendant's request by any Counsel professionally qualified to conduct cases before the Courts of his own country, or by any other person who may be specially authorized thereto by the Tribunal.

Article 24. The proceedings at the Trial shall take the following course:
(a) The Indictment shall be read in court.
(b) The Tribunal shall ask each Defendant whether he pleads "guilty" or "not guilty".
(c) The Prosecution shall make an opening statement.
(d) The Tribunal shall ask the Prosecution and the Defense what evidence (if any) they wish to submit to the Tribunal, and the Tribunal shall rule upon the admissibility of any such evidence.

(*e*) The witnesses for the Prosecution shall be examined and after that the witnesses for the Defense. Thereafter such rebutting evidence as may be held by the Tribunal to be admissible shall be called by either the Prosecution or the Defense.
(*f*) The Tribunal may put any question to any witness and to any Defendant, at any time.
(*g*) The Prosecution and the Defense shall interrogate and may cross-examine any witnesses and any Defendant who gives testimony.
(*h*) The Defense shall address the court.
(*i*) The Prosecution shall address the court.
(*j*) Each Defendant may make a statement to the Tribunal.
(*k*) The Tribunal shall deliver judgment and pronounce sentence.

Article 25. All official documents shall be produced, and all court proceedings conducted, in English, French and Russian, and in the language of the Defendant. So much of the record and of the proceedings may also be translated into the language of any country in which the Tribunal is sitting, as the Tribunal considers desirable in the interests of justice and public opinion.

VI. JUDGMENT AND SENTENCE

Article 26. The judgment of the Tribunal as to the guilt or the innocence of any Defendant shall give the reasons on which it is based, and shall be final and not subject to review.
Article 27. The Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just.
Article 28. In addition to any punishment imposed by it, the Tribunal shall have the right to deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany.
Article 29. In case of guilt, sentences shall be carried out in accordance with the orders of the Control Council for Germany, which may at any time reduce or otherwise alter the sentences, but may not increase the severity thereof. If the Control Council for Germany, after any Defendant has been convicted and sentenced, discovers fresh evidence which, in its opinion, would found a fresh charge against him, the Council shall report accordingly to the Committee established under Article 14 hereof, for such action as they may consider proper, having regard to the interests of justice.

VII. EXPENSES

Article 30. The expenses of the Tribunal and of the Trials, shall be charged by the Signatories against the funds allotted for maintenance of the Control Council for Germany.

PROTOCOL

Whereas an Agreement and Charter regarding the Prosecution of War Criminals was signed in London on the 8th August 1945, in the English, French, and Russian languages,

And whereas a discrepancy has been found to exist between the originals of Article 6, paragraph (*c*), of the Charter in the Russian language, on the one hand, and the originals in the English and French languages, on the other, to wit, the semi-colon in Article 6, paragraph (*c*), of the Charter between the words "war" and "or", as carried in the English and French texts, is a comma in the Russian text,

and whereas it is desired to rectify this discrepancy:

NOW, THEREFORE, the undersigned, signatories of the said Agreement on behalf of their respective Governments, duly authorized thereto, have agreed that Article 6, paragraph (*c*), of the Charter in the Russian text is correct, and that the meaning and intention of the Agreement and Charter require that the said semi-colon in the English text should be changed to a comma, and that the French text should be amended to read as follows:

(*c*) LES CRIMES CONTRE L'HUMANITE: c'est à dire l'assassinat, l'extermination, la réduction en esclavage, la déportation, et tout autre acte inhumain commis contre toutes populations civiles, avant ou pendant la guerre, ou bien les persécutions pour des motifs politiques, raciaux, ou réligieux, lorsque ces actes ou persécutions, qu'ils aient constitué ou non une violation du droit interne du pays où ils ont été perpétrés, ont été commis à la suite de tout crime rentrant dans la compétence du Tribunal, ou en liaison avec ce crime.

IN WITNESS WHEREOF the Undersigned have signed the present Protocol.

DONE in quadruplicate in Berlin this 6th day of October, 1945, each in English, French, and Russian, and each text to have equal authenticity.

For the Government of the United States of America
ROBERT H. JACKSON

For the Provisional Government of the French Republic
FRANÇOIS DE MENTHON

For the Government of the United Kingdom of Great Britain and Northern Ireland
HARTLEY SHAWCROSS

For the Government of the Union of Soviet Socialist Republics
R. RUDENKO

CONTROL COUNCIL LAW NO. 10

PUNISHMENT OF PERSONS GUILTY OF WAR CRIMES, CRIMES AGAINST PEACE AND AGAINST HUMANITY

In order to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, and the Charter issued pursuant thereto and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal, the Control Council enacts as follows:

Article I

The Moscow Declaration of 30 October 1943 "Concerning Responsibility of Hitlerites for Committed Atrocities" and the London Agreement of 8 August 1945 "Concerning Prosecution and Punishment of Major War Criminals of the European Axis" are made integral parts of this Law. Adherence to the provisions of the London Agreement by any of the United Nations, as provided for

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would result in the establishment of the fact that Germany, for obvious reasons, was unwilling to provide Jews with foreign currency, and thus the ultimate object would be reached, namely, to prove that it was again the German obstinacy which was responsible for the misery of the Jews; that merely for the act of making Germany the scapegoat he was unable to recommend Rublee's plan, but that he would pass the memorandum on to the competent office. In this memorandum he states that his answer to the American Ambassador was more placatory, but of the same tenor.

As stated, he was directed by von Ribbentrop to make no reply to the British memorandum. The British and Americans from time to time attempted to renew the matter, but von Weizsaecker and Woermann put them off with vague promises. The defendants claim that finally through their exclusive efforts, Rublee was permitted to visit Berlin and engaged in various conferences.

There can be no question whatsoever that here neither von Weizsaecker nor Woermann was in a position to control the matter. Their superior had given express orders as to the nature of the conversation they might conduct with the foreign representatives in question. They derived their powers only from and through him, and they merely repeated his decision. They did not execute or implement a policy of wrongdoing.

Wannsee conference and the part played by the Foreign Office. —The mass deportation of Jews to the East which resulted in the extermination of many millions of them found its expression in the celebrated Wannsee conference of 20 January 1942. The Foreign Office played an important part in these negotiations and in the actions thereafter taken to implement and assist the program. Von Weizsaecker or Woermann neither originated it, gave it enthusiastic support, nor in their hearts approved of it. The question is whether they knew of the program and whether in any substantial manner they aided, abetted, or implemented it. That both von Ribbentrop and Luther did, there can be no possible question.

On 8 December 1941 a memorandum was prepared by Luther's department "Deutschland" in preparation for a conference with Heydrich to set up the wishes and ideas of the Foreign Office concerning the "total solution" of the Jewish question in Europe. The document does not show on its face that it was submitted to von Weizsaecker or Woermann, and ordinarily this would indicate that it was not.

But on 4 December 1941 Luther prepared a memorandum which was submitted to von Weizsaecker and initialed by him regarding a proposal or suggestion made by Foreign Minister Popoff of

residing in Germany and Jews of German nationality residing in France. We find no criminality in this transaction.

On 30 October 1941 Schleier of the Embassy in Paris requested directions from the Foreign Office regarding the disposition to be made of foreign Jews who had been arrested by the military commanders in France in connection with alleged participation in Communist and de Gaullist plots for the assassination of Wehrmacht members. He states that foreign consulates had requested the Embassy to assist in having their Jewish nationals so arrested, freed.

Von Weizsaecker, on 1 November, answered, stating that there were no objections against the arrest of Jews of European nationality and no diplomatic complications were expected, but the arrest of Jews of American nationality created a dangerous situation and it must be expected with certainty that the North American governments, as well as those of the Spanish-American states, would make these arrests the object of diplomatic intervention, and if Germany refused to release Jews of American nationality, it was to be expected that the governments affected would take retaliatory measures against Reich citizens, and thereby Germany could get the worst of it; that it was intended to instruct the Embassy in Paris to request the military commander and the chief of the SD to release American Jews, provided they were not liable to criminal prosecution.

Von Ribbentrop approved this suggestion. Von Weizsaecker further stated that it should be considered as a matter of precaution, and it might be well to expel all Jews who were American citizens from occupied territories in order to eliminate friction. To this von Ribbentrop said, "No." It was, of course, as much a breach of international law to arrest Jews of European nationality as it was those of American nationality, and the reasons which von Weizsaecker gave for exempting American Jews from unlawful arrest are not based on any high moral plane. However, we are interested in what he advised, and not the reasons he gave, and we do not overlook the fact that he was not addressing his recommendations to a man who had any conception of international or other morals. We do not believe in this instance von Weizsaecker was subject to any criticism. He probably went as far as he thought was practicable.

On 19 May 1942 Woermann, on orders from von Weizsaecker to settle with Department Deutschland the question of whether American and British Jews in France should be exempted from anti-Jewish measures which were being taken there, reported that he had come to the conclusion that they should not be given any preferential treatment, and called attention to the fact that

there are strong indications that tend to show the opposite. This was a matter in which not only Himmler and the SS, but also von Ribbentrop and Hitler, took a direct interest and part. Inasmuch as von Weizsaecker and Woermann did not substantially participate in the matter they should be and are exonerated with respect thereto.

Serbia.—While von Weizsaecker and Woermann were informed of the proposals to shoot all male Serbian Jews and to assemble the women, old people, and children in local concentration camps and the desire of Benzler and the defendant Veesenmayer to make a quick, Draconic disposition of the Serbian Jews, it is certain that von Weizsaecker endeavored to keep clear of this matter. He declared that because of the Hitler order the Foreign Office was competent to deal with the deportation of Serbian Jews to other countries, but that neither Benzler nor the Foreign Office had any competency to take an active part in the manner in which the competent military and internal authorities tackled the Jewish problem within the boundaries of Serbia; that those agencies received their instructions from other sources rather than the Foreign Office, he so advised Benzler.

To this Luther disagreed, calling attention to the fact that he had been authorized by von Ribbentrop to discuss the matter with Heydrich, but by this time it appeared that the military authorities in Serbia had shot the Jews in question, and thus, the matter had been settled; and von Weizsaecker said he was no longer interested in issuing any directions to Benzler. Under these facts neither von Weizsaecker nor Woermann can be held guilty of participation in the crimes in question, and as to them they should be and are exonerated.

Bulgaria.—The evidence does not disclose that von Weizsaecker or Woermann took any active part in the deportations from Bulgaria other than Luther's report which contains the statement that the Legation at Sofia was instructed by a note signed by von Weizsaecker, Woermann, and von Erdmannsdorff that "if the question is put from the Bulgarian side as to whether Germany is ready to deport Jews from Bulgaria to the East, the question should be answered in the affirmative; but in respect to the time of deportation, it should be answered evasively."

The measures against Bulgaria's Jews actually took place during Steengracht von Moyland's incumbency as State Secretary. While he was informed of the infamous things proposed and done, and while it is evident that Bulgaria's actions were in a measure encouraged by the Legation at Sofia, acting under orders, the record is not sufficiently clear, and it is not likely that Steengracht von Moyland participated in the matter.

a fund placed at Himmler's personal disposal. There is no evidence, however, that matters relating to the resettlement program were ever discussed or acted upon in the meetings of this circle, or that it was in any way a policy-making body. Nor is there any evidence that Rasche knew that any part of the fund to which the bank made contributions was intended to be or was ever used by Himmler for any unlawful purposes.

His participation in the loans made by the Dresdner Bank to various SS enterprises which employed slave labor and to those engaged in the resettlement program presents a more difficult problem.

The defendant is a banker and businessman of long experience and is possessed of a keen and active mind. Bankers do not approve or make loans in the number and amount made by the Dresdner Bank without ascertaining, having, or obtaining information or knowledge as to the purpose for which the loan is sought, and how it is to be used. It is inconceivable to us that the defendant did not possess that knowledge, and we find that he did.

The real question is, is it a crime to make a loan, knowing or having good reason to believe that the borrower will us the funds in financing enterprises which are employed in using labor in violation of either national or international law? Does he stand in any different position than one who sells supplies or raw materials to a builder building a house, knowing that the structure will be used for an unlawful purpose? A bank sells money or credit in the same manner as the merchandiser of any other commodity. It does not become a partner in enterprise, and the interest charged is merely the gross profit which the bank realizes from the transaction, out of which it must deduct its business costs, and from which it hopes to realize a net profit. Loans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint and reflect no credit on the part of the lender or seller in either case, but the transaction can hardly be said to be a crime. Our duty is to try and punish those guilty of violating international law, and we are not prepared to state that such loans constitute a violation of that law, nor has our attention been drawn to any ruling to the contrary.

The defendant Rasche should be and is found not guilty under count five.

RITTER

The defendant Ritter, now in his 66th year, entered the Foreign Office in 1922 after a career as a civil servant in various

APPENDIX B

THE ROECHLING CASE—INDICTMENT, JUDGMENT, AND JUDGMENT ON APPEAL*

INDICTMENT

GENERAL TRIBUNAL OF MILITARY GOVERNMENT FOR THE FRENCH ZONE OF OCCUPATION IN GERMANY

Indictment Against the Directors of the Firm of Roechling

The Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany

versus

Hermann Roechling, Ernst Roechling, Hans Lothar von Gemmingen-Hornberg, Albert Maier, Wilhelm Rodenhauser, Directors of the Roechling Enterprises

Under the Moscow Declaration of 30 October 1943; the London Agreement and the Charter of 8 August 1945; Law No. 10 of the Berlin Control Council of 20 December 1945; Ordinance No. 2 of the Supreme Interallied Commander on the Military Government Tribunals; Ordinance No. 36 of 25 February 1946 of the General in Command of the French Zone of Occupation in Germany; Decree No. 43 of 2 March 1946 of the Administrator General of the French Zone of Occupation in Germany; the judgment of the International Military Tribunal of the Major War Criminals dated 1 October 1946 has the honor to submit—

The International Military Tribunal in its judgment of 30 September 1946 has laid down in principle that the political leaders of the "Third Reich" were responsible for the preparation and the

* The materials reproduced herein have been translated from the French language. The Roechling case was tried at Rastatt, Germany (French Zone of Occupation), under Allied Control Council Law No. 10 and certain ordinances of the French Supreme Commander in Germany providing for the trial of war criminals in the French Zone. The case had many interesting features and was cited in numerous arguments at Nuernberg and in the judgment of the Farben case. (United States *vs.* Carl Krauch, et al., Case 6, vol. VIII, this series.) The principal prosecutor in the Roechling case, M. Charles Gerthoffer, had been one of the French prosecutors in the first Nuernberg trial before the International Military Tribunal. In the Ministries case he appeared before the Tribunal as special counsel.

The General Tribunal in the Roechling case was composed of seven judges, five of whom were French, one of whom was Belgium, and one of whom was Dutch. The prosecution in that case included a representative of the Polish Government. The judgment of the General Tribunal was the only judgment after that of the International Military Tribunal in which a defendant was found guilty of the waging (as distinguished from the planning, preparation, and initiation) of aggressive war, or in which an industrialist was found guilty upon charges of aggressive war. However, this finding was set aside on appeal by the Superior Military Government Court. The judgment on appeal directed the forfeiture of the property of the defendants Hermann and Ernst Roechling, and half of the property of the defendant von Gemmingen-Hornberg; measures not included in the original sentences of the General Tribunal hearing the case.

The Court finds that Hermann Roechling's responsibility for the execution of the forced-labor program was of the same type as that with which the International Military Tribunal has charged Speer. For, the applications which were forwarded by Speer to Sauckel, which were the cause for the deportation of civilian workers, were drafted on behest of the Reich Plenipotentiary Hermann Roechling, president of the RVE, in order to obtain workers for the iron industry.

Moreover, the German industrialist, Flick, has confirmed this fact. He has stated that the plant executives concerned forwarded the requirement reports for foreign workers for the iron industry to the chairman of the RVE, Roechling, who in turn submitted them through the Minister, Speer, to Sauckel.

Hermann Roechling has admitted this fact. In a statement, dated 6 November 1945, which he made for the United States occupation authorities in Germany, he said that all manpower requirements were submitted to Speer through the RVE, and through Speer to Sauckel. There are numerous requirement reports of this type; it will suffice, however, to mention one of them in order to illustrate the methods used. On 12 August 1942 the RVE sent a memorandum to Speer concerning the program for raising the steel production in the last two quarters of that year.

In order to put this new plan into effect, the RVE stated that 60,000 workers would be required, of whom 55,000 could be foreigners. However, on 12 August 1942, Sauckel had been in office for 5 months, and the chairman of the RVE knew in what way such foreign workers were supplied.

On the other hand, Hermann Roechling stated the following in a report of the RVE, dated 15 August 1942: "In accordance with the requirement reports submitted by the Reich Association Iron * * * Russian civilians have arrived as the first transports during the last days of July." The exact number of workers required by the RVE and of these deported workers which were made available for the RVE by Sauckel and Speer, is not known; it is a fact, however, that their number was quite considerable and that they included civilians from France, Luxembourg, Belgium, Holland, Poland, and Soviet Russia.

A statement of Hermann Roechling shows that after 1942, approximately 200,000 foreign workers were employed in the iron industry in Germany proper. Thus, Hermann Roechling was connected with the war crime of deportation for the purpose of forced labor, and he was coresponsible for the deportation of all those workers who had been assigned to the iron and steel industry as of 29 May 1942, the day on which he assumed his supreme command of this industry.

of 11 December 1946, which initiated the fulfilment of Article 13, paragraph 1, sub-paragraph a, of the Charter, regarding the development of international law and its codification;

Considering that one of the most effective means of furthering the development of international law consists in promoting public interest in this subject and using the media of education and publicity to familiarize the peoples with the principles and rules that govern international relations;

Considering that greater knowledge of and fuller information on the aims, purposes and structure of the United Nations constitute another positive method of assisting the development of international law, of which the United Nations is the main instrument,

The General Assembly

Resolves to request the Governments of Member States:

1. To take appropriate measures to extend the teaching of international law in all its phases, including its development and codification, in the universities and higher educational institutions of each country that are under government control or over which Governments have some influence, or to initiate such teaching where it is not yet provided;

2. To promote similar teaching regarding the aims, purposes, structure and operation of the United Nations in conjunction with paragraph 1 above and in accordance with resolution 137(II) adopted by the General Assembly on 17 November 1947, on the teaching of the purposes and principles, the structure and activities of the United Nations in the schools of Member States;

3. To give to the Secretary-General the fullest possible co-operation with a view to facilitating the preparatory work on the development of international law and its codification and to support any individual or private effort to these ends undertaken in their countries.

Hundred and twenty-third plenary meeting,
21 November 1947.

177 (II). Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal

The General Assembly

Decides to entrust the formulation of the principles of international law recognized in the charter of the Nürnberg Tribunal and in the judgment of the Tribunal to the International Law Commission, the members of which will, in accordance with resolution 174(II), be elected at the next session of the General Assembly, and

1946 de l'Assemblée générale qui a inauguré la mise en application de l'Article 13, paragraphe 1, alinéa a, de la Charte, relatif au développement progressif du droit international et à sa codification;

Considérant que l'une des façons les plus efficaces de travailler au développement du droit international consiste à favoriser l'intérêt du public à son égard et à employer les méthodes d'éducation et de propagande tendant à familiariser les peuples avec les principes et les règles qui régissent les relations internationales;

Considérant qu'une connaissance plus approfondie des buts, des objectifs et de la structure de l'Organisation des Nations Unies, ainsi qu'une documentation plus riche sur ces mêmes sujets, constituent d'autres moyens efficaces de coopérer au développement du droit international dont cet organisme est le principal instrument,

L'Assemblée générale

Décide d'inviter les Gouvernements des Etats Membres:

1. A prendre les mesures propres à intensifier l'enseignement du droit international considéré dans toutes les phases de son développement et sa codification, dans les universités et établissements d'enseignement supérieur de chaque pays qui dépendent du Gouvernement ou dans lesquels celui-ci peut exercer son influence, ou à organiser cet enseignement dans les cas où il n'existe pas;

2. A favoriser de même l'enseignement relatif aux buts, aux objets, à la structure et au fonctionnement de l'Organisation des Nations Unies, compte tenu de ce qui est dit ci-dessus au paragraphe 1, et conformément à la résolution 137(II) adoptée par l'Assemblée générale le 17 novembre 1947, relative à l'enseignement des buts et des principes, de la structure et de l'activité de l'Organisation des Nations Unies dans les écoles des Etats Membres;

3. A prêter au Secrétaire général tout le concours en leur pouvoir pour faciliter les travaux de préparation à la codification du droit international et à son développement, et d'accorder leur appui à toute initiative particulière ou privée prise dans leurs pays respectifs et tendant aux fins susdites.

Cent-vingt-troisième séance plénière,
le 21 novembre 1947.

177 (II). Formulation des principes reconnus par le Statut de la Cour de Nuremberg et dans l'arrêt de cette Cour

L'Assemblée générale

Décide de confier la formulation des principes de droit international reconnus par le statut de la Cour de Nuremberg et dans l'arrêt de cette Cour, à la Commission du droit international, dont les membres seront, conformément à la résolution 174(II), élus à la prochaine session de l'Assemblée générale, et

Directs the Commission to

(*a*) Formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, and

(*b*) Prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in sub-paragraph (*a*) above.

Hundred and twenty-third plenary meeting,
21 November 1947.

178 (II). Draft declaration on the rights and duties of States

The General Assembly,

Noting that very few comments and observations on the draft declaration on the rights and duties of States presented by Panama[1] have been received from the States Members of the United Nations,

Requests the Secretary-General to draw the attention of States to the desirability of submitting their comments and observations without delay;

Requests the Secretary-General to undertake the necessary preparatory work on the draft declaration on the rights and duties of States according to the terms of resolution 175(II);

Resolves to entrust further study of this problem to the International Law Commission, the members of which in accordance with the terms of resolution 174(II) will be elected at the next session of the General Assembly,

And accordingly

Instructs the International Law Commission to prepare a draft declaration on the rights and duties of States, taking as a basis of discussion the draft declaration on the rights and duties of States presented by Panama, and taking into consideration other documents and drafts on this subject.

Hundred and twenty-third plenary meeting,
21 November 1947.

179 (II). Co-ordination of the privileges and immunities of the United Nations and of the specialized agencies

A

The General Assembly

Approves the following Convention on the Privileges and Immunities of the specialized agencies and proposes it for acceptance by the specialized agencies and for accession by all Members of the United Nations and by any other State member of a specialized agency.

[1] See document A/285.

Charge cette Commission de:

a) Formuler les principes de droit international reconnus par le Statut de la Cour de Nuremberg et dans l'arrêt de cette Cour, et

b) Préparer un projet de code des crimes contre la paix et la sécurité de l'humanité, indiquant clairement la place qu'il convient d'accorder aux principes mentionnés au sous-paragraphe *a*) ci-dessus.

Cent-vingt-troisième séance plénière,
le 21 novembre 1947.

178 (II). Projet de déclaration des droits et des devoirs des Etats

L'Assemblée générale,

Prenant note du fait qu'un nombre restreint de commentaires et d'observations sur le projet de déclaration des droits et des devoirs des Etats présenté par le Panama[1] a été reçu des Etats Membres de l'Organisation des Nations Unies,

Invite le Secrétaire général à attirer l'attention des Etats sur l'intérêt qu'il y a à ce que leurs commentaires et observations soient fournis sans délai;

Invite le Secrétaire général à entreprendre le travail préparatoire nécessaire en ce qui concerne le projet de déclaration des droits et des devoirs des Etats conformément aux dispositions de la résolution 175(II);

Décide de confier les études ultérieures concernant cette matière à la Commission du droit international dont les membres seront, conformément aux dispositions de la résolution 174(II), élus à la prochaine session de l'Assemblée générale;

En conséquence,

Charge la Commission du droit international de préparer un projet de déclaration des droits et des devoirs des Etats, en prenant comme base de discussion le projet de déclaration des droits et des devoirs des Etats présenté par le Panama et en tenant compte des autres documents et projets relatifs à ce sujet.

Cent-vingt-troisième séance plénière,
le 21 novembre 1947.

179 (II). Coordination des privilèges et immunités des Nations Unies et des institutions spécialisées

A

L'Assemblée générale

Approuve la Convention suivante sur les privilèges et immunités des institutions spécialisées et la propose à l'acceptation des institutions spécialisées et à l'adhésion de tous les Etats Membres de l'Organisation des Nations Unies et de tout autre Etat membre d'une institution spécialisée.

[1] Voir document A/285.

Elements of Crimes*,**

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

** The Elements of Crimes are reproduced from the *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002* (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.B. The Elements of Crimes adopted at the 2010 Review Conference are replicated from the *Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May -11 June 2010* (International Criminal Court publication, RC/11) .

General introduction

1. Pursuant to article 9, the following Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8, consistent with the Statute. The provisions of the Statute, including article 21 and the general principles set out in Part 3, are applicable to the Elements of Crimes.

2. As stated in article 30, unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. Where no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e., intent, knowledge or both, set out in article 30 applies. Exceptions to the article 30 standard, based on the Statute, including applicable law under its relevant provisions, are indicated below.

3. Existence of intent and knowledge can be inferred from relevant facts and circumstances.

4. With respect to mental elements associated with elements involving value judgement, such as those using the terms "inhumane" or "severe", it is not necessary that the perpetrator personally completed a particular value judgement, unless otherwise indicated.

5. Grounds for excluding criminal responsibility or the absence thereof are generally not specified in the elements of crimes listed under each crime.[1]

6. The requirement of "unlawfulness" found in the Statute or in other parts of international law, in particular international humanitarian law, is generally not specified in the elements of crimes.

7. The elements of crimes are generally structured in accordance with the following principles:

   (a) As the elements of crimes focus on the conduct, consequences and circumstances associated with each crime, they are generally listed in that order;

   (b) When required, a particular mental element is listed after the affected conduct, consequence or circumstance;

   (c) Contextual circumstances are listed last.

8. As used in the Elements of Crimes, the term "perpetrator" is neutral as to guilt or innocence. The elements, including the appropriate mental elements, apply, *mutatis mutandis*, to all those whose criminal responsibility may fall under articles 25 and 28 of the Statute.

9. A particular conduct may constitute one or more crimes.

10. The use of short titles for the crimes has no legal effect.

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1 This paragraph is without prejudice to the obligation of the Prosecutor under article 54, paragraph 1, of the Statute.

Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal

1950

Text adopted by the International Law Commission at its second session, in 1950 and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the principles, appears in *Yearbook of the International Law Commission, 1950*, vol. II, para. 97.

Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal

Principle I

Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

Principle II

The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

Principle III

The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

Principle IV

The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

Principle V

Any person charged with a crime under international law has the right to a fair trial on the facts and law.

Principle VI

The crimes hereinafter set out are punishable as crimes under international law:

(*a*) Crimes against peace:

(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

(*b*) War crimes:

Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

(*c*) Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are

done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

Principle VII

Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

Bundesministerium der Justiz

juris

Übersetzung des Strafgesetzbuches durch Prof. Dr. Michael Bohlander

Translation of the German Criminal Code provided by Prof. Dr. Michael Bohlander

Stand: Die Übersetzung berücksichtigt die Änderung(en) des Gesetzes durch Artikel 3 des Gesetzes vom 2.10.2009 (BGBl. I S. 3214)

Version information: The translation includes the amendment(s) to the Act by Article 3 of the Act of 2.10.2009 (Federal Law Gazette I p. 3214)

GERMAN CRIMINAL CODE

Full citation: Criminal Code in the version promulgated on 13 November 1998, Federal Law Gazette [Bundesgesetzblatt] I p. 3322, last amended by Article 3 of the Law of 2 October 2009, Federal Law Gazette I p. 3214

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GENERAL PART

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CHAPTER ONE
THE CRIMINAL LAW

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FIRST TITLE
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An act may only be punished if criminal liability had been established by law before the act was committed.

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Section 2
Jurisdiction ratione temporis; lex mitior

(1) The penalty and any ancillary measures shall be determined by the law which is in force at the time of the act.

(2) If the penalty is amended during the commission of the act, the law in force at the time the act is completed shall be applied.

(3) If the law in force at the time of the completion of the act is amended before judgment, the most lenient law shall be applied.

(4) A law intended to be in force only for a determinate time shall be continued to be applied to acts committed while it was in force even after it ceases to be in force, unless otherwise provided by law.

(5) Subsections (1) to (4) shall apply mutatis mutandis to confiscation, deprivation and destruction.

(6) Unless otherwise provided by law, measures of rehabilitation and incapacitation shall be determined according

2. as a partner authorised to represent a partnership with independent legal capacity; or

3. as a statutory representative of another,

any law according to which special personal attributes, relationships or circumstances (special personal characteristics) form the basis of criminal liability, shall apply to the representative, if these characteristics do not exist in his person but in the entity, partnership or person represented.

(2) If a person, whether by the owner of a business or somebody delegated by him, has been

1. commissioned to manage the business, in whole or in part; or

2. expressly commissioned to perform autonomous duties which are incumbent on the owner of the business,

and the person acts on the basis of this commission, any law, according to which special personal characteristics give rise to criminal liability shall apply to the person commissioned, if these characteristics do not exist in his but in the person of the owner of the business. Within the meaning of the 1st sentence above an enterprise shall be the equivalent of a business. If a person acts on

the basis of a similar commission for an agency performing public administrative services, the first sentence shall apply mutatis mutandis.

(3) Subsections (1) and (2) above shall apply even if the act of commission intended to create the power of representation or the agency is void.

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Section 15
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Unless the law expressly provides for criminal liability based on negligence, only intentional conduct shall attract criminal liability.

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Section 16
Mistake of fact

(1) Whosoever at the time of the commission of the offence is unaware of a fact which is a statutory element of the offence shall be deemed to lack intention. Any liability for negligence remains unaffected.

(2) Whosoever at the time of commission of the offence mistakenly assumes the existence of facts which would satisfy the elements of a more lenient provision, may only be punished for the intentional commission of the offence under the more lenient provision.

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Section 17
Mistake of law

If at the time of the commission of the offence the offender lacks the awareness that he is acting unlawfully, he shall be deemed to have acted without guilt if the mistake was unavoidable. If the mistake was avoidable, the sentence may be mitigated pursuant to section 49(1).

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Section 18
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If the law imposes a more serious sentence based on an extended result if an offence, any principal or secondary participant is liable to the increased sentence only if they acted at least negligently with respect to that result.

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Section 19
Lack of criminal capacity of children

Persons who have not attained the age of fourteen at the time of the commission of the offence shall be deemed to

Law 6107 Criminal Law
Professor Vernellia R. Randall
The University of Dayton School of Law

MPC § 2.02 General Requirements of Culpability

Please email me regarding any typos, misspelling, etc.

Syllabus
01: Introduction
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04: Personal Crimes
05: Anticipatory Crimes
06: Defenses
07. Accomplices
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Model Penal Code § 2.02. General Requirements of Culpability.

(1) Minimum Requirements of Culpability. Except as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.

(2) Kinds of Culpability Defined

(a) Purposely.

A person acts purposely with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and

(ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

(b) Knowingly.

A person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

(c) Recklessly.

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

(d) Negligently.

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

(3) Culpability Required Unless Otherwise Provided. When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto.

(4) Prescribed Culpability Requirement Applies to All Material Elements. When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.

(5) Substitutes for Negligence, Recklessness and Knowledge. When the law provides that

02: Basic Elements
02 Actus Reus
03 Mens Rea
04 Nonintent
05 Mistake
06 Causation
Lessons Outline

negligence suffices to establish an element of an offense, such element also is established if a person acts purposely, knowingly or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.

(6) Requirement of Purpose Satisfied if Purpose Is Conditional. When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense.

(7) Requirement of Knowledge Satisfied by Knowledge of High Probability. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.

(8) Requirement of Wilfulness Satisfied by Acting Knowingly. A requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears.

(9) Culpability as to Illegality of Conduct. Neither knowledge nor recklessness or negligence as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense is an element of such offense, unless the definition of the offense or the Code so provides.

(10) Culpability as Determinant of Grade of Offense. When the grade or degree of an offense depends on whether the offense is committed purposely, knowingly, recklessly or negligently, its grade or degree shall be the lowest for which the determinative kind of culpability is established with respect to any material element of the offense.

Below
Same: [MPC § 2.02 General Requirements of Culpability] [§ 2.05. When Culpabi
Above: [03 Actus Reus] [04 Mens Rea]
[05 Non-intent Mental States] [06 Mistake] [07 Causation]

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Commentary on the Rome Statute of the International Criminal Court

- Observers' Notes, Article by Article -

Second Edition

Edited by

Otto Triffterer

C.H.Beck · Hart · Nomos

Article 25
Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Literature:

Kai Ambos, DER ALLGEMEINE TEIL DES VÖLKERSTRAFRECHTS. ANSÄTZE EINER DOGMATISIERUNG (2002/2004²); *id.*, LA PARTE GENERAL DEL DERECHO PENAL INTERNACIONAL (2005); *id.*, *Individual Criminal Responsibility in International Criminal Law*, in: Gabrielle K. McDonald/Olivia Swaak Goldman (eds.), SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW, Vol. I: COMMENTARY 1 (2000); *id.*, *General Principles of Criminal Law in the Rome Statute*, 9 CRIM. L.F. 1 (1999); *id.*, *"Verbrechenselemente" sowie Verfahrens- und Beweisregeln des Internationalen Strafgerichtshofs*, 54 NJW 405 (2001); *id.*, *Superior Responsibility (Art. 28)*, in: Antonio Cassese *et al.* (eds.), THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 805 (2002); *id.*, *Some Preliminary Reflections on the Mens Rea Requirements of the Crimes of the ICC-Statute and of the Elements of Crimes*, in: Lal Chand Vorah *et al.* (eds.), MAN'S INHUMANITY TO MAN – ESSAYS IN HONOUR OF A. CASSESE 11 (2003); *id.*, *Zwischenbilanz im Milosevic-Verfahren*, 59 JURISTENZEITUNG 965 (2004); M. Cherif. Bassiouni, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW (2003); Antonio Cassese, INTERNATIONAL CRIMINAL LAW 135 (2003); Albin Eser, *Individual Criminal Responsibility (Art. 25)*, in: Antonio Cassese *et al.* (eds.), THE ROME STATUTE OF THE ICC: A COMMENTARY 767 (2002); Christopher Greenwood, *Command responsibility and the Hadzihasanovic decision*, 2 J. INT'L CRIM. JUST. 598 (2004); Kai Hamdorf, BETEILIGUNGSMODELLE IM STRAFRECHT. EIN VERGLEICH VON TEILNAHME- UND EINHEITSTÄTERSYSTEMEN IN SKANDINAVIEN, ÖSTERREICH UND DEUTSCHLAND (2002); Claus Kreß, *Die Kristallisation eines Allgemeinen Teils des Völkerstrafrechts: Die Allgemeinen Prinzipien des Strafrechts im Statut des Internationalen Strafgerichtshofs*, 12 HUMANITÄRES VÖLKERRECHT 4 (1999); Fernando Mantovani, *The General Principles of International Criminal Law: The viewpoint of a national criminal lawyer*, 1 J. INT'L CRIM.

β) "For the purpose of facilitating"

This concept introduces a subjective threshold which goes beyond the ordinary *mens rea* requirement within the meaning of article 30[113]. The expression "for the purpose of facilitating" is borrowed from the Model Penal Code. While the necessity of this requirement was controversial within the American Law Institute, it is clear that purpose generally implies a specific subjective requirement stricter than mere knowledge[114]. The formula, therefore, ignores the – above quoted – jurisprudence of the ICTY and ICTR, since this jurisprudence holds that the aider and abetter must only know that his or her acts will assist the principal in the commission of an offence[115]. Additionally, knowledge may be inferred from all relevant circumstances[116], *i.e.*, it may be proven by circumstantial evidence[117]. 23

On the other hand, the word "facilitating" confirms that a direct and substantial assistance is not necessary and that the act of assistance need not be a *conditio sine qua non* of the crime[118].

In conclusion, the formulation confirms the general assessment that subparagraph (c) provides for a relatively low objective but relatively high subjective threshold (in any case higher than the ordinary *mens rea* requirement according to article 30)[119].

(d) "In any other way contributes" to the (attempted) commission ... "by a group ... acting with a common purpose"

The whole subparagraph (d) is an almost literal copy of a 1998 Anti-terrorism convention[120] and presents a compromise with earlier "conspiracy" provisions[121], which since Nuremberg have been controversial[122]. The 1991 ILC Draft Code held punishable an individual who "conspires 24

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113 See D. K. Piragoff, *article 30*, margin Nos. 9 *et seq.* and 17 *et seq.*; generally about the mental element in international criminal law, *cf. f.* A. Eser, *Mental Elements – Mistake of Fact and Law*, in: A. Cassese *et al.* (eds.), THE ROME STATUTE OF THE ICC: A COMMENTARY 889 (2002); K. Ambos, *Some Preliminary Reflections on the Mens Rea Requirements of the Crimes of the ICC-Statute and of the Elements of Crimes*, in: L. C. Vohrah et al. (eds.), MAN'S INHUMANITY TO MAN – ESSAYS IN HONOUR OF A. CASSESE 12 *et seq.* (2003); *supra* note 2, *id.*, DER ALLGEMEINE TEIL 757 *et seq.*; *supra* note 2, O. Triffterer, *Bestandsaufnahme* 221 f.

114 *Supra* note 17, Model Penal Code, § 2.06, Conc. *supra* note 6, A. Eser, *Responsibility* 801.

115 *Supra* note 81, *Prosecutor v. Tadic*, para. 692; *supra* note 72, *Prosecutor v. Delalic et al.*, paras. 326, 328; *supra* note 88, *Prosecutor v. Furundzija*, paras. 236–249 (236, 245–6, 249); *supra* note 19, *Prosecutor v. Krnojelac*, para. 90; *Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Judgement, Appeals Chamber, 25 Feb. 2004, para. 102; *supra* note 98, *Prosecutor v. Blaskic*, Case No. IT-95-14-A, para. 49; *supra* note 71, *Prosecutor v. Akayesu*, paras. 476–9; *supra* note 103, *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, para. 388; *supra* note 103, *Prosecutor v. Kamuhanda*, Case No. ICTR-95-54A-T, para. 599.

116 *Supra* note 81, *Prosecutor v. Tadic*, para. 676; *supra* note 72, *Prosecutor v. Delalic et al.*, para. 328; *supra* note 71, *Prosecutor v. Akayesu*, para. 478; *supra* note 103, *Prosecutor v. Kamuhanda*, Case No. ICTR-95-54A-T, para. 600.

117 *Cf. f. supra* note 81, *Prosecutor v. Tadic*, para. 689: "if the presence can be shown or inferred, by circumstantial or other evidence, to be knowing ..."; *supra* note 72, *Prosecutor v. Delalic et al.*, para. 386 with regard to command responsibility: "... such knowledge cannot be presumed but must be established by way of circumstantial evidence".

118 *Supra* note 88, *Prosecutor v. Furundzija*, para. 231.

119 Conc. *supra* note 6, A. Eser, *Responsibility* 801 with fn. 145.

120 International Convention for the Suppression of Terrorist Bombings, U.N. Doc. A/RES/52/164 (1998), Annex 137 I.L.M. 249 (1998)), article 2 para. 3 (c).

121 For example: Preparatory Committee Draft, article 23 para. 7 (c) (ii).

122 See, for example, V. Pella, *Mémorandum*, 2 Y.B.I.L.C. 278–362, 357 (1950); J. Graven, *Les Crimes contre l'Humanité*, RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 433–605, 502–503 (1950); H.-H. Jescheck, *Die internationale Genocidium-Konvention vom 9. Dezember 1948 und die Lehre vom Völkerstrafrecht*, 66 ZStW 193–217, 213 (1954); R. Rayfuse, *The Draft Code of Crimes against the Peace and Security of Mankind: Eating Disorders at the International Law Commission*, 8 CRIM. L.F. 52 (1997); *supra* note 27, A. Cassese, INTERNATIONAL CRIMINAL LAW 196 *et seq.* See also the statement of the German delegate O. Kathofnigg at the Diplomatic Conference for the Adoption of the 1988 Drug Convention (United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 1988, Official Records, Vol. II, para. 52: "common law concept unknown in civil law systems"). The concept was, however, in principle recognized by the ILC Special Rapporteur D. Thiam (2 Y.B.I.L.C., Part 1, 16, para. 66 (1990)) and also exists today in civil law jurisdictions in a similar

in" the commission of a crime, thereby converting conspiracy into a form of "participation in a common plan for the commission of a crime against the peace and security of mankind"[123]. The 1996 Draft Code extends to a person who "directly participates in planning or conspiring to commit such a crime which in fact occurs"[124]. Thus, it restricts liability compared to the traditional conspiracy provisions in that it requires a direct participation – already discussed above – and an effective commission of the crime. Subparagraph (d) takes this more restrictive approach even further, eliminating the term conspiracy altogether and requiring at least a contribution to a collective attempt of a crime.

25 Subparagraph (d) establishes, on the one hand, the lowest objective threshold for participation according to article 25 since it criminalizes "any other way" that contributes to a crime. This seems to imply a kind of subsidiary liability if subparagraph (c) is not applicable. On the other hand, however, subparagraph (d) only refers to "a crime by a group of persons acting with a common purpose", *i.e.*, provides for objective – group crime – and subjective – common purpose – limitations of attribution which – at first glance – seem to delimitate subparagraph (d) from (c). Indeed, in *Furundzija*, the ICTY held that these provisions confirm that international (criminal) law recognizes a distinction between aiding and abetting a crime and participation in a common criminal plan as "two separate categories of liability for criminal participation ... co-perpetrators who participate in a jce, on the one hand, and aiders and abetters, on the other"[125]. – On the issue of delimitation, see also margin No. 45.

26 The distinction gains particular importance on the subjective level. While aiding and abetting generally only requires the knowledge that the assistance contributes to the main crime[126] and subparagraph (c) adds to this the "purpose of facilitating" (margin No. 23), participation in a group crime within the meaning of subparagraph (d) requires, on the one hand, a "common purpose" of the group and, on the other, an "intentional" contribution of the participant, complemented by alternative additional requirements ((i) and (ii)) to be discussed below (margin Nos. 29 and 30).

27 Furthermore, it is not absolutely clear what is meant by "intentional". Does it refer to the traditional use of "intent"[127] – as *dolus* (*Vorsatz*)[128] – including knowledge (*Wissen*) and intention or purpose (*Wollen*) or is it limited to the latter, *i.e.*, the first degree *dolus directus*[129]? This view seems to be supported by the Spanish version ("intencional") since Spanish doctrine, based on German thinking, starts from the general concept of *dolus* (see article 10 of the 1995 Codigo Penal: "dolosas") and reserves the notion of "intención" or "intencional" for the "delitos de intención" or the first degree *dolus directus*[130]. The French version ("intentionelle"), however, does not support this restrictive interpretation since in French thinking[131] "l'intention" consists of two elements: the foreseeability (element of knowledge) and the wish (element of will) of the criminal act. Thus, although the "faute intentionelle" is characterised by the "volonté orientée vers l'accomplissement d'un acte interdit", *i.e.*, rather by will than knowledge, the latter is also

form (see, e.g., § 30 para. 2 alt. 3 of the German *Strafgesetzbuch*).

123 2 Y.B.I.L.C., Part 2, 99 (commentary to article 3) (1991).

124 1996 ILC Draft Code, article 2 para. 3 (e).

125 *Supra* note 88, *Prosecutor v. Furundzija*, para. 216; see also para. 249.

126 *Ibid.*, para. 246.

127 W. R. LaFave/A. W. Scott, SUBSTANTIVE CRIMINAL LAW Vol. 1, § 3.5., 302–3 (1986).

128 *Cf. supra* note 7, G. Fletcher, CONCEPTS 112.

129 To avoid confusion this author uses "intent" in the sense of *dolus* in general and "intention" in the sense of first degree *dolus*.

130 Most explicitly J. M. Rodriguez Devesa/A. Serrano Gomez, DERECHO PENAL ESPAÑOL. PARTE GENERAL 459 *et seq.*, 466 (18th ed. 1995): "El dolo directo comprende aquellos casos en que el resultado ha sido perseguido intencionalmente ... Se habla entonces de un dolo directo de primer grado ...". See also M. Cobo de Rosal/T.S. Vives Anton, DERECHO PENAL. PARTE GENERAL 371, 621 *et seq.*, 625 (5th ed. 1999).

131 See J. Larguier, DROIT PÉNAL GÉNÉRAL 49, 51 (18th ed. 2001); J.-C. Soyer, MANUEL DROIT PÉNAL ET PROCÉDURE PÉNAL 99 (15th ed. 2000).

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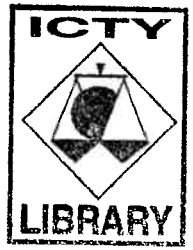

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Preface

In the preparation of the second edition, the aims of the work have undergone a slight alteration. One of its chief aims is still the identification and discussion of issues of principle and policy involved in the shaping of the criminal law by the legislature, the courts, the law reform bodies, and academic commentators. However, this edition contains somewhat more citation and discussion of statutes and case law, in the hope that it will be suitable for use by teachers and students as a companion to a collection of cases and materials.

In addition to this modest expansion, the primary task has been to take account of developments in the last four years. This has not simply been a matter of incorporating new statutory provisions and recent cases. There has been a significant increase in the output of the Law Commission in the field of criminal law, with a spate of reports and consultation papers in the last two years which raise wide-ranging questions about the proper outer limits and inner distinctions of criminal law. And, most strikingly, there has been a resurgence in academic writing on criminal law in the form of journal articles, essays, and monographs. Within the confines of this edition it has not been possible to discuss all the important contributions, but an effort has been made to include sufficient references for readers to explore further this revival of criminal law scholarship.

This book does not argue that English criminal law is grounded in a stable set of established doctrines. A more realistic view is that the arguments and assumptions which influence the development of the criminal law form a disparate group, sometimes conflicting and sometimes invoked selectively.

The first step is to identify the principles and policies which appear to play a significant part, sometimes a part not openly avowed in the reasoning of the courts or the commentators. Then questions are raised about each of these doctrines. Are they soundly based, in moral or social terms? How are they related to the proper aims, forms, and limits of the criminal sanction in modern Western societies? Are there other principles and policies which would be more appropriate? In order to produce satisfactory answers to questions of this kind or, in some instances, to demonstrate that no 'answer' can be expected, it would be necessary to travel much further into the realms of moral and political philosophy and into criminology than is possible within the confines of this book. Similarly, comparative law might be used to cast light on some of the issues and on alternative strategies, but this approach has generally been eschewed for

knowingly risked. Only if they were aware (or, as it is often expressed, 'subjectively' aware) of the possible consequences of their conduct should they be held liable. The principle of *mens rea* may also be stated so as to include the belief principle, since in some crimes it is not (or not only) the causing of consequences that is criminal but behaving in a certain way with knowledge of certain facts. For example, one element in the serious offence of rape is that the man must know that the victim is not consenting, or be reckless as to whether the victim is consenting. If a case arises in which the man claims that he genuinely believed that the victim was consenting, this raises the issue of mistake as a possible defence.[95] Reflecting the element of choice that flows from the principle of autonomy, the principle of *mens rea* would state that a person's criminal liability should be judged on the facts as he believed them to be. All these aspects of the principle of *mens rea* are discussed further in Chapter 5.2 and 5.3. Although it is closely connected with the principle of autonomy, this does not mean that negligence liability cannot be supported on the same basis: so long as there is an exception for incapacity, as argued below, this may be fair.

(p) The Policy of Objective Liability

In spheres of activity that are perceived to be particularly dangerous, it is often thought that there are sufficient justifications for going beyond subjective liability and imposing liability for lack of care. Perhaps the clearest example of this is the road traffic legislation: longstanding offences such as dangerous driving and careless driving make drivers criminally liable for the degree to which they fall below the standards expected of a competent motorist.[96] Among the justifications for this is the principle of welfare, which, in this respect, favours the imposition of standards of behaviour on citizens because their behaviour as motorists can so easily impinge on others, with disastrous consequences. In industrial contexts there is a whole host of offences based on negligence, particularly where hazardous substances or dangerous conditions are involved. Moreover, in many commercial settings the criminal law imposes strict liability on those who sell defective products or unwholesome footstuffs, convicting them in many situations where the fault is small or non-existent. The case for extending the criminal law to these minor harms is based on expediency, and has already been criticized in Chapter 2.8. Strict liability itself is often supported by reference to considerations of welfare, 'policy considerations', or 'social concern', but it will be argued in Chapter 5.3(a) that the justifications for going beyond negligence liability to strict liability are unpersuasive. Criminal liability for negligence, however, so long as it is

[95] See Ch 5.3(d) and Ch 6.6 below.

[96] See Ch 7.6.

founded on clear and well-publicized standards and duties for people performing certain activities, is often easier to support. Indeed, liability for negligence is not properly described as 'objective' if there is an exception to ensure that those who lack the capacity to conform their conduct to the required standard are not convicted. Strict liability is generally objectionable but, as will be argued in Chapter 5.3(f), there may be certain spheres in which criminal liability can properly be based on a form of negligence—taking proper account of the seriousness of the harm, the need to warn citizens of their duties, and the need to exempt the incapable.

(q) The Principle of Correspondence

Another implication of the principle of individual autonomy, and its emphasis on choice and control, is the principle of correspondence. Not only should it be established that the defendant had the required fault, in terms of mens rea or belief; it should also be established that the defendant's intention, knowledge, or recklessness related to the proscribed harm. Thus, if the conduct element of a crime is 'causing serious injury', the principle of correspondence demands that the fault element should be intention or recklessness as to causing serious injury, and not intention or recklessness as to some lesser consequence such as a mere assault. Another example, as we shall see,[97] is the law of murder: in English law a person may be convicted of murder if he either intended to kill or intended to cause grievous bodily harm. However, the latter species of fault breaches the principle of correspondence: the fault element does not correspond with the conduct element (which is, causing death), and so a person is liable to conviction for a higher crime than contemplated.

(r) Constructive Liability

The argument for extending the fault element in murder, as described in the previous paragraph, favours constructive liability. This has a Latin tag, *versari in re illicita*,[98] and in its wider form it argues that anyone who decides to transgress the criminal law should be held liable for all the consequences that ensue, even if they are more serious than expected. Whether this is properly described as a policy or a principle is open to debate. Some of its adherents take no trouble to develop a principled argument, whereas others argue that the decision that is morally most significant is the decision to cause harm intentionally to another: once a person has crossed this moral threshold, there is good reason to impose liability for whatever consequences ensue.[99] However, even those who

[97] Below, Ch 7.3.

[98] Hall, *General Principles*, 6.

[99] For a modern re-assertion of this principle, see J. Gardner, 'Rationality and the Rule of Law in Offences against the Person' [1994] Camb LJ 502.

The orthodoxy is then to criticize crimes of negligence and, ... powerfully, crimes of strict liability for their departure from the... requirements. The courts, on the other hand, have tended to p... variable approaches, upholding subjective principles on some... and giving way to objective or 'public policy' arguments... Text-writers have also tended to divide 'actus reus' from 'mens... basis that fault elements fall into the latter category, but we ha... seen that there are fault elements in conduct requirement... voluntariness, causation, and justifiable force. In Chapter 6 w... with a further group of 'negative' fault requirements: these ar... elements which the prosecution has to prove in every case, b... doctrines which suggest the absence of fault and which the pros... to negative (generally speaking) if they are raised by D. We... chapter by considering some general principles relevant to fault... go on to consider the core fault terms.

5.2 SOME GENERAL PRINCIPLES

(a) Choice and the Subjective Principles

The principle of *mens rea* has already been outlined in Chapt... together with the related principles of correspondence (Chapt... and of fair labelling (Chapter 3.5(s)). The essence of the princip... *rea* is that criminal liability should be imposed only on person... sufficiently aware of what they are doing, and of the consequence... have, that they can fairly be said to have chosen the behaviou... consequences. This approach is grounded in the principle of a... (Chapter 2.2): individuals are regarded as autonomous person... general capacity to choose among alternative courses of behavi... respect for their autonomy means holding them liable only on th... their choices. The principle of *mens rea* may also be claimed to... the constitutional values of legality and rule of law, by reassurin... that they will only be liable to conviction, and to the exercise... coercion against them, if they knowingly cause a prohibited har... were achieved, the criminal law would ensure that 'each p... guaranteed a greatest liberty, capacity and opportunity of contro... predicting the consequences of his or her actions compatible wi... liberty, capacity and opportunity for all'.[3] What this liberal view ... an approach which holds people criminally liable solely on the gro... liability and punishment would have a general deterrent e...

[3] D. A. J. Richards, 'Rights, Utility and Crime', in M. Tonry and N. Morris (ed... *and Justice: An Annual Review*, iii (1981), 274.

...harms. That approach, associated with utilitarian ...the probable social effects of liability and punishment, ...idual defendant any special status in the matter: if the ...ople in D's position would have an overall deterrent ...uld be punished, even though he or she cannot be said to ...use the harm. Deterrent theories therefore tend to give ...ce. Theories of punishment in the liberal tradition may ...evance of welfare, at least at the level of justifying the ...it and justifying certain offences, but at the level of ...to conviction and censure they tend to regard respect for ...individual autonomy as having superior value to general ...ocial utility.

...*mens rea* also encompasses the belief principle, which ...inal liability should be based on what defendants believed ...g or risking, not on actual facts which were not known to ...e. Also flowing from this, as we saw in Chapter 3.5(q), is ...correspondence which insists that the fault element for a ...rrespond to the conduct element specified for the crime. ...onduct element is 'causing serious injury', then the fault ...to be 'intention or recklessness as to causing serious injury'; ...element, such as 'intention or recklessness as to a mere ...breach the principle of correspondence. This makes the ...notion of choice is not an abstract phenomenon, but should ...linked to the circumstances or consequences specified in the ...ich crime.

...daries of Subjectivity

...dy seen, in Chapter 3.5(r), that the high value placed by ...n the principle of correspondence is disputed by those who ...ce a person has crossed a significant moral threshold, what is ...uld reflect the harm done rather than the harm foreseen. This ...ust be taken further in the present context. Constructive ...ility, whereby liability for a more serious offence is constructed ...r degree of fault, has a long history. Its most powerful ...at common law was the felony–murder rule, which rendered ...aused death while committing a felony liable for the murder ...even though the death was accidental. The felony–murder ...olished in England in 1957, but it remains law in many ...ates.[5] Its spirit survives in modern English law in the law of

...se of Bentham: for extracts and discussion, see A. von Hirsch and A. ...cipled Sentencing (1993), Ch 2.
...ion, see P. Robinson, *Fundamentals of Criminal Law* (1989), Ch 9, and ...ump, 'In Defence of the Felony Murder Doctrine' (1985) 8 Harv JLPP, 359.

manslaughter: if D commits a criminal offence which produces a risk of some harm to another person, and death results from that offence, the crime may be manslaughter. This is so, even though D merely intended to commit a minor assault, and the victim, by chance, fell awkwardly. The law of manslaughter takes the criminal intention or recklessness (as to a minor offence), couples it with the harm caused (which is major), and constructs liability for a serious offence. Even though the sentence is unlikely to reflect the death fully,[6] the label (manslaughter) is serious. The doctrine may be supported by arguing that the death, though accidental, is a direct result of D's fault in committing the minor crime, and so D should bear the legal responsibility for it.

This may be criticized as going too far: if the fault in committing minor crimes is so great, why not regard them all as serious? Why not argue that all minor assaults should be punishable up to a maximum of life imprisonment, because any assault could (albeit in unusual circumstances) cause death? Surely one can separate D's fault in committing the minor crime from the accidental consequence of death?[7] One response to this might be that it is the significance of death which is crucial here: life is valued so highly that a person who destroys it in these circumstances should be labelled accordingly. A similar approach is taken to the offence of causing death by dangerous driving: this offence now has a maximum sentence of 10 years' imprisonment,[8] compared with the maximum of two years for dangerous driving, and yet the difference between the two offences turns on an outcome which may often be a matter of chance. There seems to be considerable public sympathy for the policy of marking death with an extra punishment, even when it is not foreseen or even foreseeable as a result of what D was doing.[9] Perhaps this is rooted in a confusion between the notions of compensation and punishment. Certainly it attributes far greater significance to luck or chance than is proper on the autonomy-based approach of choice and control. Luck may be an unavoidable element in life and in moral judgments, but that does not mean that the criminal law should reflect the vagaries of chance when it has the opportunity to eliminate them as a basis for censure.[10] We will return to the conflict between constructive liability and the principle of correspondence when discussing manslaughter in Chapter 7.5.

[6] Some guidance on sentencing in this type of case was given by the Court of Appeal in *Coleman* (1992) 13 Cr App R (S) 508; the relevant law is discussed in Ch 7.5(a).

[7] Cf. L. L. Weinreb, 'Desert, Punishment and Criminal Responsibility' (1986) 49 L&CP (No. 3), 64–7, with the discussion in Ch 3.5(r) above.

[8] Criminal Justice Act 1993, s 67; see the discussion in Ch 7.6 below.

[9] See the research by P. H. Robinson and J. M. Darley, *Justice, Liability and Blame* (1995), Ch 6.

[10] See further A. Ashworth, 'Taking the Consequences', in S. Shute, J. Gardner, and J. Horder (eds), *Action and Value in Criminal Law* (1993).

There are other points at which the subjective principles, grounded in autonomy, come into conflict with welfare-based considerations. The most obvious manifestation of this is the mass of criminal offences of 'strict liability', which require hardly any fault element at all, to be discussed in 5.3(a). Even beyond those offences, however, the effects of arguments based on welfare and social defence have come to be felt. Thus, where the harm to be prevented is a fundamental one (such as death), the tendency is for the criminal law to go beyond the principle of *mens rea* and to introduce liability for negligence. The more serious the social harm, the greater care it is fair to expect citizens to take to avoid it. Another example has been the extension of the concept of 'recklessness', previously confined to an assessment of subjective awareness, to cover situations where D failed to see an obvious risk—an extension which, in part at least, challenges the moral basis of subjective recklessness in the notion of choice. The essence of the argument is that there may be just as much culpability in failing to think about an 'obvious' risk as in being aware of it, since part of living in a society is that citizens ought to be conscious of the potential of harm to others of their activities. These issues will be considered in great detail, in 5.3(c)–(g).

(c) The Principle of Contemporaneity

As we saw in Chapter 3.5(u), the principle of contemporaneity states that the fault element must coincide in point of time with the conduct element in order to amount to an offence. This forms part of the ideology that the function of the criminal law is not to judge a person's general character or behaviour over a period of time; its concern is only with the distinct criminal conduct charged. According to this view, whether or not criminal conviction is deserved depends on D's conduct and mental attitude at the relevant time. But this narrow statement of the principle, if indeed it ever represented a complete statement of the law,[11] was abandoned in the face of intuitions to the contrary exemplified in leading cases. In the famous case of *Fagan* v *Metropolitan Police Commissioner* (1969)[12] D accidentally drove his car on to a policeman's foot, and then deliberately left it there for a minute or so. The defence to a charge of assault was that the conduct element had finished before the fault element began; the act and the intent never coincided. The Divisional Court held that D's conduct in driving the car on to the foot and leaving it there should be viewed as a continuing act, so that the crime was committed when the fault element arose (by D deciding to leave the car there). This is not the only occasion on which the courts have invoked the notion of a 'continuing act' to expand the

[11] An early general statement was that of Lord Kenyon CJ in *Fowler* v *Padget* (1798) 7 Term Rep 509.

[12] [1969] 1 QB 439.

offences of negligence and, in respect of mistake, more objecti
limitations on defences to criminal liability. The fact is that in many ca
examined in this chapter, focussing solely on advertence fails to capt
moral distinctions and to satisfy social expectations. Subjective te
heighten the protection of individual autonomy, but they typically make
concession to the principle of welfare and the concomitant notion of du
to take care and to avoid harming the interests of fellow citizens. Howeve
if we are to move towards greater reliance on objective standards, at le
two points must be confronted. First, objective tests must be appli
subject to capacity-based exceptions. This preserves the principle
individual autonomy by ensuring that no person is convicted who lacke
the capacity to conform his or her behaviour to the standard require
Failure to recognize this in the *Caldwell* decision was a major blemish th
drew subsequent discussions away from the moral basis of the test itsel
Secondly, any improved moral 'fit' obtained by moving more toward
objective standards must be weighed against the greater detraction fro
the principle of maximum certainty that is likely to result.[179] Objecti
standards inevitably rely on terms such as reasonable, ordinary, an
prudent. They appear much more malleable and unpredictable tha
subjective tests that ask whether or not a defendant was aware of a give
risk, and they explicitly leave room for courts and even prosecutors
make social judgments about the limits of the criminal sanction.

5.4 THE VARIETY OF FAULT TERMS

Although the focus so far has been upon intention, recklessness, and
knowledge, an examination of criminal legislation in force—some moder
some from the nineteenth century—reveals a diversity of fault terms. Eve
if the draft Criminal Code were to be enacted, its provisions would not be
restricted to the core fault terms discussed so far. Moreover, the Code
would cover only some 200 out of nearly 8,000 criminal offences, so the
diversity would inevitably remain for some years. No survey of the
different fault terms can be offered here, but some general remarks may be
worthwhile.

Nineteenth-century legislation such as the Offences against the Person
Act 1861 makes considerable use of the term 'maliciously'.[180] It is now
settled that this term should be interpreted to mean intention or advertent
recklessness, which simplifies the criminal lawyer's task.[181] Unfortunately,
certain other terms have not been interpreted consistently in line with the
core terminology. Many statutory offences, both ancient and modern, rely

[179] Norrie, *Crime, Reason and History*, 66.
[180] See the discussion of specific offences in Ch. 8.3.
[181] *Cunningham* [1957] 2 QB 396; *Savage, Parmenter* [1992] AC 699; above, Ch 5.3(c).

on the term 'wilfully': although in *Sheppard* (1981)[182] the House of Lords
held that the term meant 'intentionally or recklessly' in the context of the
crime of wilful neglect of a child, there are other offences in which 'wilfully'
has been held not to require full mens rea.[183] Many offences are defined in
terms of 'permitting', a word that has usually been interpreted as requiring
full knowledge but has sometimes been held to impose strict liability, even
on individuals.[184]

More to the point, however, is the fact that many major criminal
offences rely on fault terms that bear little relation to any of those
discussed so far. Theft and several other Theft Act offences rely on the
term 'dishonestly', which, as we shall see,[185] may include a mixture of
elements of subjective awareness and motivation with elements of
objective moral judgment. Some fraud offences turn on whether the act or
omission was done 'fraudulently'. And a number of public order and racial
hatred offences impose liability where a certain consequence is 'likely' to
result from D's conduct, without reference to whether D is aware of this
likelihood. Thus, for example, a person commits the offence of 'fear or
provocation of violence' by threatening, abusive or insulting words or
behaviour *either* with intent to cause another person to believe that
immediate unlawful violence will be used, *or* 'whereby that person is likely
to believe that such violence will be used or it is likely that such violence
will be provoked'.[186] Similarly, the offence of publishing or distributing
racially inflammatory material is committed if *either* D intends thereby to
stir up racial hatred *or* 'having regard to all the circumstances racial hatred
is likely to be stirred up thereby'.[187] Offences that rely on the court's
assessment of the probable effect of certain conduct may be said to impose
a form of strict liability, or at least liability for negligence if it is assumed
that the defendant ought to have known what effect was likely. However,
suffice it to say that criminal offences in English law vary in their use of
fault terms. The arguments for and against the core terms, examined in this
Chapter, should provide a framework for considering the justifications for
most other fault terms that may be encountered.

5.5 THE REFERENTIAL POINT OF FAULT

To say that a certain crime should require intention, wilfulness, knowledge
or recklessness, is not enough. One must enquire: intention (or reckless-
ness) as to what? It might be said loosely that 'the crime of manslaughter

[182] [1981] AC 394.
[183] See J. A. Andrews, 'Wilfulness: a Lesson in Ambiguity' (1981) 1 Legal Studies, 303.
[184] Compare, e.g., *James and Son* v *Smee* [1955] 1 QB 78 with *Baugh* v *Crago* [1976] Crim LR 72.
[185] In Ch 9.2.
[186] Public Order Act 1986, s 4(1); see Ch 8.3.
[187] Public Order Act 1986, s 19(1).

requires proof of intention or recklessness': the reason why this is a loose statement is that the intent or recklessness required is the same as that for assault or some other criminal act, whereas the liability imposed is that for homicide. Close analysis of the elements of the crime will show that the required fault and the result specified in the definition fail to correspond. This is what the principle of correspondence, outlined above, aims to eliminate.[188] Whenever one is discussing intent or recklessness, its referential point should always be established.

(a) Fault, Conduct, and Result

The argument may be carried further by considering the breadth or narrowness of the definitions of offences. A law which included a general offence of intentionally causing physical harm to another would make it far easier to establish the intent than it is in a system with a series of graded offences, such as causing serious injury intentionally, causing injury intentionally, and so forth. Similarly, a law which includes a general offence of intentionally causing damage to property belonging to another makes it far easier to establish the intent than a law with a series of offences differentiated according to the type of property damaged. Do these different legislative techniques have significant implications for the subjective doctrines of fault? Surely they do: one could argue that a single broad offence of 'intentionally causing a physical harm to another' obliterates the distinction between intending a minor assault and intending a major injury, and that a single broad offence of 'intentionally damaging property belonging to another' obliterates the distinction between intending damage to a cheap item and intending damage to an expensive item. The trend towards broader offence definitions, evident in criminal damage[189] but not in offences against the person in England,[190] gives greater weight to the principle of taking the consequences of any wrongdoing (5.2(b) above) than to the principle of correspondence (5.2(a) above). To that extent, it detracts from the elements of choice and control which are fundamental to the subjective approach. But how should this problem be solved?[191] It is hardly practical to allow each person to nominate those factors which he or she regarded as significant in any particular event: who is to say whether fidelity to individual choice and

[188] See above, 5.2(b).
[189] *Offences of Damage to Property*, See Law Com No. 29 (1970), and the Criminal Damage Act 1971; also above, n. 138.
[190] See Criminal Law Revision Committee, 14th Report, *Offences against the Person* (1980, Cmnd 7844), discussed below, Ch 8.3(k).
[191] See A. Ashworth, 'The Elasticity of Mens Rea' in C. Tapper (ed), *Crime, Proof and Punishment* (1981), and M. Moore, 'Intention and Mens Rea', in R. Gavison (ed), *Issues in Contemporary Legal Philosophy* (1987).

control requires two or 20 grades of criminal damage, or two or four grades of offences of violence? At least, the implications for fault principles of these labelling decisions[192] should be kept firmly in mind.

The argument may be taken still further, for there are cases where, as everyone agrees, D intended to cause a different result from the one which actually occurred. How ought the law to deal with such cases? Should it respect D's choice, and provide for a conviction of attempting to do *X* (which was what D intended to do)? Or should it regard the result as the dominant factor, ignore the difference in D's intention, and convict on the basis of 'sufficient similarity' between the intention and the result? English law adopts the latter, more pragmatic approach. The Law Commission, in introducing a provision into the draft Criminal Code which follows the traditional approach, confirms the emphasis on results by stating that a conviction for attempt would be 'inappropriate as not describing the *harm done* adequately for labelling or sentencing purposes'.[193] The traditional English approach rests on three doctrines—unforeseen mode, mistaken object, and transferred fault.

(b) Unforeseen Mode

When D sets out to commit an offence by one method but actually causes the prohibited consequence in a different way, the offence may be said to have been committed by an unforeseen mode. Since most crimes penalizing a result (with fault) do not specify any particular mode of commission,[194] it is easy to regard the difference of mode as legally irrelevant. D intended to kill V; he chose to shoot him, but the shot missed; it hit a nearby heavy object, which fell on V's head and caused his death. Any moral distinction between the two modes is surely too slender to justify legal recognition. To charge D with *attempting* to kill V when he *did* kill him seems excessively fastidious. Pragmatism is surely the best approach here, and English law is generally right to ignore the unforeseen mode.[195]

(c) Mistaken Object

When D sets out to commit an offence in relation to a particular victim but makes a mistake of identity and directs his conduct at the wrong victim, the offence may be said to have been committed despite the mistaken object. The same would apply if D intends to steal one item of property but mistakenly takes another. So long as the two objects fall within the same

[192] See the discussion of the principle of fair labelling in Ch 3.4(s).
[193] Law Com No. 177, ii, para 8.57 (my italics).
[194] The offences of obtaining by deception form an exception: see below, Ch 9.7.
[195] See Ashworth, 'The Elasticity of Mens Rea', 46–7.

legal category, it may be said that any moral distinction between them is too slender to justify legal recognition. In English law, mistake of object within the same offence is ignored. Two questions may be raised, however. First, there is one other area of criminal law where as change in the identity of the victim is regarded as crucial, namely, the law of complicity.[196] One may therefore ask whether there really is inadequate moral significance in the plea: 'I intended to help to kill my enemy, X, and never meant any harm to the poor innocent, Y.' Secondly, much depends on the breadth of definition of the relevant offence: there is surely some moral significance in the plea: 'I thought the picture I damaged was just a cheap copy; I had no idea that a valuable painting would be kept in that place.'[197] English law favours the pragmatic answer of taking the defendant's mistake into account in sentencing, which incidentally is much simpler for prosecutors.

(d) Transferred Fault

When D sets out to commit an offence in relation to a particular person or particular property but his conduct miscarries and the harm falls upon a different person or different property, D's intent may be said to have been transferred and the offence to have been committed against the actual victim or property. When the fault is transferred, any defence which D might have is transferred with it.[198] As with unforeseen mode and mistaken object, the fault may only be transferred within the same offence.[199] Thus, if D throws a brick at some people, intending to hurt them, and the brick misses them and breaks a window, the intent to injure cannot be transferred to the offence of damaging property.[200] In this situation, the possible offences are an attempt to cause injury, and recklessly damaging property. As with the doctrine of mistaken object, the breadth of definition of the offence has some importance here. It is one thing to accept that D, who swung his belt at W and struck V, should be convicted of injuring V;[201] it is quite another thing, in moral terms, to accept that E, who threw a stone at a window, should be convicted of intentionally damaging a valuable painting which, unbeknown to him, was hanging inside. Yet English law would convict E, probably by reference to the broad wording of the Criminal Damage Act 1971 (any 'property belonging to another'), without any need to rely on the doctrine of transferred

[196] See Law Com No. 177, ii, para 8.31, and below, Ch 10.5(a).
[197] See Ashworth, 'The Elasticity of Mens Rea', 47.
[198] *Gross* (1913) 23 Cox CC 455 (qualified defence of provocation transferred).
[199] See A. Ashworth, 'Transferred Malice and Punishment for Unforeseen Consequences', in P. Glazebrook (ed), *Reshaping the Criminal Law* (1978).
[200] *Pembliton* (1874) 12 Cox CC 607.
[201] As in the leading case of *Latimer* (1886) 17 QBD 359.

fault.[202] Thus the more broadly offences are defined, the less resort there will be to these three doctrines.

(e) Establishing the Referential Point

A system of criminal law which succeeded in reflecting the varying degrees of importance which people attribute to aspects of their intention (the mode of execution, the identity of the victim, the value of the property) might be a 'law professor's dream', but it is clearly not practical. The law is right to regard some aspects as relevant and others as irrelevant. But that does not establish that the traditional English approach is the most appropriate. The draft Criminal Code provides for the continuance of the pragmatic approach, arguing that this is simpler for prosecutors and that an attempt conviction would ignore the harm actually done.[203] Does its pragmatism stretch too far? Would it not be better to analyse some of these cases in terms of an unfulfilled intention, combined with an accidental (or perhaps reckless) causing of harm? Some would argue that the present law of inchoate offences would not ensure a conviction in all these cases of miscarried intent and miscarried recklessness:[204] according to this view, the three doctrines are not merely effective in returning convictions and symbolically right in their emphasis on results,[205] but also necessary if justice is to be done in all cases. There is, it may be argued, no serious distortion of 'desert' or proportionality involved in the three doctrines, since the doctrines do not misrepresent the class of harm that D set out to commit. Yet there remains the law's ambivalence about the importance of a victim's identity: if this really is significant to offenders and people's judgments of them, should not prosecutors make more use of the law of attempts, where it is clearly applicable?

This chapter has outlined only part of the picture of fault requirements in criminal law, since the negative fault requirements (to be discussed in Chapter 6) have a significant bearing on general conceptions of 'desert', responsibility, and culpability. However, a few points should be made at this stage.

First, it is always necessary to analyse the elements of each offence, so as to be clear exactly what fault requirements apply to which conduct elements. The focus here on a few core fault terms should not obscure the great variety of English criminal offences. Secondly, there is the manifest flexibility of the borderlines between the various gradations of fault: the penumbra of vagueness in the extent to which 'intent' is wider than purpose,

[202] See Ashworth, 'Transferred Malice and Punishment', 89–93.
[203] In effect, cl 24 of the draft Criminal Code is a 'deeming' provision: see Law Com No. 177, ii, paras 8.57–8.59.
[204] G. Williams, 'Convictions and Fair Labelling' [1983] CLJ 85.
[205] Cf. the discussion of luck and results in Ch 5.2(b) above.

in the distinction between recklessness and negligence, and even in the notion of strict liability, not only breaches the principle of maximum certainty but also places considerable discretion in the hands of the courts. Thirdly, and most importantly, warnings have been sounded about the variable use of social defence arguments and the principle of welfare. Judges and some text writers have placed too much emphasis on social defence arguments in relation to strict liability, and yet there has been too little emphasis on the principle of welfare in the debate about liability for recklessness or negligence. Moreover, there is a widespread assumption that the same standard of liability should operate throughout the criminal law, that standard being *mens rea* defined in terms of intention, knowledge, and subjective recklessness. Yet if the potential harm is great and the precautions needed to avoid it are well-known or should be known to someone engaged in the particular activity, the argument for departing from the supposed orthodoxy may be a powerful one.

6

Negative Fault Requirements

6.1 GROUNDS OF EXCUSE

Criminal lawyers sometimes speak and write as if criminal guilt consists of the presence of *mens rea*, but observations in previous chapters have already hinted that matters are not so simple. The notions of fault and culpability go beyond *mens rea* and require a discussion of other doctrines which are sometimes referred to as 'excuses' or 'defences'. It is technically incorrect to use the term 'defence' when referring to the 'defence of mistake' or the 'defence of accident', since these (along with intoxication and, to some extent, insanity) are simply 'failure of proof' arguments; 'mistake' or 'accident' is merely a way of explaining why the prosecution has failed to prove knowledge, intention, or recklessness.[1] Beyond these, there is a range of possible excuses which contain elements which do not correspond to the positive requirements of criminal liability (e.g. duress, mistake of law), and they are discussed here with a view to assessing whether they have any general characteristics in common. They are termed 'negative fault requirements' in order to indicate that they are generally matters which the prosecution does not have to disprove unless the defence raises some credible issue on one or more of them. In other words, it is assumed that D has no excuse on any of these grounds unless some evidence of it is adduced in court. It therefore follows that many of these excuses are not inconsistent with *mens rea*: duress and mistake of law, for example, may be perfectly compatible with an intention to commit the prohibited act. However, the first two conditions to be discussed—insanity and intoxication—might well exclude *mens rea* in particular cases, and we shall see that the law has evolved doctrines which prevent or restrict the avoidance of liability by this means. The law takes such a serious view of harm caused by an insane or intoxicated person that not only does it invoke social defence arguments to justify special provisions for these cases, but it also goes some way towards ensuring that these special provisions also apply to other conditions created by insanity or intoxication (e.g. automatism, mistake).

[1] See Paul Robinson, 'Criminal Law Defenses: A Systematic Analysis' (1982) 82 Columbia LR, 199, and his *Criminal Law Defences* (1984), for a fivefold classification of defences: (i) failure of proof defences; (ii) offence modifications (e.g. withdrawal in complicity); (iii) justifications; (iv) excuses; and (v) non-exculpatory public-policy defences (e.g. time limitations). This chapter is concerned with (iv) and with some forms of (i).

PRINCIPLES OF CRIMINAL LAW

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defences have a firm subjective basis.[118] An advantage of this approach is that there is no real need to cast the evidence of the abuse suffered by an intimate partner in the form of a 'stereotype' or 'syndrome' because such evidence would be admissible in each case as relevant to the actual capacity or mental state of the accused.[119] Moreover, the evidence would be relevant to a non-pathological mental condition.

It is submitted that it is more convincing to examine the evidence of abuse as part of an inquiry into criminal capacity and 'putative' private defence than to examine it under the self-defence ground of justification.[120] Of course, the evidence of abuse is not only relevant to conviction (or acquittal) but also to sentence.[121]

As we have seen, the current predominantly subjective approach to provocation and emotional stress as defences excluding capacity[122] and the subjective approach to putative private defence as a defence excluding intention,[123] are arguably better adapted to providing a just outcome for predicaments of ongoing domestic or other abuse than an inherently objective defence of private defence, based upon the notion of a single threat of harm that must at least be imminent. The distinction between 'actual' and 'putative' private defence has the added advantage of distinguishing clearly between objective unlawfulness and subjective intention—a distinction that is not adequately made in Anglo-American jurisprudence on self-defence.

Protection orders

Some assistance to victims of domestic violence is offered by the Domestic Violence Act[124] that provides for protection orders in cases of domestic violence. The Act contains a definition of domestic violence which includes not merely physical, sexual, emotional and psychological abuse, but also economic abuse, harassment and stalking. Section 2 of the Act casts a duty on a member of the South African Police Services called to the scene of domestic violence to render assistance, including assisting the complainant to find suitable shelter, obtain medical treatment and explaining the complainant's remedies in terms of the Act. Section 9 provides for the seizure of arms and dangerous weapons.

reasonably held in the context of determining the requirements of culpable homicide. In an extreme case a complete acquittal on a homicide charge could be entered if the abused person had acted as a reasonable person in the same circumstances.

[118] Discussed fully above 243 and below 515–6.

[119] The central criticisms levelled at the battered woman syndrome by Paccioco and Coughlin above n 109 would therefore be addressed.

[120] See further below 514ff.

[121] See above 452.

[122] Above 425, 427–9.

[123] Above 243 and below 515–6.

[124] 116 of 1998.

SECTION E: FAULT *(MENS REA)*

CHAPTER 29

Introduction

I THE CONCEPT OF FAULT

Fault is an element of every crime. It takes the form of either intention *(dolus)* or negligence *(culpa)*. All common-law crimes require intention except for culpable homicide and contempt of court committed by an editor of a newspaper for which negligence is sufficient. Statutory crimes require either intention or negligence.

It is a firmly established principle of criminal justice that there can be no liability without fault, a principle generally expressed in the maxim ***actus non facit reum, nisi mens sit rea*** (the act is not wrongful unless the mind is guilty). In other words, the general rule is that, in order for an accused to be held liable, in addition to unlawful conduct (or *actus reus*) and capacity, there must be fault (or *mens rea*)[1] on the part of the accused. This fundamental principle of the South African criminal law was endorsed by O'Regan J in *Coetzee*.[2] There is also a presumption of statutory interpretation that the Legislature intended some form of fault as a requirement for liability under the statute in question.[3]

Furthermore, a collective welfare justification advanced for an exceptional, statutory strict (ie no-fault) liability[4] is severely undermined by the availability of fault-based liability founded on negligence. The reasonable care requirements of negligence as a fault element can in essence satisfy the demands of collective welfare.

II RATIONALE

The element of fault as a requirement for criminal liability rests upon the moral and ethical view that only persons who are deserving of blame ought to be punished. Persons who are at fault are blameworthy and thus it is necessary and essential to show that the accused was at fault in order to justify punishment.

The conception of fault that applies here is shaped by religious notions of wickedness and sin. The Christian church teaches that sin and wickedness

[1] The terms *mens rea* (which, literally translated, means 'guilty mind') and fault are used interchangeably in this book. *Mens rea* is the more traditional usage, favoured by the courts and the legal profession. However, the term fault, is more concise and less ambiguous than 'guilty mind'.

[2] *S v Coetzee* 1997 (3) SA 527 (CC) (1997 (1) SACR 379) at para 176, discussed above 129.

[3] See below 499–500.

[4] See below 550.

originate and exist in the minds of human beings. Fault is thus a 'mental concept, a state of mind on the part of the accused that is judged by the law to be deserving of blame. In the theory of Western systems of criminal law persons are at fault if they engage in prohibited conduct *intentionally* or, in some cases, *negligently*.

The rationale for requiring fault in the form of intention or negligence is the following. The law understands that human beings have free will and thus are able to plan and anticipate the consequences of their conduct. The requirement of an element of fault ensures that the criminal law does not inflict punishment upon persons for consequences or circumstances the individual neither planned, wished for, nor anticipated. This principle also forms the basis of the justifications for punishment.[5]

III ORIGINS

In primitive law liability to punishment rested upon a simple causative test,[6] with the result that, as in early Germanic law, the distinction between deliberate and accidental conduct was not considered to be of great importance,[7] and fault was assessed according to the principle of *strict liability*.[8]

The concept that deliberate or negligent conduct was blameworthy was developed by the Roman jurists who, as early as 715 BC, distinguished between accidental and deliberate homicide.[9] This concept was revived in Western Europe in the teachings of the Christian church concerning the nature of sin,[10]

[5] See above, Ch 4.

[6] As Kenny *Outlines* 9 puts it:

'The rough and ready rule became established that if the deed could be directly traced to a man's acts, then he was held responsible. . . . The connection between the act and the injury was plain and since in any case the consequential suffering and loss must be borne by someone, it seemed proper that the burden should be carried by him whose active conduct had brought about this misfortune.'

[7] Largely because the German law was concerned with compensation rather than punishment. The German law regarded compensation as payable as much for accidentally caused harm as for intentional harm. Concerned primarily to compensate the victim of the harm suffered, German law thus drew no distinction between accident and intention. Thus in the laws of Henry I of England it was provided that if in practising the sport of archery one accidentally kills another, 'let him repay for the law is that he who commits evil unknowingly, must pay for it knowingly': L J Downer (ed) Leges Henrici Primi s 28*b*. Compare F B Sayre 'Mens Rea' *HLR* 974 at 977–9; F Jacobs *Criminal Responsibility* (1971) 13.

[8] That is to say, liability without proof of fault. On strict liability in South African law, see above 128–32 and below, 545–51.

[9] In a law of the king Numa Pompilius who specified that only those who killed *dolo sciens* ('knowingly and with evil intent') were to be punished.

See also the exposition by Gaius (c 180):

'Unlawful slaying means slaying by intention [*dolo*] or negligence [*culpa*]; loss occasioned by no fault of the person committing it is not punished; hence a person who damages another accidentally and not intentionally or negligently does so with impunity.'

Institutes III 211.

[10] See above, 24.

and the concept of the 'wicked mind' (*mens rea*) was introduced into western systems of criminal law.[11] From this developed the doctrine that punishment could only be imposed for wrongful acts committed with a guilty mind (*actus non facit reum, nisi mens sit rea*). The nature of the *mens rea* was indicated by such descriptive terms as 'maliciously', 'fraudulently', 'dishonestly', 'deliberately', 'with malice of forethought' and so on.

In the 19th century the nature of *mens rea* was understood as consisting either in 'intention' (equivalent to the Roman law's *dolus*) or 'negligence' (equivalent to the Roman law's *culpa*).

'Intention' understood literally seemed to imply and be confined to that which the actor *desired* to happen. This suggested that that which could be foreseen as a consequence of an act, but which was not desired, was not intended. This interpretation of the concept of intention was thought to be too narrow for the purposes of criminal law. Noting that in the nature of things certain results (for example, death) are, or can be expected to be, the consequences of certain types of conduct (for example, a serious assault), lawyers queried whether an actor should be allowed to escape punishment simply because the foreseeable consequence of conduct was not desired by the actor. Relying upon the philosophical connection between cause and effect, jurists developed a concept that where human experience established that an effect (eg death) was an expected consequence of some type of conduct (eg an assault), it could be reasoned that the actor must have realized that the consequence would occur. If the actor then proceeded to engage in the conduct foreseeing the occurrence of the inevitable consequence, it could legitimately be said that the consequence, though not desired, was intended, because it was foreseen. This form of 'lawyer's' intention was called *dolus eventualis*.

As a result, the concept of fault in modern South African law exists in three principal forms: Actual intention (*dolus directus*), legal intention (*dolus eventualis*) and negligence (*culpa*).

IV FAULT AND UNLAWFULNESS

The requirement of fault as an element of liability means, among other things, that fault must exist in respect of each and every element of the crime with which the accused has been charged. This is so whether fault is in the form of intention or negligence. The only exception to the rule is where the Legislature expressly provides that fault need not exist in respect of each

[11] The phrase was first used in 430 by St Augustine (*Sermones* 180 c 2), (*ream linguam non facit, nisi mens sit rea*) who said that a person who believed he was telling an untruth committed perjury, even though in fact he had spoken the truth. The maxim appears (without the word '*linguam*') in the laws of Henry I of England (c 1100) in the form *reum non facit nisi mens rea* ('a person shall not be considered guilty unless he has a guilty intention').

element of a crime but, even in this eventuality, there is a presumption of statutory interpretation that the Legislature intended some form of fault to be required.[12]

To illustrate the rule: Murder is the unlawful, intentional killing of a human being. In terms of the rule, a person who kills another will be guilty only if he or she knows or at least foresees the possibility that what they have done is *unlawfully* to *kill* a *human being*. Fault must exist in respect of each of the elements of the crime, and if it is absent for any one of them, as where the killer believes he is acting lawfully, or does not know or foresee that death will be the consequence of his conduct, or does not know or foresee that what he is killing is a human being, there can be no fault. *R v Churchill*[13] is a case in point. X was charged with the common-law crime of abduction which requires that the person abducted must be under 21 years of age. X knew he was abducting the girl, but did not realise that she was under 21 years of age. He thus lacked the *mens rea* for the crime and was acquitted. This rule applies whether the unlawful conduct consists in circumstances or a consequence.

The Appellate Division has also recently held that, in consequence crimes, the accused's foresight of the way in which the consequence will occur must coincide substantially with the actual way in which the consequence occurs.[14]

It should be noted that although the accused may be aware of, or at least foresee the possibility of, every factual element of criminal liability (including the causal sequence) yet be unaware of the unlawfulness of what he is doing. The absence of knowledge of unlawfulness, whether induced by mistake or ignorance, is sufficient to deprive the accused of fault. This latter principle is discussed elsewhere.[15]

V FAULT AND CAPACITY

Fault and capacity both address the mental qualities of an accused. Nevertheless, they are different and distinct concepts. Capacity involves a preliminary enquiry into the ability or capacity of the accused to appreciate the wrongfulness of the conduct and the ability or capacity to act in accordance with that appreciation. In essence, the first part of this two-part enquiry relates to the accused's *capacity* to know or foresee the unlawfulness of the conduct and the second to his or her *capacity* to act voluntarily. The capacity enquiry therefore takes place *prior* to the investigation into whether the accused *in fact* acted voluntarily and with *mens rea*, whether in the form of intention (including foresight) or negligence.

[12] See below 499–500.
[13] 1959 (2) SA 575 (A).
[14] *S v Goosen* 1989 (4) SA 1013 (A) [125]. See below, 473–80 where this decision is fully discussed.
[15] 494–6.

CHAPTER 30

Intention

I INTRODUCTION

An accused is at fault where he or she intentionally commits unlawful conduct knowing it to be unlawful.

Intention is the principal form of fault. 'Even a dog', Oliver Wendell Holmes pointed out,[1] 'distinguishes between being stumbled over and being kicked'. This elementary appreciation of the distinction between deliberate and accidental conduct is the basis of the concept 'intention' as a form of fault in our law. In essence, the concept establishes that only those who deliberately cause harm ought to be punished.[2]

The concept of intention has gradually been extended to cover not just deliberate but also foreseen conduct.

II JUSTIFICATION FOR SUBJECTIVE INTENTION

Responsibility under the South African criminal law is founded upon protecting and promoting individual autonomy. The centrality of autonomy in the general principles of criminal law is manifest in the dominance of subjectivity of intention.

As Ashworth indicates:

> '[I]ndividuals are regarded as autonomous persons with a general capacity to choose among alternative courses of behaviour, and respect for their autonomy means holding them liable only on the basis of their choices.'[3]

During the second half of the 20th century South African criminal law pursued a relentlessly logical extension of the subjective inquiry to every aspect of the assessment of *mens rea* in the form of intention: Knowledge or

[1] *The Common Law* 3.
[2] For reasons well-expressed by Jeremy Bentham in his *Theory of Legislation* 17:
> 'Whether a man commits an offence knowingly or wilfully or whether he commits it unintentionally or even unwittingly, the immediate mischief is precisely the same. But the "alarm" which results is very different. A man who does an injury, knowing that he is doing wrong and intending to do it, presents himself to one's mind as a wicked and dangerous fellow; while he who commits the mischievous act without such knowledge or without such intention seems as one to be feared only by his ignorance or carelessness.'

The accidental wrongdoer is thus less of a danger to society; the harm he caused was fortuitous and isolated. The intentional wrongdoer is, however, a real and future danger to society. As Bentham puts it 'we seem to see in what he has what he can and will do again. His past conduct is a presage of his future behaviour.'
[3] *Principles of Criminal Law* 158.

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CRIMINAL LAW

Eighteenth Edition

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in that case.[76] It would, of course, be possible for a statute to give the term a different meaning in respect of a particular offence.

General points concerning intention or recklessness as to a consequence

Correspondence principle

3.35 Generally, the defendant must intend, or be reckless as to, the consequence of the *actus reus* of the offence in question as it is described in the definition of the offence, eg the destruction of or damage to property belonging to another in the offence of criminal damage.[77] This is called the correspondence principle. However, as Lord Ackner (with whose speech the other Law Lords agreed) observed in *Savage; DPP v Parmenter*,[78] there is no hard and fast principle to this effect.[79] There are some exceptional offences where intention or recklessness, or in some cases only intention, in relation to something less than the actual consequence required for their *actus reus* suffices. For example, in the offences under the Offences Against the Person Act 1861, s 20 of unlawfully and maliciously wounding another and of unlawfully and maliciously inflicting grievous bodily harm on another, the defendant has sufficient *mens rea* if he merely intended or was reckless as to some unlawful physical harm to a person, albeit of a minor nature: he need not have foreseen that his act might cause physical harm of the gravity described in the statute, ie a wound or grievous bodily harm.[80] Another example, already referred to, is murder where the *mens rea* consists of an intention unlawfully to kill or do grievous bodily harm to another human being.[81]

'Transferred malice'[82]

3.36 Provided the defendant acted intentionally or recklessly in the way required by the definition of the offence charged, it is irrelevant that the actual object (whether person or property) was unintended or unforeseen. For example, if the defendant does something intending that it should damage X's property, or being reckless as to this occurring, and quite unforeseeably P's property is damaged instead, the defendant can be convicted of criminal damage, contrary to the Criminal Damage Act 1971, s 1(1), since the *mens rea* for that offence is intention or recklessness as to damaging property belonging to another, and the defendant acted with such intention or recklessness. This is a simple application

[76] *Heard* [2007] EWCA Crim 125, [2007] 3 All ER 306, CA.

[77] See, for example, *Smith (David)* [1974] QB 354, CA; para 3.81

[78] [1992] 1 AC 699, HL.

[79] For a critique and defence of the correspondence principle, see Horder 'A Critique of the Correspondence Principle in Criminal Law' [1995] Crim LR 759; Mitchell 'In Defence of a Principle of Correspondence' [1999] Crim LR 195; Horder 'Questioning the Correspondence Principle – A Reply', ibid at 206.

[80] Para 7.88.

[81] Para 8.24. For further examples, see paras 7.63, 8.89–8.108 and 8.119.

[82] See Williams 'Convictions and Fair Labelling' [1983] CLJ 85; Horder 'Transferred Malice and the Remoteness of Unexpected Outcomes from Intention' [2006] Crim LR 383.

INTERNATIONAL CRIMINAL LAW

ANTONIO CASSESE

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9.7 PLANNING

Planning consists of devising, agreeing upon with others, preparing, and arranging for the commission of a crime. Think, for instance, of planning an air attack on civilians or the use of such prohibited arms as chemical or bacteriological weapons, or the indiscriminate killing of civilians as part of a widespread or systematic attack on civilians. As an ICTR Trial Chamber held in *Akayesu* (§480) and ICTY Trial Chambers in *Blaškić* (§279), and in *Kordić and Čerkez* (§386) planning implies that 'one or several persons contemplate designing the commission of a crime at both the preparatory and executory phases'.

As far as international crimes are concerned, given the nature and features of such crimes, it is often the higher military or civilian authorities that carry out the planning of such crimes.

Whoever takes part in the planning of an international crime is liable to punishment for the relevant crime, whatever his rank in the hierarchy and the level of his participation. (Of course, the rank and role may be germane to punishment; it is evident that the higher the status of the planner and the intensity of his participation in the planning, the harsher should be his penalty.) The subjective element required is the intent to carry out the criminal conduct.

A difficult question is whether planning an international crime is punishable per se, regardless of whether or not it leads to the actual commission of the crime planned, or instead is only punishable if planning is followed up by perpetration of the crime. Trial Chambers of the ICTR opted for the latter solution in *Akayesu* (§475), *Rutaganda* (§34), and *Musema* (§115). They grounded this conclusion on the works of the International Law Commission and on the interpretation of the relevant rule of the ICTR Statute (Article 6(1)) laying down the principle of individual criminal responsibility, which 'implies that the planning or the preparation of a crime actually must lead to its commission' (*Musema*, §115).

It may be noted that prosecuting someone for planning, where the planning is not put into effect, comes close to prosecuting *conspiracy* (although with conspiracy there must be an agreement of two or more persons, whereas planning may be carried out by one person alone, and if done by more persons, no agreement is required). The ICTY and ICTR Statutes allow conspiracy for genocide, but not for crimes against humanity and war crimes. (This was also the position of the IMT at Nuremberg: conspiracy to commit crimes against peace was held admissible whereas conspiracy to commit crimes against humanity and war crimes were not.)

An ICTY Trial Chamber, ruling in *Kordić and Čerkez*, propounded a contrary view. It held that 'an accused may be held criminally responsible for planning alone' (§386). The reason for this conclusion is that 'planning constitutes a discrete form of responsibility under Article 7(1) of the Statute'. The Trial Chamber set forth, however, two caveats: first, 'a person found to have committed a crime will not be found responsible for planning the same crime'; secondly, 'an accused will only be held

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The General Part

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another"[46] or "sets fire to"[47] constitute crimes of intent, and that a constituent element like "causes fire through negligence"[48] designates a crime of negligence, but the import of constituent elements like "damages a thing"[49] is not as clear on the basis of language. At least to the extent that there are no express provisions recognizing negligence as a culpability alternative, however, crimes must be considered to require intent.

The second meaning of Article 38(1) is that a crime of intent is not committed unless the requisite intent actually comes into being. If there is no awareness or acknowledgment of the material facts in a crime of intent, that in itself excludes a finding that the constituent elements of that crime have been satisfied.[50] Even if awareness or acknowledgment exists, however, culpability should be excluded if the exibigility is lacking.[51] Consequently, Article 38(1) has to be considered a provision establishing intent as a required element of crimes—a mandated constituent element and a prerequisite to culpability.

The second of the above two points is the one that requires further comment. In particular, it would appear the author's contention that intent has a dual significance as a mandated constituent element and a prerequisite to culpability is the one that has drawn the most fire. However, the requirement of volition based on the awareness or acknowledgment dimension of the constituent elements may be considered at the same time a requisite for culpability. Assuredly, if the constituent elements of a crime of intent have not been satisfied because awareness or acknowledgment of the material fact of the needed state of mind is lacking, there is no room to argue culpability in such a case. The existence of the requisite awareness and acknowledgment, however, is the very basis for attributing culpability to the actor with respect to the material facts. In other words, awareness or acknowledgment of those facts supports both a finding that the constituent elements of a crime have been satisfied and that there is culpability; the single fact of awareness or acknowledgment, as a matter of theory, serves two discrete functions.

46. Penal Code art. 235.

47. *Id.* arts. 108 (arson of inhabited structure), 109 (arson of uninhabited structure), 110 (setting fire to objects other than structures).

48. *Id.* art. 116 (negligent burning).

49. *Id.* art. 261 (destruction of things in general).

50. For example, even if someone unintentionally brings about the death of another, that does not amount to "killing another" [*id.* art. 199], and even though a person inadvertently places someone else's property in a briefcase and carries it home, that does not constitute "stealing property" [*id.* art. 235].

51. *See* § 7.01 *supra*.

SECTION 7.05
AWARENESS AND ACKNOWLEDGMENT OF MATERIAL FACTS

(1) Introduction

Intent is a clear manifestation of a personal attitude on the part of an actor to contravene a penal norm. Negligence, a concept discussed below,[52] involves a lack of awareness on an actor's part of the material facts, which rules out a personal attitude to act directly contrary to an essential norm; it does not extend beyond a personal state of mind indirectly to violate a norm by intentionally contravening a duty of care. In contrast, intent means that an actor knows the material facts of a crime, so that the issue presented under a given norm[53] can be resolved on a concrete basis. Accordingly, the actor's personal attitude bore directly on the norm in question. Both intent and negligence are alike in that they evince a personal attitude that contravenes a norm, but differ in terms of a direct purpose to violate an underlying penal norm.[54] Consequently, the prerequisite for intent is, first, that there be proof of awareness[55] or acknowledgment of that material fact. However, it is

52. *See* § 7.08 *infra*.

53. For example, "did the accused kill a person?"

54. For example, in the crime of death through negligence [Penal Code art. 210], an accused does not know that someone will be killed, and so does not manifest a personal attitude directly to violate a basic norm that "thou shalt not kill a person." There is only a violation of a duty to take care that actions do not result in the death of another; when that duty of care is breached, there is only an indirect contravention of the "thou shalt not kill" standard.

55. Awareness [*Vorstellung*] need not be accompanied by a tension of consciousness with reference to the activity itself. A lower court precedent that should be considered on point is 3 Kôsaikeijisaiban tokuhô no. 20, p. 984 (Takamatsu High Ct., Oct. 16, 1956). According to the judgment:

> Intent for the crime of homicide, *i.e.*, an intent to kill, need not be manifested clearly at the surface level of the actor's consciousness. There are instances in which the intent to kill for purposes of the crime of homicide must be recognized even though no apparent intent to kill could be perceived at that level of the actor's consciousness, when an actor has inflicted a grave wound on a vital part of the victim's body while in a state of unconsciousness, with the intent to kill buried within the depth of consciousness. In instances of unawareness brought on by excessive rage, when an accused takes up a Japanese sword and slashes at the head of another person, or takes a sharp chef's knife and thrusts it into the breast of another, resulting in an extremely serious injury to the part of the body in question that precipitates death, even if the accused immediately thereafter calms down, and as a result sincerely reconsiders the matter in a way indicating no reason and no volition to kill, the matter involves nothing more than a problem of a manifestation of consciousness (if the accused suffered from no mental defect); the latent state of

necessary to distinguish between two categories of material facts. The first is material facts in the narrow sense, *i.e.*, those corresponding to the constituent elements of a crime. The second comprehends other facts bearing on the substance of illegality. If there is neither awareness nor an acknowledgment of both these categories of fact, an actor cannot be found culpable on the basis of intent.

(2) Awareness and Acknowledgment of Facts Corresponding to Constituent Elements

Before intent can come into being, first, an actor must be aware of objective facts[56] corresponding to the constituent elements of the crime, and must acknowledge their existence. If this requirement is not met, then from the outset the constituent elements have not been satisfied either. For example, if there is no intent to kill at the time of an act producing death, then from the outset there is no fact corresponding to a constituent element of the crime of homicide, and the intent to kill is of itself a prerequisite for attributing blameworthiness to the actor. Thus, the problem of intent may be said to be covered concurrently by the doctrines of constituent elements and of culpability.

Objective facts corresponding to the constituent elements of a crime comprehend acts (including the subject of those acts, their object and the circumstances in which they take place), consequences, and the cause-and-effect relationship between the two.[57] If an actor was not aware of all of them —in detail, a knowledge of present facts and foresight as to future facts— then there cannot be said to have been intent. In contrast, it is not necessary that there have been an awareness of the actor's own criminal capacity or of

consciousness is taken to be the intent to kill and there is no objection to a finding that the crime of homicide has been established.

In the context of continuing crimes, the awareness need not continue throughout the entire period. *See* 3 Keishû 796 (S. Ct. G.B., May 18, 1949); 4 Keishû 2194 (S. Ct. First P.B., Oct. 26, 1950) (both relating to unlawful possession). *Compare* ALI MODEL PENAL CODE § 2.01(4) (1985) ("possession is an act . . . if the possessor . . . was aware of his control for a sufficient period to have been able to terminate his possession").

56. If the subject matter of the awareness is facts not amounting to a crime, no crime in fact arises even if an actor erroneously believes there is a crime. This is called a putative crime [*Wahnverbrechen, Putativdelikt; reato putativo, reato immaginario*]. Italy Penal Code article 49(1), (4) provides for protective measures to be taken in such cases, but the propriety of such legislation is questionable. The 1949 Italian draft (art. 19) would have abrogated the provision.

57. It is not required, however, that there have been knowledge of all the details of the causal relationship. 4 Keishû 470 (Gr. Ct. Cass., July 3, 1925). Precedents on mistake as to causation are discussed *infra* note 7.

prerequisites for punishability not pertaining to the constituent elements.[58] It is obvious that in crimes based on purpose, in which purpose is a subjective material constituent element to which the facts must pertain, there need be no additional awareness beyond the fact of the purpose itself. Second, in instances of habitual criminality, the fact of being habituated is a material constituent element, but because it ought to be considered a standardized culpability requirement, an actor need not acknowledge it.

Facts corresponding to constituent elements are replete with significance. Consequently, an awareness of such facts has to embrace a knowledge of their significance.[59] For example, for the crime of trafficking in obscene material[60] to come into being, an actor must know the obscene character of the written or other material in question. Even though a person can see all the characters printed on each page, if at the time of sale or distribution the actor has no knowledge of the contents because he or she is illiterate and cannot read what is written, there is no intent. In instances of trafficking, the acknowledgment need not extend to the issue of whether the contents are "obscene" as the term is used in the Penal Code. Intent requires simply that one know the nature and significance of the material within the valuative norm provided by the Penal Code.[61]

There is, however, a further problem as to whether an actor need only be aware of such facts (the acknowledgment theories[62]), or whether volition or will is needed, especially as far as the occurrence of results is concerned (the volitional theories[63]). In the author's view, intent must be conceived of as a positive personal attitude toward the emergence of the facts of a crime. For that reason, an actor at least should have been aware that the facts might come into existence,[64] although it is unnecessary that he or she have antici

58. A contrary position is taken in 3 Kôsai keishû 487 (Fukuoka High Ct., Oct. 17, 1950).

59. *Bedeutungskenntnis.*

60. Penal Code art. 175.

61. This may be the thrust of statements that there must be "parallel [or equivalent] evaluation among lay people" [*Parallelwertung in der Laiensphäre*], E. MEZGER, STRAFRECHT: EIN LEHRBUCH 304 (3d ed. 1949), or "parallel evaluation based on the actor's understanding" [*Parallelbeurteilung im Täterbewußtsein*], H. WELZEL, DAS DEUTSCHE STRAFRECHT 61 (11th ed. 1969) (the term "parallel" used in this way means an equivalent evaluation by specialists and laypersons). The author's position, however, is that there should be a differentiation between evaluation (whether by laypeople or not) and awareness of significance.

62. *Vorstellungstheorien.*

63. *Willenstheorien.*

64. Precedent appears to utilize a theory of awareness, *e.g.*, 21 Keiroku 21 (Gr. Ct. Cass., Jan. 26, 1915); 1 Keishû 255 (Gr. Ct. Cass., May 6, 1922) ("it is enough that there be an awareness and anticipation of the facts; it is unnecessary that there have been a desire that they would

pated or intended that such might occur.[65] The volitional theory is valid to the extent it is understood in the above way.[66] In other words, the formation of intent requires not only that there be an intellectual element[67] of the facts, but also an emotional[68] and volitional dimension[69] as well.

On the basis of such an acknowledgment, it is not necessary that there be a definitive awareness that the facts, and in particular the results, of a crime will come into being;[70] it is enough to be aware simply of such a possibility.[71] If an actor knows of the possibility that results might occur, but acknowledges their emergence with an attitude of personal indifference

come into being"). However, precedent also has indicated that there is intent if the actor, having such an awareness, nevertheless "dared" to do the act. *See, e.g.*, 1 Keishû 255 (Gr. Ct. Cass., May 6, 1922); 2 Keishû 227 (S. Ct. Third P.B., Mar. 16, 1948). That appears to adopt in essence a theory based on acknowledgment (*cf.* 33 Hanreitaikei 991 [S. Ct. First P.B., Feb. 24, 1949]).

The German Draft Penal Codes of 1927 (§ 17) and 1930 (§ 17) expressly incorporated the theory of acknowledgment.

65. In some crimes, simple awareness and acknowledgment concerning results do not suffice. For example, the crime of breach of trust [Penal Code art. 247] is defined as follows:

> When a person who administers the affairs of another performs, for the purpose of . . . inflicting damage on such other person, an act in violation of duty and causes damage to any property of such other person, [specified punishment] shall be imposed.

Under that language, an awareness and acknowledgment of inflicting loss by themselves are insufficient; the statute should be construed to require an intent to bring that about, more affirmative in character than awareness and acknowledgment. That is a special mode of intent, as contrasted with the objective in crimes based on purpose, which is not a manifestation of intent but rather a subjective requirement for illegality.

66. Beling called this the theory of acknowledgment [*Einwilligungstheorie*]. E. BELING, GRUNDZÜGE DES STRAFRECHTS 50 (11th ed. 1930); *see also* SCHÖNKE-SCHRÖDER, *supra* note 3, at 242, 243, paras. 81, 86 (24th ed. 1991).

67. *Intellektuelles Element.*

68. *Emotionales Element.*

69. *Voluntatives Element.*

70. This is not necessarily restricted always to the point of the emergence of results. For example, for the crime of receiving stolen property [Penal Code art. 256] to be committed it is, of course, important that the property which is the object of the crime appear to be property obtained through a crime against property. However, if someone acquiring the property by purchase is indifferent to whether it was criminally acquired, a conditional intent has come into existence. 2 Keishû 227 (S. Ct. G.B., Mar. 16, 1948).

71. 2 Keishû 97 (Gr. Ct. Cass., Feb. 16, 1923) (homicide case); 7 Keishû 46 (S. Ct. Second P.B., Jan. 23, 1953) (crime of false accusation).

In certain crimes, a conditional intent would appear to be insufficient to satisfy the constituent elements. To illustrate, the crime of false accusation [Penal Code art. 172] requires a "false denunciation," which should be construed to necessitate a definite awareness that an accusation is false, which limitation should exclude guilt based on a conditional intent.

toward the results, intent has come into being. This state of mind may be designated as conditional intent.[72] In contrast, if an actor is aware of a possibility that results may come into existence, but does not acknowledge and accept them, this constitutes nothing more than conscious negligence, which is discussed below.[73]

Can intent be recognized to exist if there is a discrepancy between the objective reality and the actor's perception of that reality? This is the problem of mistake of fact.[74]

72. *Dolus eventualis; bedingter Vorsatz; dol éventuel; dolo eventuale. See generally* G. FLETCHER, RETHINKING CRIMINAL LAW 445–49 (1978) [hereinafter cited as G. FLETCHER]; SCHÖNKE-SCHRÖDER, *supra* note 3, at 239–40, paras. 72–73. The concept appeared expressly in the German Draft Penal Codes of 1913 (§ 18[1]), 1919 (§ 13[1]), 1927 (§ 18[I]) and 1930 (§ 18[1]), and is to be found in Greece Penal Code art. 27(2). On the Anglo-American legal counterpart, see *infra* at § 7.09 note 173.

There is also something called general intent [*dolus generalis; dol générique; dolo generico*]. *See* G. FLETCHER, *supra*, at 453–54; SCHÖNKE-SCHRÖDER, *supra* note 3, at 235–36, para. 58. This is used in a multiplicity of meanings:

(a) As an illustration of the term in common usage, general intent is present if someone throws a bomb into a crowd of people. The actor may not have known who or how many persons would be killed, but in such instances it is obvious that an affirmative response will be given to the question of whether there was intent to kill. However, a problem arises in connection with the number of crimes committed, granted that crimes like homicide are designed as a legal safeguard for highly personal interests pertaining to the individual. Since homicide is a normative legal safeguard, the usual explanation is that a conceptual concurrence should be acknowledged between homicide and an attempted homicide affecting an indeterminate number of persons. *See* 23 Keiroku 1261 (Gr. Ct. Cass., Nov. 9, 1917).

(b) An alternative meaning is indicated when, for example, a person thinks he or she has already killed a person and throws the victim into the water, causing the victim to drown. *See infra* at note 93. This amounts to a mistake as to causation.

73. *See* § 7.09 *infra.*

74. *Error facti; Tatirrtum; erreur de fait; errore di fatto.* A mistake which excludes intent is sometimes called a "material error" [*wesentlicher Irrtum; errore essenziale*].

Consider, for example, an automobile driver who tries to graze a pedestrian but knocks down and kills the victim. If the driver's state of mind is, "let's see if I can skillfully brush by that pedestrian, but if I run him over, so what," then the case involves conditional intent, because there is acknowledgment that the fatal result may come into being. If, instead, the driver thought, "to run over someone would be a terrible thing, but because I know I am a good driver everything will turn out O.K.," then there would be only a negligent state of mind, because there was no acknowledgment that death would occur.

A contrasting theory to the acknowledgment theory discussed above is the probability theory [*Wahrscheinlichkeitstheorie*], see SCHÖNKE-SCHRÖDER, *supra* note 3, at 217, para. 76, which distinguishes conditional intent from a negligent state of mind based on the extent to which an actor considered the degree of the probability of harm flowing from the activity. There is very little difference between the two theories in practical application, but the

(1) First, even if there is mistake concerning the actual facts lying within the bounds of a constituent element of a crime, we can recognize a personal attitude directly to contravene a norm which does not differ from the problem of norms[75] governing the facts that the actor caused to come into being, at least if the facts (actual and perceived) carry the same import within a constituent element. Consequently, in such instances we should say that there is no exclusion of the existence of intent,[76] a conclusion that does not differ whether it be mistake as to object,[77] mistake as to method,[78] mistake as to the path of causation[79] or mistake as to various other facts.[80]

(2) In contrast, if both the facts as an actor was aware of them and the facts that actually came into being fall within the constituent elements of different crimes,[81] culpability based on intent cannot be alleged on the basis of those facts. Indeed, in such instances, not only is culpability based on intent excluded, but also the prerequisite constituent elements cannot be said to have been met. It does not matter whether an actor, intending to perpetrate minor

probability theory puts too much stress on the intellectual aspect of intent. In the author's view, this fails to perceive correctly the basic character of intent. Obviously, even from the standpoint of the acknowledgment theory, the extent to which an actor was aware of the degree of probability that harm would occur is quite important in determining the existence of acknowledgment.

75. For example, "is it licit to kill?"

76. For example, an actor shoots at and kills someone he or she believes to be *A*; the victim turns out to be *B*. Such instances are denominated mistakes as to person [*error in persona, error personae*]. When a blow goes astray, a mistake as to attack [*aberratio ictus; Abirrung, Fehlgehen der Tat; deviazione di colpo*] is involved.

77. *Error in objecto. See* SCHÖNKE-SCHRÖDER, *supra* note 3, at 236–37, para. 59.

78. For example, an actor shoots at *A* and misses, instead hitting *B* who happens to be standing nearby. *See* 32 Keishû 1068 (S. Ct. Third P.B., July 28, 1978) (discussed *infra* note 96); *see also infra* note 93.

79. This covers instances in which results come into being in a different manner than an actor anticipated. Illustrative precedents include 2 Keishû 254 (Gr. Ct. Cass., Mar. 23, 1923) (the accused threw the victim off a cliff and then, under the pretext of helping him, pushed him into a river, causing the victim to drown); 2 Keishû 378 (Gr. Ct. Cass., Apr. 30, 1923) (the accused mistakenly believed he already had killed his victim and concealed the latter's body in sand, which led to the victim's death through suffocation).

80. *See, e.g.*, 19 Keiroku 559 (Gr. Ct. Cass., May 1, 1913).

81. Some authors use the term "mistake of concrete fact" for a mistake concerning facts falling within the constituent elements of the same offense and the term "mistake of abstract fact" for a mistake concerning facts falling under constituent elements of different crimes. *See* E. MAKINO, KEIHÔ SÔRON (General principles of penal law) 312 (1948).

crime *A*, actually commits serious crime *B*[82] or, conversely, intending to commit serious crime *A*, in fact perpetrates minor crime *B*.[83] The first of the two alternatives is directly covered by the provisions of Article 38(2) of the Penal Code:

> When a person who commits a crime is not, at the time of its commission, aware of the fact that he is committing a crime graver than the one he thinks he commits, he shall not be dealt with in accordance with the graver crime actually committed.[84]

It is appropriate, however, to apply precisely the same reasoning to cases falling within the second alternative. Nevertheless, if the constituent elements of two crimes overlap,[85] it should be recognized that an intent is present con-

82. There are two patterns for this. One is illustrated by a person who throws a stone with the intent to destroy a thing, but hits and kills a person who is nearby—called a mistake as to method. The second occurs if an actor throws a stone at what is believed to be a thing, but, in fact it is a person who is struck and killed—called a mistake as to object.

83. For example, someone might shoot with the intent to kill a person but hit and damage nearby property (a mistake as to method), or might shoot at something in the belief that it is a person and hit the intended target, which turns out to be property which is damaged as a result (mistake as to object).

84. Apparently the only two foreign codes directly covering the matter are Spain Penal Code art. 50 and Switzerland Penal Code art. 19(1) (and see THORMANN-OVERBECK, DAS SCHWEIZERISCHE STRAFGESETZBUCH 105ff. [1940–43]).

Art. 38(2) of the Penal Code of Japan has interesting antecedents. The *Keiritsu no katei* of 1868 [see *supra* § 3.01] incorporated the *Taihôritsu* (701) and *Yôrôritsu* (718), both of which were derived from *Tôritsu*, the Chinese Penal Code of the T'ang Dynasty. The 1868 document provided:

> What in fact is qualified as a serious offense but was not known by the actor to be such at the time of its commission *is* to be punished as if it were an ordinary offense.
> What in fact is designated as a less serious offense but was not known by the actor to be such at the time of its commission may be punished as an ordinary offense.

Meireiritsu, Bk. I, Part B. That was brought into the Provisional Criminal Ordinance [*Karikeiritsu*] in the initial Meiji year and then into the successor *Shinritsu kôryô* of 1870. The next in succession was article 77(3) of the old Penal Code (based on art. 89 of the Boissonade draft code; on its interpretation see G. BOISSONADE, PROJET RÉVISÉ DE CODE PÉNAL POUR L'EMPIRE DU JAPON, ACCOMPAGNÉ D'UN COMMENTAIRE 271 [1886]). The subsequent draft codes did not contain similar provisions. The only exception was the Draft Code of 1890, article 68 of which read: "One who commits a crime against a person or property cannot be held to lack intent to commit that crime even though there is a mistake as to that person or property." That idea appeared once more in the present code. *Cf.* Preparatory Draft Code arts. 10, 11. Article 10(2) of the Temporary Draft is identical to current law, and article 20(2) of the Draft Penal Code is to the same effect.

85. For example, the crimes of homicide [Penal Code art. 199] and killing an ascendant [*id.* art. 200 (which carries heavier penalties) (note, however, that art. 200 has been repealed in 1995].

cerning the lighter of the overlapping offenses. The above-quoted language of Article 38(2) should be considered to have that meaning.[86]

The concepts just discussed are usually designated as a theory of statutory conformity because they are based on a criterion of statutory constituent elements. A more accurate designation, however, would be a theory of correspondence of constituent elements.

The theories contrary to the explanation that the author has advanced above take two different directions. The first, called the theory of actual overlap, adopts the premise that if there is mistake as to concrete facts, even though they fall within the limits of constituent elements, in particular, an error as to method, the existence of intent must be denied concerning facts of which the actor was unaware. Apparently, this recognizes that mistakes as to actual facts can be categorized into mistakes as to object and mistakes as to method. In the first category of cases intent comes into being. In the latter category, however, the result is a concurrence of an attempt to commit a crime of intent concerning the facts which the actor thought to exist[87] and a crime of negligence concerning the facts that actually occurred.[88] For example, if a shot fired at *A* strikes and kills *B*, there is conceptual concurrence[89] of the crime of attempted homicide involving *A* and causing *B*'s death through negligence.[90] In Germany, this concept is reflected in current precedent and the predominant scholarly opinion. For a time it was also observable in the holdings of the Great Court of Cassation.[91] Such a position,

86. Note that the official commentaries [*sôgi*] to the provisions of *Tôritsu* and the Japanese counterparts corresponding to article 38(2) of the Penal Code covered only instances of overlapping constituent elements.

87. If attempts are not punishable, no crime has been committed.

88. If crimes based on negligence have not been legislated, no crime has been committed.

89. Penal Code article 54(1) provides that "when a single act constitutes two or more separate crimes, . . . the heaviest punishment of those prescribed for such crimes shall be imposed." *See* § 10.03 *infra*.

90. Penal Code art. 210.

91. A precedent excluding intent based on a mistake as to method is 22 Keiroku 1313 (Gr. Ct. Cass., Aug. 11, 1916). It should be noted, however, that the Court adopted a theory of statutory overlap based on elderly precedent under the former Penal Code. Under article 298 of that code (and see art. 304): "A person who in the course of a premeditated or intentional homicide kills another by mistake shall be considered to have committed premeditated or intentional homicide." That was construed as a form of precatory provision. 13 Keiroku 475 (Gr. Ct. Cass., May 23, 1907). As the Court stated in the latter case:

> If an accused, with intent to destroy official documents, does so, but destroys other documents than those originally intended, from a legal standpoint there is a concurrence of the result of document destruction and intent to commit the crime, and there is nothing to prevent this from constituting the crime of destruction of official documents. To be sure, the Penal Code provision concerning mistake only applies to offenses relating to killing and wounding. It is designed, however, to avert any doubts that might arise. Nevertheless, it is not the only ground for punishing a killing or wounding by mistake, because such acts done intentionally will constitute the offense of killing or wounding, independent of the particular provision. The lack of a similar provision covering the crime of destruction of documents does not constitute a ground for finding no guilt in the instant case.

In the above-cited case, 22 Keiroku 1313 (Gr. Ct. Cass., Aug. 11, 1916), the Court apparently reached an erroneous interpretation of its earlier precedent on this point. Initially, the same approach was adhered to after the present Penal Code was enacted. *See, e.g.*, 15 Keiroku 237 (Gr. Ct. Cass., Mar. 12, 1909). Thereafter, however, the Court clearly came to accept the theory of statutory overlapping; see the precedent discussed *infra* at note 95. For that reason, the 1916 judgment, in its use of a theory of actual overlapping, has to be viewed as an exception to the succeeding line of cases adopting a different theory.

however, is unduly restrictive when considered from the standpoint of the theory of constituent elements.[92] Accordingly, the precedents of the Great Court of Cassation came to reflect a theory of statutory overlapping.[93] In the above illustration, for example, a crime of intent was considered to exist concerning the death of *B*. The same position appears to be reflected in the language of the Supreme Court that "it suffices if there is concurrence

92. If someone should have any intent whatever to kill and the act caused the death of anyone, this has to constitute the crimes of intentional homicide—consummated in the case of the person actually killed and attempted as far as any other intended victim is concerned. Accordingly, the author's personal view is that, in an instance in which an accused discharges a firearm at *A* and the shot strikes and kills *B*, the appropriate charges should reflect a conceptual concurrence of attempted murder with reference to *A* (assuming that the shot missed *A* completely and *A* suffered no injury), and the consummated crime of homicide with reference to *B*. If the actor tried to kill both *A* and *B* but struck and killed *A* alone, the conceptual concurrence is the same: the crime should be that of homicide concerning both *A* and *B* (the same type of conceptual concurrence). Again, if an actor discharges a firearm into a crowd of people, killing a person in the crowd, the conceptual concurrence (as discussed *supra* note 67) should be homicide concerning the person who was slain and attempted homicide concerning the persons who might have been struck by the shots (even though, depending on circumstances, it may not be possible to designate the number of such persons). Although that view may be criticized on the ground that it is unjust to structure a number of crimes on the basis of an intent to commit a single crime, the appropriate response should be that conceptually concurrent crimes are treated as a single crime for purposes of the imposition of punishment [Penal Code art. 54].

93. *See* 1 Keishû 313 (Gr. Ct. Cass., May 9, 1922); 10 Keishû 312 (Gr. Ct. Cass., July 8, 1931) (the judgment utilized the terminology of "overlapping statutory bounds," which is interesting; the case itself involved a mistake as to object); 12 Keishû 1445 (Gr. Ct. Cass., Aug. 30, 1933).

(overlap)[94] within the limits established by the provisions establishing the pattern (typology) for a crime."[95]

94. 5 Keishû 1261 (S. Ct. Second P.B., July 11, 1950). A noteworthy precedent involving the theory of statutory overlap is 32 Keishû 1068 (S. Ct. Third P.B., July 28, 1953), in which the Court stated:

> It is not necessary that the facts of a crime as an accused perceived them and the facts of that crime as it actually was committed always correspond concretely; it should be considered sufficient that both fall within the limits of statutory coverage [see 10 Keishû 312 (Gr. Ct. Cass., Jt. No. [1931]–[re]–607, July 8, 1931); 4 Keishû 1261 (S. Ct. Third P.B., Jt. No. [1950]–[re]–3030, July 11, 1950)]. Therefore, if an accused inflicts a mortal injury on someone with an intent to kill, but the act takes effect on someone other than the person intended by the accused, it should be considered to be an intentional homicide. . . . In the present case, the accused, on the basis of an intent to inflict a lethal wound, fired a loaded home-made weapon and inflicted such a mortal wound. The accused had intended to inflict a perforating gunshot wound in the right breast of Police Officer *T*, but such an injury did not occur. The result was the commission of the crime of attempted homicide against Officer *T*. The shot fired by the accused, actually inflicted a perforating wound of the abdomen on Officer *K*, whom the accused had not intended to injure. However, because we recognize a causal relationship between the above-described act of the accused and the wounding of Officer *K*, the crime of attempted homicide of Officer *K* also was committed [see 12 Keishû 1445 (Gr. Ct. Cass., Jt. No. [1933] [re]–831, Aug. 30, 1933)]. Moreover, the above-described attempted murder of Officer *K* by the accused was a phase of the commission of a robbery. Therefore, there obviously should be concurrence between the crime of robbery, and the crime of attempted homicide in the course of robbery [Penal Code art. 240] based on the act committed against *K*.

In Germany, the theory of overlapping constituent elements seemed to have become more influential, at least at one time. *See* E. BELING, GRUNDZÜGE DES STRAFRECHTS 47 (11th ed. 1930); R. v. FRANK, DAS STRAFGESETZBUCH FÜR DAS DEUTSCHE REICH 188 (18th ed. 1931) (based on the premise that this already had been followed during the era of German common law [*gemeines Recht*]); Lowenheim, JURISTISCHE SCHULUNG 310 (1966); Noll, 77 Z.St.R.W. 5ff. (1965). B. HILLENKAMPF, DIE BEDEUTUNG VON VORSATZKONKRETISIERUNGEN BEI ABWEICHENDEM TATVERLAUF (1971), also has been influential in support of the actual overlapping theory in Germany.

It would appear that French precedent has utilized the statutory overlapping theory, see P. BOUZAT, DROIT PÉNAL GÉNÉRAL 137 n.3 (2d ed. 1970), but scholarly opinion generally endorses the actual overlapping theory. *See* H. DONNEDIEU DE VABRES, TRAITÉ DE DROIT CRIMINEL ET DE LÉGISLATION PÉNALE COMPARÉE 84 (3d ed. 1947); *cf.* G. BETTIOL, DIRITTO PENALE: PARTE GENERALE (12th ed. L. Mantovani ed., 1986).

95. Eiichi Makino gave several illustrations: (a) An individual acts with the intent to destroy property but by mistake kills someone. Even though the property was not destroyed, there should be conceptual concurrence [Penal Code art. 54] of the consummated crime of destruction of things [*id.* art. 261] and the crime of causing death through negligence [*id.* art. 210]. (b) An individual acts with the intent to injure another person but by mistake damages property. Even though the actor failed to perceive the fact that the property would be damaged, the crime of destruction of things should be considered to have been committed, concurrently

The second theory is one of abstract overlapping; it holds that even if constituent elements differ, the least serious of them at least should be viewed as a crime of intent.[96] This rests on an analysis that because crimes

with the crime of attempted bodily injury [*id.* art. 204], which is a crime of violence [*id.* art. 208]. Both are to be jointly punished, the penalty being that governing the more serious of the two crimes. E. MAKINO, KEIHÔ SÔRON (Criminal law: general part) 316ff. (1948).

In both (a) and (b), however, the results exceed the bounds of the theory of criminal intent resting on the theory of culpability, and creates a problem of satisfying the constituent elements. If, without regard to the failure to satisfy the constituent elements to cover, a consummated crime is considered to have been committed, the result is a basic disruption of the principle of legality.

Hyôichiro Kusano modified Makino's view in certain respects: In relation to illustration (a) above, he proposed that the crime of attempted destruction of things should be recognized. H. KUSANO, KEIHÔ YÔRON (Essential principles of penal law) (1956). Despite the justification advanced for the theory by its proponent, however, the result is contrary to Penal Code article 44 [attempts are punishable only when specifically provided in each article concerned], as well as contrary to the principle of legality.

Hidenaga Miyamoto carried Makino's concept an additional step forward. Thus, if in implementing an intent to commit minor crime *A* an actor should perpetrate serious crime *B*, the latter should be considered to have come into being as a crime of intent. However, because of the applicability of Penal Code art. 38(2), minor crime *A* would set the limits on the punishment that could be imposed. For example, if someone should inflict injuries on a person lying at the roadside, in the belief that the injuries are being inflicted on another person's household dog, a crime of intent, namely, bodily injury, came into existence, but the maximum penalties should be those for the crime of destroying an animal. H. MIYAMOTO, KEIHÔ TAIKÔ (Fundamental principles of penal law) 166 (1935). That drives home Makino's theory, and on that basis must be strongly criticized.

96. In addition, balanced or proportionate punishments are a direct objective of the advocates of this scholarly view. Consider, for example, the instance of a person who intends to destroy property and by mistake kills someone. If this is dealt with under the theory of statutory overlapping, then only the crime of causing death through negligence is to be recognized. If the actor had achieved the purpose of destroying property, the maximum period of imprisonment under article 261 would have been three years' imprisonment at forced labor. The actual consequence was injury to the life of a person, however, which is a much more important legal interest than property, but nevertheless under article 210 is reached only by a penal fine. That result seems objectionable.

If the matter is considered in the abstract, the result certainly supports such an impression. Analyzed in the context of actual circumstances, however, the conclusion is not at all inappropriate from the standpoint of advocates of the statutory overlap theory. If we inquire into the cause of the circumstances that appear at first blush to be inappropriate, we have to conclude that (a) the penalties for causing death through negligence are a light punishment, and (b) attempted destruction of property is not a crime that can be attempted. The first matter was resolved through legislation, at least with reference to the crime of injury through grave negligence (through the amended form of Penal Code art. 211). With reference to the second, it is inappropriate to punish attempts to commit as trifling a crime as destruction of property. In both

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